

**« United Nations Security Council's targeted sanctions: economic weapons  
between coercion and legal limits of fundamental rights »**

Research Question

*Human Rights: a toolbox restricting the United Nations Security Council discretionary power?*

TFE réalisé par  
**Lauren Tatard**

Promoteur(s)  
**Frédéric Dopagne**

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*« If you are going through hell, keep going. »*

*— Winston S. Churchill*

*Before starting my specialized Master in International Law, I did a Master in Political Sciences, International Relations, Diplomacy and Resolution of Conflicts. Because of my academic background – which did not really contain any law content – I was told « it is doubtful that you will ever succeed. Maybe you should give up. »*

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# *Introduction*

*« Sanctions are a peaceful, silent deadly remedy »*

*Woodrow Wilson*

*(Peace Conference, Versailles, 1919)*

In its universal task to protect the international peace and security, the United Nations Security Council (UNSC) had recourse, several times, to the so-called sanctions. While some speak about « the sanctions syndrome »<sup>1</sup>, underlining the negative aspects of those instruments, some others insist on the necessity of sanctions, in order to induce compliance of States or individuals, with international law requirements.

On one hand, there is this necessity to protect the World order, which can lead the UNSC to resort to such mechanisms. On the other hand, human rights emphasize a set of rules - that have been widely recognized as being part of the common-law principles – which are in constant evolution, and must be respected.

The present analysis is situated at the crossroad between those two necessities: the need to protect the World order and the need to protect human rights. « Sanctions, as it is generally recognized, are a blunt instrument. They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate consequence, in exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects. Sanctions also always have unintended or unwanted effects. [...] They can also defeat their own purpose by provoking a patriotic response against the international community [...] and by rallying the population behind the leaders whose behaviour the sanctions are intended to modify. »<sup>2</sup>

This critical analysis will try to determine whether the several progresses made regarding sanctions at the U.N level were effective and whether such measures are taken within the framework of human and fundamental rights, or taken in the name of collective security, while neglecting such rights, in the name of institutional primacy.

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<sup>1</sup> Minear, Larry Cortright, David, Wagler, Julia, Lopez, George A and Weiss, Thomas G. « Toward More Humane and Effective Sanctions Management: Enhancing the Capacity of the United Nations System », *Institute for International Studies*, Brown University, 1998, p.2.

<sup>2</sup> UN General Assembly and Security Council, Supplement to an Agenda for Peace: position paper of the Secretary General on the occasion of the fiftieth anniversary of the United Nations, Fiftieth Session, Report of the Secretary General on the work of the organization, 3 January 1995, §70.

In order to answer such questions, the present work will be divided in four main chapters. The first one will introduce key notions to sanctions by providing a broad definition of the concept and distinctions between the types and natures of sanctions.

The second chapter will be devoted to the analysis of the legislative framework of the sanctions implemented by the UNSC. In consequence, two sub-sections will be introduced, about the *Chapter VII of the U.N Charter* and the sanctions' Committees.

The third chapter will analyse the targeted sanctions, and their emergence on the international scene. Then, a case study will be introduced in order to assess the impacts of targeted sanctions on Iran and their humanitarian consequences. Finally, the efficiency of sanctions will be questioned.

The fourth and last chapter will describe the human rights that are put at risk by the UNSC sanctions, and the distinction made between criminal and administrative measures. In the end, the development will introduce the issue of jurisdictional review of UNSC decisions and Resolutions, mainly at the European and international levels.

Before introducing the first chapter, a disclaimer shall be made. Indeed, despite being an analysis bearing a judicial character, the present work also mobilizes notions and key issues related to International Relations. The reason for this is quite logical: it is assumed that without understanding some notions which belong to the field of Political Sciences and International Relations, a practical understanding of the legality of sanctions would be compromised. It is by combining both fields of study that such a complex issue can be assessed and understood.

## *I – Introductory notions to sanctions*

### **A - Sanction's definition: « wars without bullets »<sup>3</sup>**

Usually described as the guardian of collective security and common international interests, the UNSC sometimes resort to the use of sanctions, which are generally described as a « peaceful form of pressure »<sup>4</sup>, and which sought to induce a compliance or at least, a change in the behaviour of a targeted actor. « Sanctions generally represent a range of actions that can be taken against a person who has transgressed a legal norm. »<sup>5</sup> Sanctions are usually seen as a kind of « smart diplomacy », in the sense that they are the combination of hard power and soft power, that tries to induce compliance, without necessarily having recourse to the use of force itself. In that sense, « sanctions represent a middle ground in international politics, being more severe than mere verbal condemnation, but less severe than the use of force. »<sup>6</sup>

While several definitions can be given regarding sanctions, such measures are generally described as being « actions initiated by one or more international actors (the « senders ») against one or more others (the « targets ») with either or both of two purposes: to punish the targets by depriving them (...) or to make the « targets » comply with certain norms the senders deem important. »<sup>7</sup>

Sanctions have various goals and different objectives. Indeed, when a sender State targets another entity, the sanctions employed are, in some extent, also directed to other audiences. Different adjectives can describe sanctions. Those instruments are combining strategies of deterrence, compliance, destabilization but can also aim to limit conflict and to enhance solidarity between States, by using symbolisms. Indeed, while solidarity refers to the allies of the sender State, symbolism is direct towards the targets, their allies and domestic audiences.

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<sup>3</sup> Oskarsson, Katerina. « Economic Sanctions on Authoritarian States: Lessons Learned », *Middle East Policy*, Vol. XIX, N. 4, Winter 2012, p. 88.

<sup>4</sup> MacDonald, R. St. J. « Economic Sanctions in the International System », *Canadian Yearbook of International Law* 7, 1969, p. 88.

<sup>5</sup> Matam Farrall, Jeremy. *United Nations Sanctions and the Rule of Law*. (Cambridge: Cambridge University Press, 2007), p. 6.

<sup>6</sup> UN Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *The Adverse Consequences of Economic Sanctions*, The Bossuyt Report, Fifty-second session, E/CN.4/Sub.2/2000/33, 21 June 2000. p. 4.

<sup>7</sup> Daoudi, M.S and Dajani, M.S. *Economic sanctions, ideals and experience*. (London: Routledge & Kegan, 1983), p.7.

One of the main objectives of sanctions is generally deterrence. Indeed, « deterring norm-violation would seem to be the prime function of threatened sanctions. »<sup>8</sup>

Very often, sanctions are described and seen as punitive measures. Especially because of some impacts on which the present analysis will focus on, in the following chapters. The impacts on populations, for example, are very often used as an illustration of the punitive character of sanctions, that appear as being enforcing tools of multilateral diplomacy, carrying an aggressive aspect. However, when the UNSC resorts to sanctions, the institution generally emphasizes the necessity of such measures, taken for the common good, without necessarily being punitive by nature. As stressed by Boutros Boutros-Ghali, who was the Secretary General of the U.N from January 1992 to December 1996 in the *Supplement to the Agenda for Peace of 1995*, « If general support for the use of sanctions as an effective instrument is to be maintained, care should be taken to avoid giving the impression that the purpose of imposing sanctions is punishment rather than the modification of political behaviour. »<sup>9</sup>

As a consequence, despite the quite common negative image associated with sanctions, such measures are rather incentives aimed to deterrence and compliance than punishments *per se*. « Sanctions are threatening and therefore preventive in intent rather than [...] coercive. »<sup>10</sup>

The doctrine provides good examples of the different types and natures of sanctions, which can lead to a better understanding of those measures. As stated by several analysts, sanctions oscillate between a coercive and a non-coercive nature, depending on the context, the causes of such sanctions, and the actors at stake. A specific regime of UNSC sanctions will not be the same than another one, which underlines the necessity to analyze case by case each sanctions regime, in order to decrypt and rightly understand the measures concerned. « The motive for imposing sanctions may be to respond to a breach of a norm or to prevent such a breach [...] some commentators have even employed the term « positive sanctions » to refer to acts of a non-coercive nature which seek to induce a particular type of behaviour. »<sup>11</sup>

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<sup>8</sup> Doxey, Margaret. *International sanctions in contemporary perspective*, Second edition (London: Macmillan Press, 1996), p. 55.

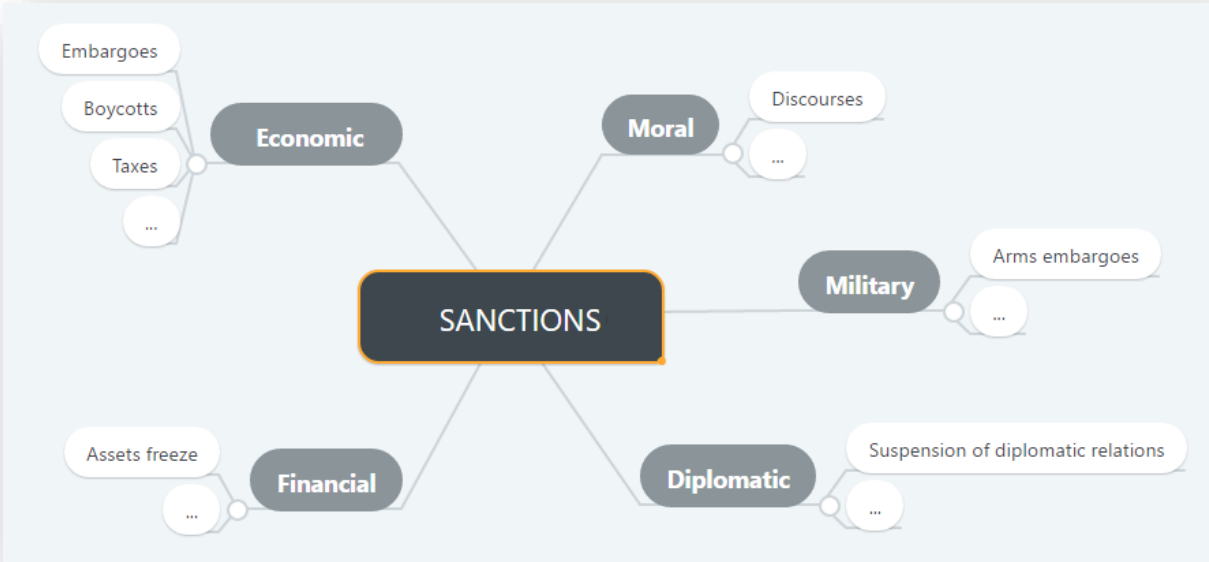
<sup>9</sup> United Nations General Assembly and Security Council, *Supplement to an Agenda for Peace: position paper of the Secretary General on the occasion of the fiftieth anniversary of the United Nations*, *Op. Cit.*

<sup>10</sup> Doxey, Margaret, *Op. Cit.*

<sup>11</sup> Ven Bergeijk, Peter A.G. *Economic Diplomacy, Trade and Commercial Policy: Positive and Negative Sanctions in a New World Order*. (Brookfield: Edward Elgar Publishing, 1994) in Matam Farrall, Jeremy. *United Nations Sanctions and the Rule of Law*, *Op. Cit.*, p. 7.

Beyond defining sanctions, it is necessary to stress the differences between the types and natures of sanctions. Indeed, this word can refer to an array of measures, which are not all the same, depending on the context of application and the actors involved in the process.

### B - Types and natures of sanctions



*Mind map*<sup>12</sup>

First of all, sanctions can be of different natures. A sanction can be moral, military, economic, diplomatic and financial, as shown on the mind map above. Economic sanctions refer to a wide array of actions, such as embargoes, boycotts and taxes, while diplomatic and military sanctions refer respectively to, for instance, suspension of diplomatic relations and arms embargoes. Finally, financial sanctions are generally based on the so-called assets freeze. « Financial sanctions are closely related to economic sanctions, but their focus is upon prohibiting the flow to and from the target of financial and economic resources, rather than commodities, products or supplies. »<sup>13</sup> To sum up, financial sanctions will interrupt the ability of a target to build financial relations, or to continue the existing ones, with its partners.<sup>14</sup> In the present work, for the purpose of concision, the analysis will focus on financial sanctions.

<sup>12</sup> *Mind map* (own initiative)

<sup>13</sup> Matam Farrall, Jeremy. *United Nations Sanctions and the Rule of Law*, Op. Cit.

<sup>14</sup> *Ibid.*, p. 120.

Nevertheless, the different natures of those instruments can be combined within a specific measure, or even associated with other diplomatic and political tools, which can straighten their effectiveness. It is thus necessary not to think to such natures as being completely independent from one another. Beyond the natures of sanctions, different types exist, according to the actors that launch the measures. There are three main types of sanctions: multilateral, unilateral and universal. First, multilateral sanctions are taken by several States. They are generally described as being multistate coercive actions.

This type of sanctions is taken on a collective basis, which tends to ensure a better effectiveness of the measures concerned. Second, unilateral sanctions are taken by one actor – a State – against another one. Such actions have been initiated by the United States (U.S) against Cuba, and also by Russia against several Eastern countries. To be clear, unilateral sanctions are not allowed by the UNSC.

Finally, universal sanctions refer to measures taken within the framework of International Organizations (IO's) under a « universally approved Charter. »<sup>15</sup> In the present analysis, the universal sanctions are going to be at the heart of the developments. Indeed, the UNSC puts in place sanctions' regimes, taken on a collective basis, but within the framework of an IO, which distinguishes those measures from multilateral sanctions, that can be taken among several States, but outside the UN institutional framework.

