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Rights-Based Boundaries Of The United Nations' Sanctions

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ABSTRACT

The article examines sanctions imposed by the United Nations (U.N.), the most critical sender of multilateral sanctions, by categorising them as embargoes against states and their main sectors, as well as targeted sanctions against individuals and micro entities. The U.N. Charter serves as the foundation for determining the boundaries of U.N. embargoes. Accordingly, the Security Council is bound by the U.N. Charter's Preamble and Articles as the only international treaty that can control its actions. Furthermore, based on the Charter's proportionality principle, the Security Council must balance subjective wrongdoings and the consequences of sanctions. The article then evaluates flaws in the designation, implementation, judicial reviews, and targets substantive and procedural human rights in order to determine how U.N. targeted sanctions should be formed to become rights-based. The central issue of due process is addressed by examining certain recorded rights-based challenges in the process of domestic implementation of sanctions that are reviewed by international courts in order to demonstrate that the Security Council's targeted sanctions require reconsideration as well as their own independent judicial review.

KEYWORDS

Economic Sanctions; Human Rights; Security Council; Targeted Sanctions

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INTRODUCTION

International law evolved from *jus ad bellum* to prohibit use of armed forces, and along the way, the United Nations Security Council [hereinafter U.N.S.C.] became the sole responsible organ for maintaining international peace and security. In this regard, the Security Council has the authority under Chapter VII of the U.N. Charter to issue recommendations or binding decisions such as imposing sanctions,[1] after determining the existence of a *threat to the peace*, breach of the peace or act of aggression.[2]

Sanctions are classified as embargoes and targeted sanctions. According to the present article, embargoes shall be considered as coercive measures that impose costs on states, major entities and sectors of states such as the oil industry or a state's central bank. Targeted sanctions are defined as coercive measures such as asset freeze and travel ban against individuals, whether official or non-official; entities governing privately or without affiliation with any state; as well as those against entities acting on behalf of the states but with minimal effects on people in general.

According to Article 41 of the Charter, the Security Council may call upon all U.N. Members to implement its sanctioning resolutions domestically. Under Article 25 of the Charter, they must agree to accept and employ the sanctions. As a result, all U.N. Member States are clearly obligated to implement Security Council Resolutions [hereinafter S.C.R.s] domestically. It is because they consented to the potential invasion of their sovereignty by joining the U.N. under the *pacta sunt servanda* principle.[3] This principle affirms that the legality of all the sanctions imposed by international organisations on their Member States can be established primarily based on the consent given by the targeted Member State. Therefore, any sanctioning regimes founded by the

[1] The U.N.S.C. in carrying out its mandate is authorised to use the powers outlined in Chapters VI, VII, VIII, and XII of the U.N. Charter. The Security Council has the authority to make recommendations under Chapter VI or legally binding decisions under Chapter VII. Chapter VI of the U.N. Charter addresses the methods of peaceful resolution of disputes and empowers the Security Council to call on all parties, to investigate, to request appropriate procedures or methods of adjustment, and to make recommendations to the disputing parties. As a result of meeting the requirements of Article 39, the Security Council based on its power that is given under Chapter VII, is authorised to impose binding sanctioning resolutions. These binding resolutions may impose coercive measures involving or not involving use of force, such