Initially, the sanctions taken by the UNSC were said to be comprehensive or global measures. But facing several criticisms, mainly linked to the unintended consequences of these global measures, the UNSC gradually evolved towards a new type of mechanism: the so-called smart or targeted sanctions.

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<sup>15</sup> Bredel, Ralph. *Long-Term Conflict Prevention and Industrial Development: The United Nations and Its Specialized Agency* (Nijhoff, 2003), p. 208.

## *II – Legislative framework of sanctions implemented by the UNSC*

### **A – The CHAPTER VII of the United Nations Charter: collective security**

#### **CHAPTER VII (U.N CHARTER)**

*ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION<sup>16</sup>*

As expressed by the *Article 24 of the U.N Charter*, the UNSC has the « primary responsibility for the maintenance of international peace and security »<sup>17</sup>. The power which will be central in the present analysis concerns the *Chapter VII of the Charter*, regarding « Action with respect to threats to the peace, breaches of the peace, and acts of aggression ». This chapter allows the UNSC to take recommendations but also Resolutions, that will be binding on UN Member-States. Before triggering this key chapter, the UNSC must first determine the existence to such a threat to the peace, a breach of the peace or an act of aggression.

While many times discussed within the doctrine, no clear and univocal definition has ever been agreed upon in order to determine such concepts. The margin of appreciation of the UNSC in the determination of such situation is then widely recognized. The *Chapter VII of the UN Charter* is a key element regarding State sovereignty. Indeed, what has been called as internal affairs of the State – which should be exempted from external interference, be it from IO's, States or other actors – are interfered on the basis of the collective security, as enshrined in the *Chapter VII of the Charter*, and especially in the *Article 41* of the latter. What is supposed to fall beyond the competence of the UN is not excluded from the intervention of the UNSC.

#### **ARTICLE 41 (U.N 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*

<sup>16</sup> *United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Chapter VII.*

<sup>17</sup> *Ibid.*, Article 24.

*economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.*<sup>18</sup>

However, what must be underlined is the nature of such a qualification. Indeed, the UNSC is not a legal organ, but a political entity. As a matter of consequence, the qualification of a situation as being a threat to the peace, a breach of the peace or an act of aggression remains primarily a political qualification, emanating from a political entity. As it will be illustrated in the next chapter, sanctions are mainly political acts by nature. As the UNSC is not supposed to judge the legality of an act, sanctions are mainly taken as responses to what the organization qualifies as a situation which comes in the framework of the *Chapter VII*.

Moreover, it is necessary to underline that a threat to the peace is not necessarily a breach of international law. The UNSC does not need to wait for such a breach to trigger the *Chapter VII*. « The response to them is authorized in virtue of their character as threats to or breaches of the peace and not in virtue of their character as internationally wrongful acts. »<sup>19</sup> But the distinction is often blurred. That leads to some ambiguity, especially regarding the character of sanctions, which are more and more seen as being punitive measures, because associated with measures taken in response to a wrongful act. However, there is no mention of the term « sanction » within the Charter itself.

Be that as it may, some distinctions and precisions must be made, in order to avoid contradictions in the present essay. First of all, despite the fact that the doctrine and the UNSC itself, generally refer to measures seeking to induce compliance with international law or Resolutions of the UNSC as being « sanctions », such measures are not sanctions *per se*. Indeed, as stated above, there is no mention of the word « sanctions » within the Charter itself. But moreover, in order to be more accurate, it is necessary to underline that sanctions are basically measures aimed to react to a breach of international law, especially sanctions taken by IO's against their own Member-States. In those cases, the sanction will deprive the State breaching the law of the IO or a rule of international law, mostly by entailing its rights linked to its membership.

Theoretically, the *Chapter VII of the UN Charter* is not intended to react to a breach of international law. Indeed, as stated above, this Chapter applies in case of threat to the peace, breach of the peace or acts of aggression. Such elements, in the practice of the UNSC are not

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<sup>18</sup> *Ibid.*, Article 41.

<sup>19</sup> Crawford, James. « The relationship between sanctions and countermeasures » in Gowlland-Debbas, Vera (ed.). *United Nations Sanctions and International Law* (The Hague: Nijhoff, 2004), p. 57.

necessarily equivalent to breaches of international law. As stated above, the primary aim is not based on any wrongful act or any breach of international law itself. This is why such measures cannot be categorized at first sight as being sanctions.

In practice, of course, elements overlap and articulate between one another. That can lead to some confusion. Even the doctrine and the UNSC itself, generally refer to sanctions, when speaking about measures taken in order to ensure the compliance of a State with some obligations or international standards. That is ambiguous. Then, the gap between such measures and « real sanctions » intended to respond to any breach of international law, tends to be reduced and the limit becomes blurred. To sum up, the *Chapter VII* is not supposed to apply to breaches of international law as such. It can be invoked for natural disasters and pandemics. Then, it could be far-fetched to qualify measures taken on this basis as being real sanctions, that are primarily and originally supposed to answer to breaches of international law. In practice, things are evolving.

Today, the UNSC generally refers to sanctions, even when such measures are taken in the absence of any breach of international law: and this is because it becomes more and more publicly admitted that those measures – taken on the basis of the so-called *Chapter VII* – aim to indirectly restore legality by inducing some compliance of the target entity, States and / or individuals (with targeted sanctions that will be studied in the next chapter). Moreover, sanctions as such are considered as being lawful. That is the main difference with what is called a countermeasure. The latter is not supposed to be lawful. But because being a measure taken in order to respond to a previous wrongful act, countermeasures are one of the elements precluding wrongfulness, in the sense of the *Draft Articles on Responsibility of States for International Wrongful Acts (ARSIWA)* and the *Draft Articles on Responsibility of International Organizations (ARIO)*.<sup>20</sup> Anyhow, what must be mentioned is the fact that, generally, sanctions are seen as being statutory measures, which will be reinforced or complemented by harsher policies, if they fail to induce some compliance in the behavior of the target State.

Indeed, the *Article 41 of the Chapter VII* refers to non-forcible measures that the UNSC may decide to give effect to its decisions. They are means of pressure which are supposed to induce compliance with the requests that are formulated by the UNSC. The range of such measures is quite wide. In the present case, sanctions are key tools of such an array. Such

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<sup>20</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

measures are aimed to resolve a situation qualified as a threat to the peace, but without resorting to force, as enshrined in the *Article 42*. In case of a failure of such measures – for example if the target State does not comply with sanctions – the UNSC can resort to the *Article 42*, which is about the military means of compliance.

**ARTICLE 42 (U.N CHARTER)**

*Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.* <sup>21</sup>

Finally, the Resolutions of the UNSC can create direct obligations. When the UNSC imposes measures under the *Chapter VII of the UN Charter*, they generally necessitate that the Member-States enact implementing measures, at the national level. Those national measures are aimed to transpose sanctions in national legislations. But in practice, Member-States do not really follow this path. Because the Resolutions of the UNSC do not mention the direct or indirect character of the measures enacted, the interpretation comes into play. Most of the time, nothing would lead to the conclusion that the intention of the UNSC was to deprive such measures from carrying a direct effect. Then, generally, the interpretation will underline the direct effect of Resolutions. Or at least, nothing will go against such a nature of the policies. In that sense, because being direct in nature, those measures and restrictions – as sanctions – apply to individuals and private companies.

To be clear, this means that Resolutions impose obligations and rights to private persons. And that element has led to several criticisms, which are at the core of this essay. One of the key criticism is based on the fact that sanctions do not necessarily make any distinction between individuals when they are applied on the ground, leading to what has been called an « indiscriminate destructiveness »<sup>22</sup> Moreover, sanctions have been widely denounced in the doctrine as measures taking part in the infringement of human rights. « In the case of *Chapter VII* sanctions targeting individuals, those sanctions do have a direct impact on the rights and

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<sup>21</sup> *United Nations Charter, Op. Cit., Article 42.*

<sup>22</sup> Reisman, Michael W. « Sanctions and International Law », *Intercultural Humanitarian Law Review Annual Symposium*, Vol. 4, October 2008, p. 13.

freedoms of individuals. »<sup>23</sup> As a consequence, a part of the doctrine tried to provide answers in order to improve the implementation of sanctions. One perspective should retain the attention, which claims that when implementing sanctions, the Military, Necessity, Proportionality and Differentiation (MNPD) principle should be applied, as it is the case for military actions in time of war.<sup>24</sup>

The upholder of this approach, Michael Reisman, has developed this perspective, insisting on the fact that the « framework for deciding the legitimacy of military action in time of war be applied to any determination of the legality of UN sanctions. »<sup>25</sup>

Indeed, proportionality « requires that the consequences of a decision affecting the rights, entitlements and obligations of other parties must be proportional to the harm caused by that party and consistent with the overall objectives for which the decision is being taken. »<sup>26</sup> If applied to the implementation of sanctions, the MNPD principle could contribute to avoid unnecessary collateral damages within the population but also within sectors of society of the target entity, that should be exempted from such measures. But despite the suggestions of the doctrine in that sense, such principles of necessity, proportionality and differentiation have not yet been applied seriously to sanctions, maybe testifying from a lack of willingness of the UNSC itself or even from States.

Finally, what should not be overlooked is the reluctance of the UNSC to invoke the *Article 41 of the UN Charter* while applying sanctions. As noted by Jeremy Matam Farrall, « the Security Council routinely invokes *Chapter VII* when applying or modifying sanctions. However, it has rarely stated expressly that it was acting under *Article 41*, which is the only specific basis within *Chapter VII* for the application of sanctions. The Council's recent references to Article 41 as the basis for its sanctions' regimes against North Korea and Iran are welcome, but it is unclear why the Council has not invoked *Article 41* on a more regular basis. »<sup>27</sup> Obviously, this can give rise to some questionings.

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<sup>23</sup> Wellens, Karel. *Remedies against international organisations*. (Cambridge: Cambridge University Press, 2002) in Fassbender, Bardo. « Target Sanctions and Due Process. The responsibility of the UN Security Council to ensure fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter. », *Humboldt-Universität Zu Berlin*, 20 March 2006. p. 22.

<sup>24</sup> Reisman, Michael W. « Sanctions and International Law », *Intercultural Humanitarian Law Review Annual Symposium*, Vol. 4, October 2008, p. 11.

<sup>25</sup> *Ibid.*

<sup>26</sup> Matam Farrall, Jeremy. *Op. Cit.*, p. 223.

<sup>27</sup> *Ibid.*, p. 195.

In order to implement and monitor the sanctions that have been decided by the UNSC, the latter started to settle sanctions' committees. The first one was the Al-Qaida sanctions' committee, established pursuant *Resolution 1267 (1999)*<sup>28</sup>. Such Committees are in charge of the monitoring of sanctions.

## B – Sanctions' Committees

As enshrined by the *UN Charter*, in its *Article 29*, the UNSC is allowed to establish any subsidiary organ necessary for the performance of its functions.

### **ARTICLE 29 (U.N CHARTER)**

*The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.*<sup>29</sup>

Sanctions' Committees are subsidiary organs of the UNSC, that are primarily aimed at monitoring the implementation of sanctions. The Committee will verify that Member-States of the UN will take all necessary steps and measures in order to implement the UNSC Resolutions regarding sanctions, if such measures are necessary. But its tasks will not be limited to such aspects. Indeed, beyond the monitoring role, the Committees are responsible for the allowance of derogations and humanitarian exceptions, in case of sanctions. In some cases, humanitarian exceptions can be granted, in order for the Non-Governmental Organizations (NGO's) or other actors to provide a population from a country being under a sanctions' regime, with goods of first necessity. Moreover, the Committees can receive de-listing requests from Member-States of the UN.

Such Committees can be standing ones or working groups, depending on the mandate and / or the mission allocated to such bodies. As explained by the UNSC official website, such subsidiary organs « can range from procedural matters to substantive issues. »<sup>30</sup> A Committee has been established within counter-terrorism strategies of the UNSC. That is the CTC (Counter-Terrorism Committee), established after the attacks of the 9/11. Another body is the NPC (Non-Proliferation Committee), followed by the sanctions' Committees. The first one and the last type of Committees are the ones which lie at the core of the present analysis.

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<sup>28</sup> Resolution S/RES/1267 of the U.N Security Council, Adopted by the Security Council at its 4051st meeting, on 15th October 1999, accessible at [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/RES/1267%281999%29](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1267%281999%29)

<sup>29</sup> *United Nations Charter, Op. Cit., Article 29.*

<sup>30</sup> United Nations Website, Security Council Subsidiary Bodies: An Overview, <https://www.un.org/sc/suborg/en/>

This is not an obligation for the UNSC to create a new Committee each time the institution decides to set up a sanctions' regime. But this is now, in practice, a kind of trend. And this is because it gives also more legitimacy, more transparency to such measures, despite many criticisms that have been raised against such Committees. Indeed, the opaque functioning of sanctions' Committees has been pointed out numerous times. For example, « whether the respective committee, or the Security Council itself, grants a de-listing request is entirely within the committee's or the Council's discretion: no legal rules exist that would oblige the committee of the Council to grant a request if specific conditions are met. »<sup>31</sup> What criticisms may have in common is that there is a need to improve the procedural exigence of such subsidiary organs, in order to reinforce the judicial security of targeted individuals.

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<sup>31</sup> Fassbender, Bardo. *Op. Cit.*, p. 4.



### *III – Targeted sanctions: between alternative and persistence of collateral damages*

#### **A – From comprehensive and global sanctions towards targeted measures: « smart sanctions » in a new global order**

Initially comprehensive and / or conventional, sanctions initiated by the UNSC were indiscriminate, in the sense that they were targeting a society, a country as a whole. « Conventional sanctions theory holds that political change is directly proportional to economic hardship. The greater the damage caused by sanctions, the theory holds, the higher the probability of attaining the stated political objectives. This understanding fails to account for the complex and often contradictory ways in which sanctions affect the internal political dynamics of a targeted society. »<sup>32</sup>

Facing criticisms, especially regarding the impacts on the populations of the target countries – the example of Iraq is one of the most pertinent here - the UNSC started to replace such tools by « tailored measures »<sup>33</sup> since the end of the 1990's. The targeted sanctions are based on the progressive individualization of sanctions. « Smart sanctions seek to remedy the shortcomings of older sanctions tools by granting humanitarian exemptions to alleviate the pain of vulnerable groups and targeting sanctions measures against the culpable elites. Their objective is to reduce humanitarian damage without relieving political pressure on targeted governments. »<sup>34</sup>

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<sup>32</sup> Minear, Larry Cortright, David, Wagler, Julia, Lopez, George A and Weiss, Thomas G. « Toward More Humane and Effective Sanctions Management: Enhancing the Capacity of the United Nations System », *Institute for International Studies*, Brown University, 1998, p. 7.

<sup>33</sup> Matam Farrall, Jeremy. *Op. Cit.*, p. 132.

<sup>34</sup> Tostensen, Arne, Bull, Beate. « Are Smart Sanctions Feasible? », *World Politics*, Vol. 54, N. 3 (April 2002), p. 402.



*UN Targeted Sanctions' Regimes*<sup>35</sup>

However, a distinction must be made between targeted and selective sanctions. While targeted sanctions are measures targeting specific persons (by resorting to assets freeze, restriction on the freedom of movement etc.), selective sanctions are directed towards specific and strategic goods like weapons or military supplies and oil products. While the first type is a kind of direct sanctioning, the second one is more indirect. Nevertheless, as stated by Farideh Shaygan, the two types of sanctions are generally combined and are considered as constituting smart sanctions.<sup>36</sup>

Of course, smart sanctions did not pop up from anywhere. In 1996, the UN Sub-Commission on the Promotion and Protection of Human Rights already stressed several points regarding sanctions. Among those key issues, the discussion underlined that sanctions should always be limited in time because they affect the innocent population, aggravate the imbalances in income distribution and finally, generate illegal and unethical business practices.<sup>37</sup> In response to criticisms, a structured process based on several conferences was held.

The first one, the Interlaken process, took place in 1998. Several suggestions were made, regarding the humanitarian exceptions that should be allowed within the framework of sanctions' regimes. Few recommendations were submitted, as the establishment of sanctions' committees, procedures for individuals to be removed from lists of targets and effective

<sup>35</sup> Map: *UN Targeted Sanctions Regime*, <http://graduateinstitute.ch/un-sanctions>

<sup>36</sup> Shaygan, Farideh. *La compatibilité des sanctions économiques du Conseil de Sécurité avec les droits de l'homme et le droit international humanitaire* (Bruxelles: Bruylant, 2008) p. 432.

<sup>37</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, *Protection of Minorities*, 8 July 1996, E/CN.4/Sub.2/1996/28.

monitoring of sanctions, in order to avoid the collateral damages that left a bitter taste in the past UN sanctions.<sup>38</sup>

Following the first conference, the Bonn process was held in 2000. This conference had the aim to go further than the previous one, by determining targets with more precision and setting up a black-list of groups and individuals, while improving the implementation of sanctions.

Finally, in 2003, the Stockholm process completed the scheme by performing a deeper analysis of sanctions implementation. Such a process was aimed to improve the measures of the UNSC in the context of sanctioning mechanisms, but was also aimed to reinforce the credibility of the latter. Indeed, because of the impacts of comprehensive sanctions, previously used by the UNSC, the legality of sanctions has been questioned multiple times, by the doctrine but also by NGO's and other actors.

The first use of proper targeted sanctions against individuals was made against Osama Bin Laden in 1999. Constituting an « heterogenous toolbox »<sup>39</sup>, this new type of sanctions was supposed to protect vulnerable individuals and entities from collateral damages of sanctions.

The improvement of sanctions – especially regarding their legality and effectiveness – was reinforced by the establishment of a Focal Point, by the *Resolution S/RES/1730*, in 2006<sup>40</sup>. The Focal Point is a mechanism established within the General Secretariat of the UN, which receives requests of removal from the list of targeted individuals, without being necessary for the latter to address themselves to their governments. The Focal Point appeared like a direct link between individuals and the organization. However, despite improvements, the UN sanctions still attracted criticisms. « Even though individuals now have access through the focal point, there still is no body with any level of independence to assess an application for review. »<sup>41</sup> Indeed, the Focal Point is only a centralization actor. The latter transmits the demands to the States concerned, and then, its role is over. Moreover, there is no judicial

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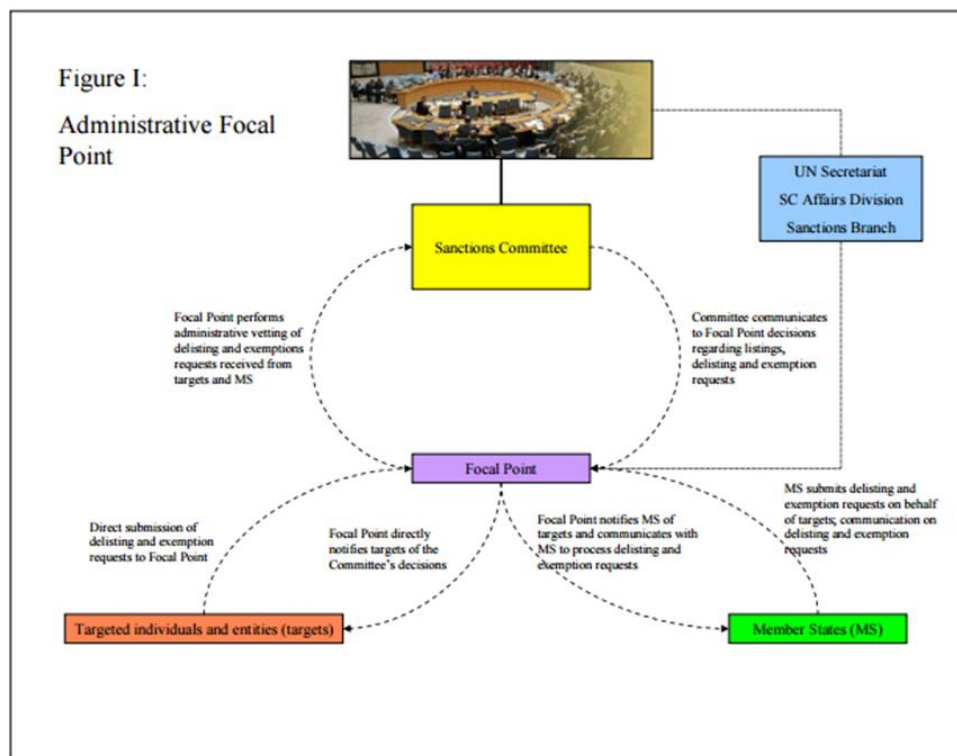
<sup>38</sup> Summary of the Bonn-Berlin Process, Interactive Sanctions Digest, Targeted Sanctions Project, *Watson Institute for International Studies*, Brown University.

<sup>39</sup> Portela, Clara. « National implementation of United Nations sanctions. Towards fragmentation », *International Journal*, Winter 2009-10, p. 15.

<sup>40</sup> Resolution S/RES/1730 of the U.N Security Council, Adopted by the Security Council at its 5599th meeting, on 19 December 2006, accessible at [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/RES/1730%282006%29](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1730%282006%29)

<sup>41</sup> Van den Herik, Larissa. « The Security Council's targeted sanctions regimes: in need of better protection of the individual », *Leiden Journal of International Law*, Vol. 20, Issue 4, December 2007, p. 13.

guarantee going along with the Focal Point mechanism, thus making the latter hardly compatible with human rights norms and requirements.<sup>42</sup>



### *UN Administrative Focal Point<sup>43</sup>*

In the Dick Marty's report for the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe of 2007, the blacklisting procedures that were first suggested by the Bonn process were heavily criticized, and described as flagrant violations of human rights: « The UN's current « blacklisting » procedure not only violate fundamentals rights, by doing flagrant injustice to many persons against whom there is no proof of any wrongdoing. It also detribalizes the whole of the international fight against terrorism (...). Using arbitrary procedures violating the most elementary rights risks doing a disservice to the fight against terrorism: states attached to the rule of law (...) should surely hesitate to put forward person for inclusion in such list which do not provide for any protection of fundamental freedom. »<sup>44</sup>

<sup>42</sup> Shaygan, Farideh, *Op. Cit.*, p. 468.

<sup>43</sup> *UN Administrative Focal Point*, in Biersteker, Thomas J., Eckert, Sue E. « Strengthening targeted sanctions through fair and clear procedures », *Watson Institute for International Studies*, Brown University, March 2006.

<sup>44</sup> Dick Marty's report for the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, 16th November 2007, AS/jur.

Following such criticisms, and the very well-known judgement of the European Court of Justice (ECJ) in the joined cases of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*<sup>45</sup>, some improvements were made. « The Security Council responded to Kadi I by creating an Office of the Ombudsperson to provide help to individuals aggrieved by their listing, and subsequently made the Ombudsperson's recommendations regarding delisting more robust. In October 2012, the Committee delisted Mr. Kadi after a recommendation by the Ombudsperson. »<sup>46</sup>

The mediator (or Ombudsperson) – created in 2009 by the *Resolution S/RES/1904*<sup>47</sup> - was supposed to be more autonomous than the Focal Point. The main ambition was to enhance the transparency of procedures and the respect of fundamental rights. By collecting information, setting up concertation and transmitting regularly information to the claimants regarding the procedure, the mediator was given a role of intermediary between claimants and States. However, the States can still contest the decisions of the mediator. « Les cibles désireuses de voir leur nom radié de la liste restent entièrement tributaires de la volonté des Etats, et ce, à une étape ultérieure de la procédure de radiation, ces derniers jouissant effectivement d'un droit de veto. »<sup>48</sup>

Finally, such a mechanism does not have a real power to challenge the UNSC Resolutions, neither to allow indemnities to individuals unfairly targeted by sanctions.<sup>49</sup> Nonetheless, by establishing a triennial exam with the *Resolution S/RES/1822*<sup>50</sup>, as well as the Focal Point and the Mediator, the UNSC tried to improve the sanctions mechanisms and the means available to targeted individuals, especially in the context of the fight against terrorism, in order to challenge the UNSC Resolutions. While the Focal Point provides a way to submit requests,

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<sup>45</sup> E.C.J., 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05, Rec. I-06351, ECLI:EU:C:2008:461.

<sup>46</sup> Margulies, Peter. « Aftermath of an Unwise Decision: The U.N. Terrorist Sanctions Regime After Kadi II », *Amsterdam Law Forum*, VU University Amsterdam, Vol. 6:2, 2014, p. 53.

<sup>47</sup> Resolution S/RES/1904 of the U.N Security Council, Adopted by the Security Council at its 6247th meeting, on 17th December 2009, accessible at [http://www.un.org/french/documents/view\\_doc.asp?symbol=S/RES/1904\(2009\)&TYPE=&referer=/french/&Lang=E](http://www.un.org/french/documents/view_doc.asp?symbol=S/RES/1904(2009)&TYPE=&referer=/french/&Lang=E)

<sup>48</sup> Gauthier, Marie. « Lutte contre le terrorisme et droits fondamentaux : le droit international sous la surveillance de la CJCE », *La Semaine Juridique Edition Générale*, N. 45-46, 5 Novembre 2008.

<sup>49</sup> L. Ginsborg, Lisa and Scheinin, Martin. « You Can't Always Get What You Want: The Kadi II Conundrum and the Security Council 1267 Terrorist Sanctions Regime », *Essex Human Rights Review*, 2011, p. 11.

<sup>50</sup> Resolution S/RES/1822 of the U.N Security Council, Adopted by the Security Council at its 5928th meeting, on 30th June 2008, accessible at [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/RES/1822%20%282008%29](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1822%20%282008%29)

the individuals are allowed a direct access via the Ombudsperson, which grants a possibility to be heard. Before, such possibilities were only accessible for the country of the targeted individual. That was pointed out as a lack of procedural fairness. But what needs to be underlined is that despite such improvements, one of the main limits of the radiation procedure is that there is not any jurisdictional instance intervening within the removal mechanism.

Beyond that aspect, the impacts of targeted sanctions are also regularly questioned. Despite the spread idea saying that targeted sanctions do not impact on goods of first necessity, the practice shows a gap between what is suggested in theory and what is done in reality. Initially created in response to the collateral damages of comprehensive sanctions on societies of the target States, smart sanctions fail to win unanimous support.

First of all, is it hard to imagine how sanctions would totally avoid the impacts on the standards of living of a given society: « a program of economic sanctions should not diminish the standards of living of a significant segment of society below the subsistence level. »<sup>51</sup> As stressed by the *UN Resolution A/RES/51/242 of 1997*, it is necessary for the UNSC, to impose sanctions while not causing unnecessary suffering to the civilian population.<sup>52</sup>

Second, the proper functioning of the sanctions mechanisms remains blurred. The lack of institutional transparency leaves the door open to criticism. As stated by Clara Portela, « from a legal point of view, the trend towards fragmentation appears extremely difficult to reverse. [...] it leaves the identification of targeted persons and entities undefined. »<sup>53</sup> This fragmentation phenomenon is directly related to the opacity of the institutional functioning, which is basically decentralized, and lacks guarantees about the respect of human rights, under sanctions' regimes. « This introduces a decentralization of sanctions decision-making without required adequate human rights guarantees to be exercised by the implementing member states. »<sup>54</sup> Such criticisms arose, despite the possibility for the sanctions committee to grant humanitarian exceptions.

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<sup>51</sup> Fislser Damrosch, Lori. « The Civilian Impact of Economic Sanctions » in Fislser Damrosch, Lori (ed.). *Enforcing Restraint. Collective Intervention in Internal Conflicts* (New York: Council on Foreign Relations Editions, 1993), p. 281.

<sup>52</sup> Resolution A/RES/51/242 of the U.N General Assembly, *Supplement to an Agenda for Peace*, of 26 September 1997, accessible at [http://www.un.org/fr/documents/view\\_doc.asp?symbol=A/RES/51/242&TYPE=&referer=http://www.un.org/depts/dhl/resguide/r51\\_resolutions\\_table\\_fr.htm&Lang=E](http://www.un.org/fr/documents/view_doc.asp?symbol=A/RES/51/242&TYPE=&referer=http://www.un.org/depts/dhl/resguide/r51_resolutions_table_fr.htm&Lang=E)

<sup>53</sup> Portela, Clara. *Op. Cit.*, p. 20.

<sup>54</sup> Gowlland-Debbas, Vera (ed.). *Op. Cit.* p. 647.

Those exceptions have been granted in 1995, in the context of the Kuwait War, by the so-called « Oil for Food Program » of the UN. Originally intended to provide the Iraqi population with goods of first necessity, the program unfortunately led to corruption and embezzlement. Such an experience was a complete social and economic disaster.

With the evolution of sanctions, from global measures to targeted mechanisms, such exceptions on goods of first necessity are not relevant anymore, because such goods are not supposed to be targeted by smart sanctions. Nonetheless, humanitarian exceptions still exist regarding targeted individuals, in order to ensure they can fulfil their basic vital needs.<sup>55</sup> Nowadays, several doubts still persist regarding the efficiency of such a mechanism. Indeed, « there is no [...] standardized list of what should qualify as humanitarian exemptions. »<sup>56</sup>

Moreover, humanitarian exceptions are not always sufficient to counterbalance the fact that sanctions have the tendency to complicate the intervention of humanitarian organizations. « Even when sanctions are designed with humanitarian safeguards, they might not always be « humane » enough to avoid the civilian suffering. »<sup>57</sup>

### ➔ *Proportionality, necessity and distinction test*

Back to the theory of Michael Reisman (developed within the second chapter of the present work), one of the main pitfall of the UNSC sanctions is that, when taking such measures, the UNSC is not bound to apply the principles of proportionality, necessity and distinction, which are governing the military actions in time of war. However, as stated by Bardo Fassbender, « there is a duty of the Council duly to balance the general and particular interests which are at stake. Every measure having a negative impact on human rights and freedoms of a particular group or category of persons must be necessary and proportionate to the aim the measure is meant to achieve. »<sup>58</sup>

Finally, Mathias Forteau insisted on the time criteria, in order to assess the efficiency of sanctions and the compliance of such measures with necessity and proportionality: « [...] on peut sans doute considérer qu'une mesure coercitive qui ne ferait que restreindre l'exercice de

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<sup>55</sup> Mélot, Bénédicte. « L'évolution de la mise en œuvre des sanctions onusiennes : vers une nouvelle modernité dans l'encadrement juridique d'instruments indispensables pour la régulation de la société internationale ? », Master thesis of Faculty of Law and Criminology, under the direction of Philippe Gautier, Université Catholique de Louvain, 2015, 83p., p. 56.

<sup>56</sup> Tostensen, Arne, Bull, Beate, *Op. Cit.*, p. 394.

<sup>57</sup> Peksen, Dursun. « Economic Sanctions and Human Security: The Public Health Effect of Economic Sanctions », *Foreign Policy Analysis*, Vol. 7, 2011, p. 240.

<sup>58</sup> Fassbender, Bardo. *Op. Cit.*, p. 7.

ces droits ne répondrait pas non-plus au critère de nécessité et de proportionnalité à partir du moment où elle aurait prouvé son inefficacité à atteindre les objectifs poursuivis. Dans cette situation en effet, la population de l'État cible subirait, si l'on s'inspire ici de la terminologie du droit des conflits armés, des dommages « excessifs par rapport à l'avantage [...] attendu » ou bien « des maux superflus. »<sup>59</sup>

## **B – Case study: efficiency and the humanitarian consequences of smart sanctions**

« *A hand upon the throat of the offending nation* »<sup>60</sup>

In 2006, in response the development of a nuclear program by Iran and its alleged support of terrorism, the UNSC enacted the *Resolution S/RES/1737*<sup>61</sup>, establishing sanctions against the Iranian economy. The latter, heavily dependent on oil exportations, had to face assets freeze and a total oil embargo. The country was targeted by economic, financial and travel sanctions.<sup>62</sup>

While the UN constantly underline that sanctions do not aim to cause negative consequences for populations, collateral damages cannot be absolutely avoided. In the present case, all sectors of society have been impacted by the sanctions. As a consequence, the UNSC sanctions against Iran have generally been referred to as being a « collective punishment of people »<sup>63</sup>

As Thierry Coville underlines, unfortunately, the poorest social classes of the society are the ones having suffered the most from the sanctions. Poverty was on the rise during several years following the sanctions' regime. Moreover, according to the author, in 2012, 30% of the Iranian population was in a situation of absolute poverty. Finally, sanctions caused medicines shortages.<sup>64</sup>

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<sup>59</sup> Forteau, Mathias. « La levée et la suspension des sanctions internationales. », *Annuaire français de droit international*, Vol. 51, 2005. DOI : 10.3406/afdi.2005.3873, p. 80.

<sup>60</sup> Woodrow Wilson, Paris Peace Conference, Versailles, 1919.

<sup>61</sup> Resolution S/RES/1737 of the U.N Security Council, Adopted by the Security Council at its 5612th meeting, on 23rd December 2006, accessible at [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/RES/1737%282006%29](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1737%282006%29)

<sup>62</sup> See Annex 1

<sup>63</sup> Al-Anbara, Amir A. Gowlland-Debbas, Vera. « The Impact of United Nations Sanctions on Economic Development, Human Rights and Civil Society » in Gowlland-Debbas, Vera (ed.). *Op. Cit.*, p. 372.

<sup>64</sup> Coville, Thierry. « Les sanctions contre l'Iran, le choix d'une punition collective contre la société iranienne ? », *Revue Internationale et Stratégique*, 2015, Vol. 1, N. 97, ISSN 1287-1672, p. 156.

Sanctions imposed on Iran have increased unemployment but also induced a decline in the Gross Domestic Product (GDP), a loss of foreign investments and a declining public health. Humanitarian costs were not completely avoided by smart sanctions, which also led to the increase of black market activities. The efficiency was then contestable, as the respect for human rights. Of course, some impacts as the decline of GDP and the loss of foreign investments were obviously aims of sanctions. One should not neglect that by definition, despite not being referred as punitive measures by the UNSC, sanctions are used in order to induce compliance of the target entity. Compliance is sought through the negative impacts on economy, growth and investments. However, real efficiency must also be based on the lowest collateral damages possible.

**Tableau 1 : Structure du budget iranien de 2011 à 2013 (% du PIB)**

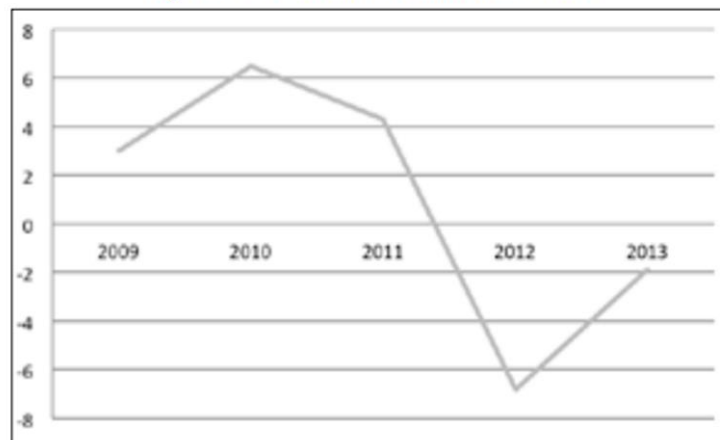
	2011	2012	2013
Recettes totales	19,7	15	13,9
dont recettes pétrolières	10,8	6,6	6,2
Dépenses totales	19,5	15,3	14,8
Dépenses courantes	14,8	13,1	13,6
Dépenses d'investissement	4,7	2,2	1,2
Targeted Subsidy Organization*	-1,6	-1,6	-1,3
Solde	-1,4	-2	-2,2

Source : FMI, « Islamic Republic of Iran », *IMF Country Report*, n° 14/93, avril 2014.

\* Ce poste correspond au solde budgétaire de l'organisation chargée de gérer la réduction des subventions sur l'énergie mise en place durant le deuxième mandat de M. Ahmadinejad. Ce solde a été déficitaire car les recettes supplémentaires liées à la diminution de ces subventions ont été inférieures aux versements en liquide à la population – qui visaient à compenser l'impact de cette réduction des subventions.

*Structure of the Iranian budget from 2011 to 2013 (% of GDP)<sup>65</sup>*

**Figure 3 : Croissance en Iran (% du PIB)**



Source : Banque centrale d'Iran.

*Iranian growth (% of GDP)<sup>66</sup>*

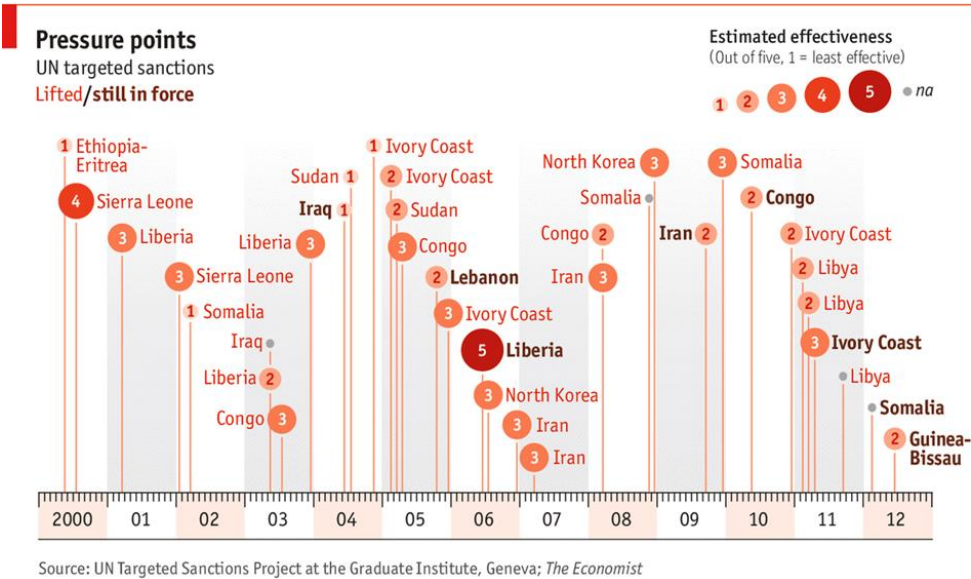
<sup>65</sup> *Structure of the Iranian budget from 2011 to 2013 (% of GDP)*, *IMF Country Report*, N. 14/93, April 2014, in Coville, Thierry. *Op. Cit.* p. 153.

<sup>66</sup> *Iranian growth (% of GDP)*, *Central Bank of Iran*, in Coville, Thierry. *Ibid.*, p. 154.

### C- A questionable efficiency

Despite evolutions of sanctions, from comprehensive spectrum to individualization, as stated previously, some criticisms were reinforced while new ones emerged.

First of all, targeted sanctions do not always achieve their objectives « thereby producing a number of unintended consequences. This could lead to what Bruce Jentleson has described as « backfiring » (strengthening the will of the target), « misfiring » (humanitarian pain), « cross-firing » (straining relations with allies) and « shooting in the foot » (self-inflicted costs). »<sup>67</sup>



*Pressure points / UN targeted sanctions effectiveness<sup>68</sup>*

Second, the argument according to which a pressure on the population will lead to State compliance or even regime change, should be nuanced. As stated by Marc Bossuyt in its commentary entitled « The adverse consequences of economic sanctions on the enjoyment of human rights »: « The whole theory behind economic sanctions appears to be fallacious. It is assumed that pressure on civilians will in turn translate into pressure on the Governments for change. However, in regimes where political decision-making is not democratic, there is simply no pathway through which civilian pressure can bring about change in the Government. [...] If they would be sincerely concerned about the fate of their people, it is

<sup>67</sup> Mack, Andrew (ed.). *The Human Security Report 2005* (Oxford: Oxford University press, 2005) in Eriksson, Mikael. *Targeting Peace. Understanding UN and EU Targeted Sanctions* (Surrey: Ashgate, 2011), p. 34.

<sup>68</sup> « The economic battleground. Too smart by half? Effective sanctions have always been hard to craft », *The Economist*, September 6th, 2014, <http://www.economist.com/news/briefing/21615603-effective-sanctions-have-always-been-hard-craft-too-smart-half>

unlikely that their country would ever become the object of economic sanctions.<sup>69</sup> Greater sanctions and severity may thus lead to the so-called « rally around the flag » effect<sup>70</sup> and to greater levels of repression. Sanctions taken in order to improve the respect of human rights in a given country also appear as being generally counterproductive. As an example, Reed Wood stated that « U.S. sanctions threats against China following the Tiananmen Square massacre failed to improve human rights practices. »<sup>71</sup>

Third, the time variable is generally invoked as a key element in assessing the efficiency and the legitimacy of sanctions. The longer the sanctions' regime remains, the higher the risk of humanitarian negative impacts and collateral damages on the population is. Generally speaking, the doctrine agrees on the point that as soon as the aim pursued by such a sanctions' regime is not attained by the mere implementation and monitoring, sanctions should be lifted. Otherwise, the legitimacy of such measures will be easily contestable. « Sanctions which are legitimate at the outset may cease to be so, if after a reasonable period of time they do not lead to the desired result. The lack of efficacy impairs their legitimacy. [...] This is why the imposition of sanctions for an indefinite period of time should be avoided and a periodic evaluation of their efficacy – and hence legitimacy – should always be provided for. »<sup>72</sup>

Finally, despite the humanitarian exceptions that could be granted, especially regarding food and medical items, the mere nature of such exceptions is contestable, and their efficiency remains doubtful. While intending to provide the population with goods of first necessity, such mechanisms do not avoid – or at least, cannot really counterbalance – the collateral damages of sanctions, that generally lead to the aggravation of poverty in the targeted countries.<sup>73</sup>

However, despite the negative aspects of sanctions, asserting that smart sanctions are fundamentally and always negative, because always failing to induce compliance while always depriving the populations and aggravating their life conditions, would be tantamount. It is necessary to stress that sanctions are complex instruments, whose efficiency and impacts

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<sup>69</sup> Bossuyt, Marc. « The adverse consequences of economic sanctions on the enjoyment of human rights », Geneva, 5 April 2012, (E/CN.4/Sub.2/2000/33), p.2.

<sup>70</sup> Galtung, Johan. « On the Effects of International Economic Sanctions: With Examples from the Case of Rhodesia », *World Politics*, Vol. 19, Issue 3, April 1967, pp. 378-416.

<sup>71</sup> Wood, Reed M. « A Hand upon the Throat of the Nation”: Economic Sanctions and State Repression, 1976–2001 », *International Studies Quarterly*, Vol. 52, Issue 3, September 2008, DOI: 10.1111/j.1468-2478.2008.00512.x, p. 3.

<sup>72</sup> Bossuyt, Marc. *Op. Cit.*

<sup>73</sup> Shaygan, Farideh. *Op. Cit.* p. 254.

need to be assessed on a case by case basis. Of course, sanctions are not perfect, but neither are the States' behaviors and actions nor is the mere functioning of IO's.

One of the main criticisms of sanctions is linked to the violations of human rights. But is the Security Council bound to respect such rights? Actually, the UN is not party to any treaty for the protection of human rights. As a consequence, « it is not directly bound by the respective treaty provisions guaranteeing rights of due process. »<sup>74</sup> That element is easily explained by the doctrine. Indeed, « the reason for this restrictive approach of human rights treaties in defining the respective duty bearers is that traditionally States (i.e., their governmental, administrative, legislative and judicial organs) have been regarded as the main potential violators of human rights. »<sup>75</sup>

When the UN was created, the founders did not estimate necessary to make human rights directly binding on the IO itself, and especially because they « did not expect the Organization to exercise power or authority in a way that rights and freedoms of individual persons would be directly affected. »<sup>76</sup> But with the development of international institutions, and also the evolutions of international relations, the need to ensure a better protection of individuals against international institutions' arbitrariness has gradually increased.<sup>77</sup>

While the UN is not bound by the well-known instruments which are the *International Covenant on Civil and Political Rights (ICCPR)*, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the *Universal Declaration of Human Rights (UDHR)*, it has been quite widely recognized that such instruments as the *ICCPR* and the *UDHR* are « relevant standard [...] part of the concept of the international public order. »<sup>78</sup> Moreover, IO's being subjects of international law, it seems legitimate that such bodies would be bound by obligations stemming from general rules of law, the international agreements to which they are parties or even under their constitutions, as stated by the International Court of Justice (ICJ), in its *Advisory Opinion about the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*.<sup>79</sup>

« The United Nations shall respect fundamental rights, as guaranteed by the universal human rights treaties, and as they result from the constitutional traditions common to the Member

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<sup>74</sup> Fassbender, Bardo. *Op. Cit.*, p. 6.

<sup>75</sup> *Ibid.*, p. 16.

<sup>76</sup> *Ibid.*, p. 22.

<sup>77</sup> Van den Herik, Larissa. *Op. Cit.*, p. 1.

<sup>78</sup> Fassbender, Bardo. *Op. Cit.*, p. 26.

<sup>79</sup> I.C.J., *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I. C.J. Reports 1980, p. 73.

States, as general principles of UN law. »<sup>80</sup> While it is widely recognized that the sole fact that its Member States have ratified human rights instruments is not sufficient to bind the UN – which is an autonomous subject under international law – some trends are challenging this idea. Indeed, the « law of the European Community (E.U), has made both human rights treaty obligations of EC (EU) Member States as well as « constitutional traditions common to the Member States » sources of Community (Union) law from which direct obligations of the Community (Union) itself arise. »<sup>81</sup>

The same evolutions could be said about customary international law. While customary international law « does not provide for sufficiently clear rules which would oblige international (intergovernmental) organizations to observe standards of due process vis-à-vis individuals »<sup>82</sup>, the progressive developments of customary international law tend to counterbalance this traditional view, especially regarding the standards of due process. Those evolutions are perfectly sum up by Christian Tomuschat in *Human Rights: Between Idealism and Realism*: « the screen which originally separated the United Nations from the man on the street disappeared. »<sup>83</sup>

However, that « screen » actually did not completely went away. The following chapter will assess the very key point of this analysis, meaning the legal framework which restrain the actions of the UNSC, taken on the basis of collective security. The constraining character of human rights will be analyzed, in order to determine the margin of appreciation that the UNSC enjoys, while taking sanctions. Are procedural rights of targeted individuals really respected? And if not, is that a breach of human rights?

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<sup>80</sup> Fassbender, Bardo. *Op. Cit.*, p.19.

<sup>81</sup> *Ibid.*, p. 6.

<sup>82</sup> *Ibid.*, p. 19.

<sup>83</sup> Tomuschat, Christian. *Human Rights: Between Idealism and Realism*. (Oxford: Oxford University Press, 2003) in Fassbender, Bardo, *Ibid.*, p.22.

## *IV – Rights at stake and jurisdictional review of UNSC sanctions*

### **A - Rights at stake**

As explained in the previous chapters of the present analysis, the imposition of sanctions can potentially affect several human rights. In order to make a brief reminder, the *Article 4 of the ICCPR* provides a distinction between derogable and non-derogable human rights. While the former could be derogated from in state of emergency, the latter cannot. But such distinction shall not be confused with absolute and non-absolute rights. « Non-derogable rights may be either absolute or non-absolute. While non-derogable rights cannot be suspended, some non-derogable rights provide for limitations in their ordinary application. »<sup>84</sup>

In the present chapter, several rights will be at the core of the analysis: the right to property, the right to respect of private life, the right to life and the right to a fair trial. Some of them are considered as being derogable, while some others do not. Two main questions will be answered: first, the development will assess whether the UNSC is bound by the relevant law instruments, after having described the rights at stake. Second, the existence or non-existence of UNSC Resolutions judicial review will be analysed.

#### *a. Right to a protection of property*

Such right is recognized by *Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (PCPHRFF)* Such a right can be impeded by financial sanctions which have the power – and of course, the aim – to impose assets freeze and several types of economic and financial bans on States and individuals. For the latter, sanctions can lead to the freezing of their bank account, and thus limiting their right to property. However, the same *Article 1 (PCPHRFF)* also allows for restrictions, when they are deemed necessary for public interest.

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<sup>84</sup> Australian Government, Attorney-General's Department, Absolute Rights, <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx>

**ARTICLE 1 (PCPHRFF)**

***Protection of property***

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.<sup>85</sup>*

The right to property is also recognized in the *Article 17 of the UDHR*, in the *ICCPR* and the *ICESCR*.

***b. Respect of private life***

Such a right is enshrined in the *Article 8 of the ECHR*.

**ARTICLE 8 (ECHR)**

***Right to respect for private and family life***

- 1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>86</sup>*

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<sup>85</sup> Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS, *Article 1*.

<sup>86</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, *Article 8*.

This notion is also present in the *Article 17 of the ICCPR*, which states:

**ARTICLE 17 (ICCPR)**

1. *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.*
2. *Everyone has the right to the protection of the law against such interference or attacks.*<sup>87</sup>

Once again, as provided by the *Article 8 of the ECHR*, such a right can be restricted provided that such a restriction by the public authority is in accordance with the law and necessary in a democratic society (...)

**c. Right to life**

While derogable rights can be set aside by a State in case of emergency (provided that a fair balance has been struck between such rights and the public interests at stake), the right to life is an absolute and non-derogable right which is protected by the *Article 6 of the ICCPR*, the *Article 2 of the ECHR* and the *Article 3 of the UDHR*.

**ARTICLE 6 (ICCPR)**

1. *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. (...)*<sup>88</sup>

**ARTICLE 2 (ECHR)**

**Right to life**

1. *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
2. *Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape*

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<sup>87</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, *Article 17*.

<sup>88</sup> *Ibid.*, *Article 6*.

*of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.*<sup>89</sup>

**ARTICLE 3 (UDHR)**

*Everyone has the right to life, liberty and security of person.*<sup>90</sup>

As stated by Thomas Biersteker and Sue Eckert, « Sanctions could conceivably violate the right to life, for instance if a travel ban prevents a targeted person from leaving the country to seek medical aid, or when financial sanctions are so stringent that a targeted person does not have resources to buy basic goods such as food. »<sup>91</sup> Well, as a reminder, the right to food is enshrined in the *Article 25 of the UDHR*, and the *Article 1§2*, common to both the *ICESCR* and the *ICCPR*. « In no case may a people be deprived of its own means of subsistence »<sup>92</sup>

Moreover, sanctions can impede the right to health, by depriving people of the access to medical supply and support, and imposing conditions leading to illnesses and medical shortages: « L'obligation d'assurer le droit à la santé des individus, comprend aussi l'obligation de ne pas imposer des conditions provoquant les maladies, la malnutrition, la pénurie de médicaments [...] »<sup>93</sup> The right to health has a customary character under International Law. Finally, sanctions can deprive individuals of their right to decent life conditions, as protected by the *Article 25 of the UDHR*, which can, in return, lead to breaches of a fundamental provision, meaning the *Article 3 of the ECHR*, prohibiting inhuman or degrading treatments, which is a non-derogable right. And it appears that sanction's collateral damages can amount to inhuman or degrading treatment.

**ARTICLE 3 (ECHR)**

***Prohibition of torture***

*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*<sup>94</sup>

<sup>89</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, *Article 2*.

<sup>90</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), *Article 3*.

<sup>91</sup> Biersteker, Thomas J., Eckert, Sue E. *Op. Cit.*, p. 10.

<sup>92</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, *Article 1§2*.

<sup>93</sup> Shaygan, Farideh. *Op. Cit.*, p. 246.

<sup>94</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, *Article 3*.

#### *d. Right to a fair trial*

Finally, the right to a fair trial is the one that has been at the core of several claims, regarding breaches of human rights by the UNSC sanctions. As it is well-known, this right is enshrined by the *Article 10 of the UNDR*, which protects individuals from arbitrary or unfair treatment by State organs. This right is also protected by the *Article 6 of the ECHR* and by other regional instruments and Conventions around the World, as the *Article 14 of the ICCPR*.

#### **ARTICLE 10 (UDHR)**

*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*<sup>95</sup>

#### **ARTICLE 6 (ECHR)**

##### ***Right to a fair trial***

*1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (...)*<sup>96</sup>

#### **ARTICLE 14 (ICCPR)**

*1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (...)*<sup>97</sup>

Such a right is derogable, but has also been widely recognized as being of a customary nature. The right to a fair trial means also the right to be notified, to have access to an effective remedy and the right to a legal protection, for all individuals, which are legal requirements generally referred as being due process rights. « Due process rights include the right of every person to be heard before an individual measure which would affect him or her adversely is taken, and the right of a person claiming a violation of his or her rights and freedoms by a

<sup>95</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), *Article 10*.

<sup>96</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, *Article 6*.

<sup>97</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, *Article 14*.

State organ to an effective remedy before an impartial tribunal or authority. »<sup>98</sup> There is a duty, for States, to respect such rights when exercising authority over individuals. But not only for States. « The due process rights of individuals recognized as general principles of law are also applicable to international organizations as subjects of international law when they exercise « governmental » authority over individuals. »<sup>99</sup> Indeed, with the development of international human rights law, the UN has been more and more expected to respect such rights, which also refer to fair and clear procedures. As stated by Bardo Fassbender, this expectation « is in line with essential notions of the concept of international personality. »<sup>100</sup>

Those principles are related to the necessity to allow to individuals the right to defend themselves, on the basis of the concept *Audi alteram partem* « hear the other side. » Indeed, « Everyone must be free to show that he or she has been unjustifiably placed under suspicion and that therefore the freezing of his or her assets has no valid foundation. »<sup>101</sup>

In order to defend themselves, individuals also need to be notified – or to be informed - of the charges retained against them. However, until 2004, the individuals were not informed prior their listing, while « notification is central to the idea of procedural fairness. In addition to being promptly notified, individuals should be aware of the reasons for their designation, how they can modify their behaviour to conform to international norms, and the procedures for applying for exemptions and delisting. »<sup>102</sup> Such a right to be notified – or to be informed – is enshrined in the *Article 6§3 of the ECHR*, the *Article 14§3 of the ICCPR* and in other regional human rights instruments.

When imposing sanctions, the UNSC can also breach the right to an effective remedy of individuals. Such a right is recognized by the *Article 8 of the UDHR* and the *Article 2 of the ICCPR*. It was also recognized by the U.N General Assembly (UNGA) in its *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*<sup>103</sup>

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<sup>98</sup> Fassbender, Bardo. *Op. Cit.*, p. 6.

<sup>99</sup> *Ibid.*, p. 19.

<sup>100</sup> *Ibid.*, p.21.

<sup>101</sup> Tomuschat, Christian. *Op. Cit.*, p. 5.

<sup>102</sup> Biersteker, Thomas J. « Targeted sanctions and individual human rights », *Op. Cit.*, p. 109.

<sup>103</sup> Resolution 53/144 of the U.N General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, A/RES/53/144, of 8 March 1999, accessible at [http://www.un.org/fr/documents/view\\_doc.asp?symbol=A/RES/53/144&TYPE=&referer=http://www.un.org/depts/dhl/resguide/r53\\_resolutions\\_table\\_fr.htm&Lang=E](http://www.un.org/fr/documents/view_doc.asp?symbol=A/RES/53/144&TYPE=&referer=http://www.un.org/depts/dhl/resguide/r53_resolutions_table_fr.htm&Lang=E), *Article 9 §1*.

Finally, due process rights also refer, among others, to the presumption of innocence in criminal proceedings (*Article 6§2 of the ECHR*, the *Article 14§2 of the ICCPR*, the *Article 8§2 of the American Convention on Human Rights (...)*) and to the right of appeal in criminal matters (*Article 14§5 of the ICCPR (...)*). While « the right of access to the court in order to have disputes determined in accordance with the law is deeply rooted in the common law »<sup>104</sup>, such a recognition has been generally given to the whole array of rights related to a fair trial. As explained by Bardo Fassbender, « in continental Europe and civil law jurisdictions, rights of due process or fair trial are regarded as inherent in the idea of the rule of law »<sup>105</sup>

As the analysis underlined, the four rights mentioned in the present chapter are protected at different levels of jurisdiction, including the regional, the European and international levels. Of course, in the present case, it could be easily argued that because being instruments at the European level (*ECHR*) or at the regional one (American and African Conventions on Human Rights, for instance), the UNSC is definitely not bound to respect their provisions.

Moreover, the UN is not a party to such Treaties, including the *ICCPR* and the *ICESCR*. But, as widely recognized by the doctrine, the rights enshrined in such Conventions – such as the example given above – are part of the common-law principles, and to some extent, have acquired a customary nature. Indeed, although the *UDHR* is a non-binding instrument, it is generally recognized as being part of international customary law. Moreover, one should not neglect that the *UDHR*, combined with the *ICCPR* and the *ICESCR* are often referred as the *Charte internationale des Droits de l'Homme*.<sup>106</sup>

But are all those elements sufficient to prove that when enacting Resolutions imposing sanctions on individuals, the UNSC is bound to respect such rights? Well, one more element must be taken into account in order to properly answer. Indeed, the judicial qualification of sanctions is a key point: are sanctions civil and criminal measures, or administrative instruments? While civil and criminal measures are covered by the *Article 6 of the UNDRH*, administrative measures do not, and remain outside of the scope of the latter.

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<sup>104</sup> Fassbender, Bardo. *Op. Cit.*, p. 11.

<sup>105</sup> *Ibid.*

<sup>106</sup> Sudre, Frédéric. *Droit européen et international des droits de l'homme*. (Paris: Presses Universitaires de France, 2006), p. 128.

## *B - Criminal or administrative measures?*

While the *Article 6 of the ECHR* sets a framework of standards, the major limit of the former is that those standards only apply to civil and criminal law cases. A part of the doctrine has underlined that because of the punitive character of sanctions, they amounted to criminal measures, against individuals. But, as explained by the truly relevant analysis provided by Thomas Biersteker and Sue Eckert in « Strengthening targeted sanctions through fair and clear procedures »: « [...] The criteria for listing bear a criminal law connotation. [...] In addition to this criminal connotation of the listing criteria, some people have argued that the aim of the sanctions also appears to be punitive and that the effect of the sanctions may rise to a level that is similar to criminal sanctions. [...] Hence, the fact that there may be a criminal law connotation does not mean that the sanctions should be characterized as criminal sanctions. »<sup>107</sup>

While the European Court of Human Rights (ECtHR) « ruled that the concept of criminal charge bears an « autonomous meaning », which is independent of the characterization of a measure pursuant to national law. [...] the ECtHR has not given general guidelines to determine whether civil rights or obligations are involved in a certain case, but it has chosen to deal with this issue on a case-by-case basis. »<sup>108</sup> As a consequence, this qualification is to be assessed on a case-by-case basis but also according to the type of sanction used. In the case of targeted sanctions, the qualification generally oscillates between criminal and administrative qualification: for instance, the answer will differ between assets freeze and travel bans. While the first type of measure could be qualified as being civil, the second one will generally fall under the scope of the scope of administrative measures.

To sum up this point, what is at stake with this categorization is the question of legal requirements. Indeed, if sanctions « are characterized as criminal charges the required evidence for listing an individual would have to meet the standard of « beyond reasonable doubt » »<sup>109</sup>, amongst other judicial standards, while if sanctions are characterized as being administrative measures, « the evidentiary burden for listing is lower. »<sup>110</sup> Moreover, this characterization plays a role in determining the requirements of a civil mechanism for judicial review: « If *Article 6* is applicable, then the review mechanism must be judicial in nature. If

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<sup>107</sup> Biersteker, Thomas J., Eckert, Sue E. « Strengthening targeted sanctions through fair and clear procedures », *Op. Cit.*, p. 12.

<sup>108</sup> *Ibid.*, p. 13.

<sup>109</sup> *Ibid.*, p. 14.

<sup>110</sup> *Ibid.*

*Article 6* is not applicable, then the right to an effective remedy (*Article 13 of the ECHR*) may still apply, but this provision sets a lower standard since the remedy need not necessarily to be judicial. »<sup>111</sup> After a detailed analysis, the two authors come to the conclusion that it is very unlikely that targeted sanctions would qualify as being criminal measures. Then, following such a conclusion, it seems that the protection provided by the *Article 6 of the ECHR* to individuals is weakened when mobilized in the face of targeted sanctions.

That point directly affects the right to an effective remedy, as enshrined in *Article 8 of the UDHR* and the *Article 2 of the ICCPR*. « No effective opportunity is provided for a listed individual or entity to challenge a listing before a national court or tribunal. »<sup>112</sup> Indeed, as recognized by the ECtHR, the « remedy has an administrative rather than a judicial character. »<sup>113</sup> - but this shall not wipe away the fact that remedy does not necessarily need to be judicial to be effective.

Despite the improvement of delisting procedures and the establishment of the Ombudsperson Office – or mediator -, individuals « are not allowed directly to petition the respective Security Council committee for de-listing. Individuals are entities are not granted a hearing by the Council or a committee. »<sup>114</sup> While the Focal Point only allows individuals to submit requests, it does not provide them with direct access or hearing possibilities. Certainly, some improvements have been made compared to the previous mechanisms. But limits lie within the qualification of measures, and whether they are to be considered as criminal or administrative measures. « Sanctions are political and administrative measures, and as such, they do not require the evidentiary standards associated with legal prosecutions. »<sup>115</sup>

### ***C - Reassessment of the myth of a legibus solutus entity***

At the U.N level, there is no review mechanism. The UNSC has a discretionary power, meaning that it enjoys a wide margin of action, especially when acting under *Chapter VII of the Charter*. In that sense, the UNSC is the only one which has the power to modify its own functioning, which seems quite unlikely to happen, given the traditional practices of the organization. Despite the existence of such a review mechanism within the U.N itself, part of the doctrine has underlined that « The UN Security Council being a principal organ of the

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<sup>111</sup> *Ibid.*

<sup>112</sup> Fassbender, Bardo. *Op. Cit.*, p. 4.

<sup>113</sup> Biersteker, Thomas J., Eckert, Sue E. « Strengthening targeted sanctions through fair and clear procedures », *Op. Cit.*, p. 22.

<sup>114</sup> Fassbender, Bardo. *Op. Cit.*, p. 4.

<sup>115</sup> Biersteker, Thomas J. « Targeted sanctions and individual human rights », *Op. Cit.*, p. 101.

United Nations, a legal obligation of the Council to comply with standards of due process, or « fair and clear procedures », for the benefit of individuals and « entities » presupposes that the United Nations, as a subject of international law, is bound by respective rules of international law. »<sup>116</sup> In order to counterbalance such a lack of judicial review at the U.N level, several Courts and Tribunals proceeded to a kind of indirect review of U.N Resolutions regarding sanctions' implementation, facing the general reluctance of States to « challenge the legal validity of the acts and decisions of international organizations. »<sup>117</sup>

***a. Judicial review at the European level (ECJ, ECtHR)***

***i. By the European Court of Justice (ECJ): a dualist perspective based on the European Court of Human Rights (ECtHR) as a reference***

In the case of *Kadi and Al Barakaat International Foundation v. Council and Commission* of 2008<sup>118</sup>, the claimants sustained that the freezing of their financial assets - following a regulation adopted by the E.U in order to implement a *UNSC Resolution (S/RES/1267 (1999))*<sup>119</sup> - was unlawful, and that such a regulation must be annulled. According to the claimants, the right to be heard and to have access to an effective remedy, as provided by the *ECHR*, had been violated by the E.U, when implementing the U.N Resolution. As a reminder, at the time of the case (2008), the Focal Point already existed, but not the mediator. Of course, the European Court of Justice, does not have the legal power to review the UNSC Resolution.

Instead, the latter adopted a dualist perspective regarding the relations between the law governing the European order and the U.N law. « The Court clarified that the EU legal order is different and separate from the international legal order. [...] Subsequently, the Court examined whether « the principles governing the relationship between the international legal order under the United Nations and the Community legal order » excluded the judicial review of the Regulation at hand.

The Court emphasised that the Community institutions « must respect international law in the exercise of its powers » [...] and based itself on the conviction that the claim that acts on restrictive measures affect « national security and terrorism » was not sufficient to exclude

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<sup>116</sup> Fassbender, Bardo. *Op. Cit.*, p. 6.

<sup>117</sup> Osieke, Ebere. « The Legal Validity of Ultra Vires Decisions of International Organizations », *The American Society of International Law*, Vol. 77, N. 2, 1983, pp. 239-256, <http://jstor.org/stable/2200852>, p. 240.

<sup>118</sup> E.C.J, 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05, *Rec. I*-06351, ECLI:EU:C:2008:461.

<sup>119</sup> Resolution S/RES/1267 of the U.N Security Council, *Op. Cit.*

any judicial review of these measures. »<sup>120</sup> The Court emphasized that a fair balance must be struck between the obligations of the E.C to apply the UNSC Resolutions, and the rights of procedural fairness, as enshrined in the *ECHR*. The reasoning of the Court restricted the extent to which the implementation of such U.N Resolutions can impede fundamental rights. In the present case, the ECJ did an incidental review of a UNSC Resolution by annulling the Regulation transposing the former. In other words, the ECJ did what the Tribunal refused to do in first trial by stating that « a constitutional guarantee stemming from the E.C Treaty as an autonomous legal system cannot be prejudiced by an international agreement. »<sup>121</sup> and that Resolutions stemming from the international level were to be « given effect in accordance with the procedure applicable in the domestic legal order of each member of the United Nations. »<sup>122</sup>

But does this incidental review of the UNSC Resolution entail the primacy of the measure? While the ECJ conducted « a fully-fledged, yet indirect fundamental rights review vis-à-vis Security Council resolution »<sup>123</sup>, it is doubtful that such a review has entailed such a primacy. As stated by Clara Portela, the judgement itself « argues that the annulment of a community measure intended to give effect to an international law measure does not entail any challenge to the primacy of that measure in the international legal order: it is not for the Community judicature (...) to review the lawfulness of such a resolution adopted by an international body »<sup>124</sup> However, in their article entitled « All done and dusted? Reflections on the EU standard of judicial protection against UN blacklisting after the ECJ's Kadi decision », Valentina Azarov and Franz Christian Ebert underlined that whether the Court considered the sanctions as administrative measures or criminal sanctions remained unclear.<sup>125</sup> In 2009, taking into account the issue of the case, the U.N implemented the Mediator office – Ombudsperson.

In the present case, the ECJ insisted on the preservation of the autonomy of the European order, by performing a judicial review which certainly appeared as being intrusive, but was

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<sup>120</sup> Azarov, Valentina, Christian Ebert Franz. « All done and dusted? Reflections on the EU standard of judicial protection against UN blacklisting after the ECJ's Kadi decision », *Hanse Law Review*, Vol.5, N., 2009, p. 102-104.

<sup>121</sup> E.C.J., 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05, *Rec. I*-06351, ECLI:EU:C:2008:461, §316.

<sup>122</sup> Portela, Clara. *Op. Cit.* p. 25.

<sup>123</sup> Portela, Clara. *Ibid.*

<sup>124</sup> Portela, Clara. *Ibid.*

<sup>125</sup> Azarov, Valentina, Christian Ebert, Franz. *Op. Cit.* p.107.

mainly indirect. Such a reasoning is consistent with the case of *Bosphorus Hava Yollary Turizm Ve Ticaret Anonim Sirketi v. Ireland* of 2005, in which the ECtHR followed a reasoning underlying that measures taken by a contracting party when implementing a UNSC resolution, are attributable to that party and consequently, non-exempt from review.<sup>126</sup>

**ii. By the ECtHR: a review of domestic implementing acts**

In the case of *Al-Jedda v. The United Kingdom* of 2011<sup>127</sup>, the ECtHR considered that « in interpreting its Resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. »<sup>128</sup> This idea that a margin of action is therefore allowed to the States when implementing the UNSC Resolution also appeared in the case of *Nada v. Switzerland* in 2012.<sup>129</sup> In this case, the claimant complained that several of his rights were breached by Switzerland, when the latter applied the *U.N Resolution 1333 (2000)*<sup>130</sup> by enacting the *Taliban Ordinance* (before being a member of the UN). The claimant, Mr. Nada, invoked several rights, like the right to respect for private and family life, as enshrined in the *Article 8 of the ECHR*.

The biggest difficulty for the ECtHR was to engage the conventional responsibility of Switzerland, while the source of the dispute lied within a UNSC Resolution. Logically, the defense of Switzerland relied upon this argument: indeed, according to the Swiss government, the latter had no choice but implementing the UNSC Resolution, by enacting a federal ordinance, even at the risk to deprive the claimant of his rights, as provided by the *ECHR*. But the ECtHR considered that States' commitments at the U.N level did not relieve them from their conventional responsibility. In particular, the Court stressed that the argument according to which a UNSC Resolution would not be compatible with the *ECHR*, is insufficient to set aside the rights of individuals, as enshrined in the latter. In such a case, the supremacy of the *Article 103 of the U.N Charter* was challenged. Subsequently, the Court found a breach of the

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<sup>126</sup> ECtHR., 30 June 1996, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi c. Irlande*, Application no.45036/98, Published in Reports of Judgments and Decisions 2005-VI, ECLI:CE:ECHR:2005:0630JUD004503698

<sup>127</sup> European Court of Human Rights, Grand Chamber, *Case of Al-Jedda v. The United Kingdom*, (Application no. 27021/08), 11 July 2011.

<sup>128</sup> *Ibid.*, §102.

<sup>129</sup> ECtHR, 12 September 2012, *Nada v. Switzerland*, Application no. 10593/08, Published in Reports of Judgments and Decisions 2012, ECLI:CE:ECHR:2012:0912JUD001059308.

<sup>130</sup> Resolution S/RES/1333 of the U.N Security Council, Adopted by the Security Council at its 4251st meeting, on 19th December 2000, accessible at [http://www.un.org/fr/documents/view\\_doc.asp?symbol=S/RES/1333\(2000\)&TYPE=&referer=http://www.un.org/fr/sc/documents/resolutions/2000.shtml&Lang=E](http://www.un.org/fr/documents/view_doc.asp?symbol=S/RES/1333(2000)&TYPE=&referer=http://www.un.org/fr/sc/documents/resolutions/2000.shtml&Lang=E)

Article 8 of the ECHR, having regard to the unjustified interference of the Swiss authorities with the right to respect of private life of the applicant.

**Key extracts of the judgement<sup>131</sup>**

196. *In the light of the Convention's special character as a treaty for the collective enforcement of human rights and fundamental freedoms [...] the Court finds that the respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions [...]*

197. *[...] In the Court's view, the important point is that the respondent Government have failed to show that they attempted, as far as possible, to harmonise the obligations that they regarded as divergent [...]*

« 198. *Having regard to all the circumstances of the present case, the Court finds that the restrictions imposed on the applicant's freedom of movement for a considerable period of time did not strike a fair balance between his right to the protection of his private and family life, on the one hand, and the legitimate aims of the prevention of crime and the protection of Switzerland's national security and public safety, on the other. Consequently, the interference with his right to respect for private and family life was not proportionate and therefore not necessary in a democratic society. »*

The very key point of this case is that the State responsibility could be engaged under the ECHR, because the measures enacted – despite being applied in response to the UNSC Resolution – were taken by the respondent government, in the exercise of its jurisdiction, which also meant that the ECtHR had the competence, *ratione materiae*, to hear the case.<sup>132</sup> Then, the contractual responsibility of the State was engaged.

***b. At the International level (UNCHR, ICJ)***

***i. By the U.N Committee on Human Rights (UNCHR)***

In the case of *Sayadi and Vinck v. Belgium* in 2008<sup>133</sup>, the UNCHR rendered an opinion about the alleged violation, by Belgium, of the ICCPR, following the inscription of two individuals on the UNSC list of targeted sanctions. The measures taken by Belgium in order

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<sup>131</sup> *Ibid.*, §196-198.

<sup>132</sup> *Ibid.*, §122.

<sup>133</sup> U.N.H.R.C., 22 October 2008, *Sayadi and Vinck v Belgium*, Merits, Communication No. 1472/2006, *UN Doc CCPR/C/94/D/1472/2006*, IHR 3216.

to implement the UNSC sanctions were questioned, and indirectly, the UNSC measures themselves. In the present affair, the listing of the applicants was done following a UNSC Resolution, taken under *Chapter VII of the U.N Charter*. « Belgium argued that its obligations under the resolution prevailed over its obligations under the *ICCPR*, by virtue of *Art. 103 of the Charter*. »<sup>134</sup> While the UNCHR underlined that the obligation to comply with the UNSC decisions adopted under *Chapter VII of the U.N Charter* could amount to necessary restrictions in the name of national security and public order, it also stressed that « the travel ban results from the fact that the State party first transmitted the authors' names to the Sanctions Committee. [...] In the present case, the Committee finds that, even though the State party is not competent to remove the authors' names from the United Nations and European lists, it is responsible for the presence of the authors' names on those lists and for the resulting travel ban. »<sup>135</sup>

By rendering such an opinion, the UNCHR did not intent to perform a judicial review of the UNSC Resolution itself, but had shown its competence to judge eventual breaches of human rights by States, especially regarding the *ICCPR*. As a reminder, the *ICCPR* gives such a competence to the Committee, by stating that « a State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. »<sup>136</sup>

**ii. By the International Court of Justice (ICJ): a tendency to reluctance**

The judicial review of UNSC Resolutions is not envisaged by the U.N Charter, neither by the ICJ, nor by another Court or Tribunal. While the doctrine is very divisive on this point, two main examples provided some answers. First, the case of *Libyan Arab Jamahiriya v. United States of America* of 1992<sup>137</sup>, often referred as the *Lockerbie case*. In this affair, by refusing to grant the provisional measures requested by Libya, the ICJ refused to review the UNSC Resolution. Indeed, those requested measures were « diametrically opposed to Resolution

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<sup>134</sup> « Sayadi: The Human Rights Committee's Kadi (or a pretty poor excuse for one...) », Marko Milanovic *in Blog of the European Journal of International Law*, January 29th 2009, <https://www.ejiltalk.org/sayadi-the-human-rights-committee%E2%80%99s-kadi-or-a-pretty-poor-excuse-for-one%E2%80%A6/>

<sup>135</sup> *Ibid.*

<sup>136</sup> Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS, *Article 1*.

<sup>137</sup> I.C.J., *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)*, Preliminary Objections, Judgment, I. C. J. Reports 1998, p. 115.

748. »<sup>138</sup> Second, in its advisory opinion about the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)* of 1971<sup>139</sup>, « The Court stated that it « does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs (...) »<sup>140</sup> However, it is necessary to underline that nothing prohibits, as such, an advisory opinion to point out an infringement by the UNSC. Such a reluctance by the ICJ to proceed to a judicial review of the UNSC decisions is mainly explained by the fact that the drafters of the U.N Charter « assumed that the Security Council would be making its own judgments on legal issues that might arise in its work, and did not find it necessary to give the ICJ any right of review over Security Council decisions. »<sup>141</sup> At that time, providing the ICJ with a reviewing function was considered as being risky: such an idea persisted with time.

### **iii. By the International Criminal Tribunal for the former Yugoslavia (ICTY)**

Finally, in the case of *Prosecutor v. Dusko Tadic* of 1995, the ICTY stressed that the « Security Council is subject to constitutional limitations, no matter how broad its power may be. »<sup>142</sup> The ICTY concluded then that the Security Council does not have a completely unfettered discretion power. Generally speaking, the International Tribunals have been more inclined to incidental reviews of the UNSC Resolutions.

To sum up, despite the lack of any judicial mechanism to review the UNSC decision, some Courts and Tribunals proceeded to such review, be it indirect or more straightforward. However, as stressed by Jeremy Matam Farrall, because judicial reviews are generally « incidental or fortuitous [...] the potential of such attempts to play a meaningful regulatory role over Security Council action is limited. »<sup>143</sup> While the doctrine is very divisive on this point – especially because even if such a judicial review by the ICJ would be possible, it would be more symbolic than involving true legal consequences -, it has been stated by John Dugard that because « the Security Council has interpreted the Charter liberally to give itself implied

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<sup>138</sup> Martenczuk, Bernd. « The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie? », *European Journal of International Law*, Vol. 10, N. 3, 1999. p. 521.

<sup>139</sup> I.C.J., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16.

<sup>140</sup> Usiak, Jaroslav, Saktorova, Lubica. « The International Court of Justice and the Legality of UN Security Council Resolutions », *DANUBE: Law and Economics Review*, 5(3), 201-202, DOI: 10.2478/danb-2014-0011, p. 205.

<sup>141</sup> Matheson, Michael J. « ICJ Review of Security Council Decisions », *George Washington International Law Review*, Vol. 36.3, 2004, p. 619.

<sup>142</sup> I.C.T.Y., *Prosecutor v. Dusko Tadic*, IT-94-1-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, I.C.T.Y. Rec. 1996, I, p. 57., §27 in Matam Farrall, Jeremy. *Op. Cit.* p. 69.

<sup>143</sup> *Ibid.* p. 74-75.

powers [...] There is no reason why the ICJ should not follow this example in respect of its own powers. »<sup>144</sup>

### *D - The constraining power of the U.N Charter on the UNSC itself*

« It's self-evident that an organ created by a treaty is subjected to that instrument in its very existence, its mission and its power »<sup>145</sup> At first sight, when the UNSC enacts decisions and Resolutions, it has to respect the provisions of the U.N Charter. Even when acting in the perspective of collective action, such respect is required, especially within the *Article 55 of the Charter*. In case of breaches of the Charter's principles, such actions could be considered as being taken *ultra vires*.<sup>146</sup>

In case of conflicts of obligations, the U.N generally relies on the so-called *Article 103 of the U.N Charter* which confers a primacy to the measures enacted by the UNSC.

#### **ARTICLE 103 (U.N Charter)**

*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.*<sup>147</sup>

But the right to impose sanctions is not unlimited. While, once again, opinions are divided on the point to know if whether the UNSC must respect peremptory norms of international law, it becomes more and more admitted that because « the Charter obliges the organs of the United Nations, when exercising the functions assigned to them, to respect human rights and fundamental freedoms of individuals to the greatest possible extent »<sup>148</sup>, if the UNSC contravenes, by the way of a decision or a Resolution, a peremptory norm, such an act « should be considered *void ab initio*. »<sup>149</sup>

« La Déclaration universelle des droits de l'homme et les deux Pactes de 1966, sont considérés comme l'interprétation faisant autorité de la Charte [...] Par conséquent, si le Conseil prend des mesures qui privent une partie significative de la population de son droit à la nourriture

<sup>144</sup> Dugard, John. « Judicial Review of Sanctions » in Gowlland-Debbas, Vera (ed.). *Op. Cit.*, p. 85.

<sup>145</sup> Bedjaoui, Mohammed. *The New World Order and the Security Council: Testing the Legality of Its Acts*. (The Hague: Kluwer Law International, 1995), p. 14.

<sup>146</sup> Shaygan, Farideh. *Op. Cit.* p. 185.

<sup>147</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI. *Article 103*.

<sup>148</sup> Fassbender, Bardo. *Op. Cit.*, p. 7.

<sup>149</sup> Matam Farrall, Jeremy. *Op. Cit.*, p. 71.

[...] ces mesures peuvent être considérées comme prises en violation de sa propre Charte. »<sup>150</sup>  
However, the stalemate resides in the fact that, acting on the basis of *Chapter VII*, the UNSC can derogate human rights, providing that such derogations are necessary.

Nevertheless, States and IO's committed themselves to respect human rights, from which no derogation is permissible, even in urgent situations. As a consequence, the power of the UNSC is certainly not absolutely discretionary.

« The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large [...] In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law). »<sup>151</sup> In consequence, there is a urgent need to set up an independent judicial review body, which would meet the criteria for « accessibility, independence, and the ability to grant appropriate relief. »<sup>152</sup> But generally speaking, there is a traditional reluctance of the UNSC members, especially stemming from the P5, about the possibility of such mechanism to emerge. To sum up, the UNSC cannot completely ignore fundamental human rights, only by relying on the *Article 103 of the U.N Charter* and the need to protect international peace and security. However, because there is no clear prohibition to suspend or to derogate from human rights for the UNSC, the latter operates in a kind of legal vacuum, which unfortunately, leads to complex situations.

In assessing the right of the UNSC to infringe fundamental human rights when applying sanctions, the main pitfall remains, as stated within this chapter, the distinction between administrative and criminal measures. Indeed, if sanctions are qualified as penalties and criminal measures, judicial standards linked to the right to a fair trial can play a role, and then, counterbalance the discretionary power of the UNSC. On the contrary, if sanctions are qualified as administrative measures which do not penalize individuals following a criminal offense but try to provide incentives to make individuals change their behaviour, the standards of evidence required for criminal measures would not apply to the same extent. « With regard to the right to a hearing, the non-European permanent five members argued that sanctions committee designations were not criminal charges and penalties, but rather that they were

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<sup>150</sup> Shaygan, Farideh. *Op. Cit.*, p. 255.

<sup>151</sup> *I.C.T.Y., Prosecutor v. Dusko Tadic*, IT-94-1-AR72, *Op. Cit.*, in Tuffi Saliba, Aziz. « Is the Security Council *Legibus Solutus*? An analysis of the legal restraints of the UNSC », *Michigan State International Law Review*, Vol. 20:2, 2012, p. 419.

<sup>152</sup> Biersteker, Thomas J. « Targeted sanctions and individual human rights », *Op. Cit.*, p. 113.

administrative decisions and determinations. Therefore, the standards of evidence required in courts were not required and there was no « right to a fair trial » in these circumstances. »<sup>153</sup>

Today, the common view that has gradually emerged is that « sanctions do not impose a criminal punishment or procedure, such as detention, arrest or extradition, but instead apply administrative measures. »<sup>154</sup> However, the common view does not amount to *de lege lata*.<sup>155</sup> Finally, the ECJ considered in 2009 that an administrative sanction could be considered as a penal measure, because of its degree of severity. « In the light of the nature of the infringements at issue and the degree of severity of the sanctions which may be imposed, such sanctions may, for the purposes of the application of the ECHR, be qualified as criminal sanctions»<sup>156</sup> Such a reasoning is quite logical with the argument according to which targeted sanctions, despite being recognized as political and administrative measures, can affect peoples' lives in like criminal proceedings can do.<sup>157</sup>

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<sup>153</sup> Ibid., p. 110.

<sup>154</sup> UN Security Council, Letter dated 2 September 2005 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, 9 September 2005, S/2005/572.

<sup>155</sup> « *The law as it exists.* »

<sup>156</sup> E.C.J., 23 December 2009, *Spector Photo Group NV and Chris Van Raemdonck v. Commissie voor het Bank-, Financie-en Assurantiewezen (CBFA)*, Case C-45/08, Rec. I-12073, ECLI:EU:C:2009:806, §42.

<sup>157</sup> Biersteker, Thomas J., Eckert, Sue E. « Strengthening targeted sanctions through fair and clear procedures », *Op. Cit.*, p. 3.

## *Conclusion: the double-mandate conflict between improvement and paradox*

Finally, what does this analysis did emphasize? Well, it's quite clear now that when accomplishing its role, the UNSC may face what is called the dilemma of the double-mandate. Indeed, while on the one hand the UNSC is considered as being the guarantor of international peace and security, on the other hand, its mandate also requires the UNSC to respect, safeguard and defend human rights.

While trying to protect international peace and security by imposing sanctions, there is a risk to impede and threaten the enjoyment of human rights for targeted individuals.<sup>158</sup> This articulation between the need to protect peace and security at the international scale, while ensuring the protection of human rights is constitutive of this double-mandate. And nothing, within the U.N mechanisms, really helps the UNSC to ensure a fair balance between the two obligations, as underlined by Gernot Biehler's article, stating that « The Security Council does not have a mechanism to sufficiently balance human rights and concerns in the implementation of sanctions. »<sup>159</sup>

A first idea would be to compensate this difficulty by a review mechanism of the UNSC Resolutions, which would ensure that all decisions and especially sanctions Resolutions, are taken on a fair basis, in the respect of individuals' due process rights. However, as demonstrated by the previous chapter, the U.N system does not provide for such a judicial review mechanism. And the several European, international and regional Courts and Tribunals are not entitled, as such, to proceed to such reviews. Or at least, officially. The only examples of reviews are said to be indirect, because challenging the supremacy of the U.N decisions is generally seen as being juridically inappropriate.

Now, one paradox shall not be overlooked: the States' margin of implementation. Actually, when the U.N enacts a Resolution imposing sanctions, the U.N Member States are called upon to implement such Resolutions, generally by domestic legislation – or European legislation in the case of the E.U.

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<sup>158</sup> « Les conséquences humanitaires des sanctions économiques » in *Principes et intervention en matière d'assistance et de protection dans le cadre de l'action humanitaire internationale*, XXVI<sup>me</sup> conférence internationale de la Croix-Rouge et du Croissant Rouge in Shaygan, Farideh. *Op. Cit.*, p. 211.

<sup>159</sup> Biehler, Gernot. « Legal Limits to International Sanctions? », *Hibernian Law Journal*, Vol. 4, 2003, pp. 15-24, p. 19.

But, while « the language of security council Resolutions, is increasingly intrusive in the domestic competences of member states, but often too vague to provide effective guidance for their implementation »<sup>160</sup>, it is a paradox to require from States that their own measures of implementation will perfectly respect fundamental rights. Conversely, States are supposed to strike a fair balance between their international obligations and human rights. Such a margin is double-edged: Resolutions are sometimes blurred, leading to a margin of appreciation for States, which can in return, be accused for human rights violations

Finally, despite the wide array of criticisms against targeted sanctions, one should not neglect that collateral damages are not always directly linked with the implementation of sanctions. Indeed, the multiple causation principle states that « The inability of a population to subsist may be due to the cumulative effects of its preexisting state of development, or natural disaster, aggravated by civil strife (the internal conflict), aggravated by the international community's response to the conflict. »<sup>161</sup>

To sum up, there is a general acceptance today that smart sanctions may simply not be « smart enough to achieve their stated objectives and will therefore remain an instrument that only causes further violations of economic and social rights on a large scale. »<sup>162</sup> Moreover, some argue that collateral damages are often overlooked, and that there is a need to take into account the long-term effects of sanctions (for example, on children, health, security, food sectors and social support systems)<sup>163 164</sup>, while improving the degree of clarity, consistency, transparency and accountability of the U.N mechanisms.<sup>165</sup> However, while requiring more basic legal safeguards for individuals is a legitimate aim, which is more than relevant in the present case, isn't it paradoxical to require from the U.N a total respect of human rights, while States do not always respect them?

According to the vision of Hans Kelsen, law is an order of constraint. While « there should be no trade-off between our security and our values »<sup>166</sup>, in contemporary World and

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<sup>160</sup> Portela, Clara. *Op. Cit.*, p. 29.

<sup>161</sup> Fislser Damrosch, Lori. *Op. Cit.*, p. 282.

<sup>162</sup> Tostensen, Arne, Bull, Beate. *Op. Cit.*, p. 403.

<sup>163</sup> Minear, Larry Cortright, David, Wagler, Julia, Lopez, George A and Weiss, Thomas G., *Op. Cit.*, p. 25.

<sup>164</sup> *Annex 2.*

<sup>165</sup> Minear, Larry Cortright, David, Wagler, Julia, Lopez, George A and Weiss, Thomas G. *Op. Cit.*, p. 25.

<sup>166</sup> Ambassador Daniel Benjamin, Coordinator for Counterterrorism at the U.S. Department of State, in an address on International Counterterrorism Policy in the Obama Administration at the International Peace Institute, New York, March 1, 2010 in Terlingen, Yvonne. « The United States and the UN's Targeted Sanctions of Suspected Terrorists: What Role for Human Rights? », *Ethics & International Affairs*, Vol. 24, N. 2, 2010, pp. 131-142, p. 131.

international relations as such, sanctions appear today as being a necessary part of international law. Of course, protection and improvement of human rights is more than a simple necessity, but constraint and enforcement are key components of a realistic order, that far from being idealistic concepts, are sometimes needed to protect the same human rights that are invoked against the use of sanctions themselves.

*« Si vis pacem, para iustitiam »<sup>167</sup>*

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<sup>167</sup> *« If you want the peace, prepare the justice. »*



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## *List of acronyms*

<b>ACRONYMS</b>	<b>SIGNIFICATION</b>
<b>ARIO</b>	Draft Articles on Responsibility of International Organizations
<b>ARSIWA</b>	Draft Articles on Responsibility of States for International Wrongful Acts
<b>CTC</b>	Counter-Terrorism Committee
<b>E.C</b>	European Community
<b>E.U / EU</b>	European Union
<b>ECHR</b>	European Convention for the Protection of Human Rights and Fundamental Freedoms
<b>ECtHR</b>	European Court of Human Rights
<b>ECJ</b>	European Court of Justice
<b>GDP</b>	Gross Domestic Product
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICJ</b>	International Court of Justice
<b>ICTY</b>	International Criminal Tribunal for the Former Yugoslavia
<b>IO</b>	International Organization
<b>MNPD</b>	Military, Necessity, Proportionality and Differentiation
<b>NGO</b>	Non-Governmental Organization
<b>NPC</b>	Non-Proliferation Committee
<b>P5</b>	Five Permanent Members of the United Nations Security Council (China, France, Russia, United Kingdom, United States of America)
<b>PCPHRFF</b>	Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms
<b>UDHR</b>	Universal Declaration of Human Rights
<b>U.N / UN</b>	United Nations
<b>UNCHR</b>	United Nations Committee on Human Rights
<b>UNGA</b>	United Nations General Assembly
<b>UNSC</b>	United Nations Security Council
<b>U.S / US</b>	United States
<b>WHO</b>	World Health Organization



## Annexes

### ➤ ANNEX 1: Iran

(Source: Eriksson, Mikael. *Targeting Peace. Understanding UN and EU Targeted Sanctions* (Surrey: Ashgate, 2011))

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*Targeting Peace*

**Table 8 Iran**

Episode no.	Decision	Total entities	Travel bans <sup>1</sup>	Assets freezes
1	27 February 2007	12	12	12
2	19 April 2007	12		12
3	20 April 2007	27		27
4	23 April 2007	42	42	42
5	23 April 2007	42		42
6	25 April 2007			
7	5 June 2007			
8	28 January 2008			
9	11 March 2008	55		55
10	23 June 2008	60	15	60
11	23 June 2008	60	60	60
12	24 June 2008			
13	7 August 2008	68	68	68

*Note:* <sup>1</sup> Entities subject to travel bans are the only ones listed, and remain the same throughout the regime – for this reason, they should not be added as a separate category to the total.

➤ **ANNEX 2:** Checklist of Indicators for Preassessing and Monitoring Humanitarian Impacts of Economic Sanctions

(Source: Minear, Larry Cortright, David, Wagler, Julia, Lopez, George A and Weiss, Thomas G. « Toward More Humane and Effective Sanctions Management: Enhancing the Capacity of the United Nations System », *Institute for International Studies*, Brown University, 1998.)

Table 3: Checklist of Indicators for Preassessing and Monitoring Humanitarian Impacts of Economic Sanctions

Category	Baseline Indicator	Change Indicators
1. Public Health	Infant and Child Health Status	Increase in infant deaths, as reported by hospitals and in vital events recording systems Wastage and stunting of children, as measured by adverse changes in weight-for-age and height-for-age ratios
	Hospital and Medical System Capacity	Decreases in numbers of operations and x-rays performed Diminished availability of vaccines Reduced number of visits to health system Reported cases of previously eradicated diseases
	Low Birth Weight	Rise in reported percentage of low-weight infants Rise in number of pregnant women with low weight gain
	Access to Safe Drinking Water	Decline in percentage of population receiving pumped water Breakdowns in water pumping system Decline in the availability of chlorine
2. Economic Conditions	Level of Economic Development as measured by GDP/capita	Changes in income distribution across different income groups

Table 3: Checklist of Indicators for Preassessing and Monitoring Humanitarian Impacts of Economic Sanctions (cont'd)

	Dependence on Imports and Exports	Declining availability/rising market price of foodstuffs Declining availability/rising market price of pharmaceuticals
	Form of Economic Specialization	Changes in urban/rural population mix
3. Population Displacements	Presence of Refugee Camps and Populations of Displaced Persons	Increase in involuntary migration Start of new migratory population flows Creation or rapid expansion of refugee camps and/or concentrations of internally displaced persons (IDPs)
4. Governance and Civil Society	Status of Civil Society	Changes in government budgetary allocations Increases in crime and civil unrest Decline in number of independent civic organizations
	Degree of Political Freedom	Suppression of political parties Decline in number of independent media outlets Increasing numbers of political arrests
5. Humanitarian Activities	Level of Humanitarian Activity	Change in ratio of people served by aid programs relative to the people making demands on those services Decline in the ability of humanitarian agencies to perform services



Place Montesquieu, 2 bte L2.07.01, 1348 Louvain-la-Neuve, Belgique [www.uclouvain.be/drt](http://www.uclouvain.be/drt)

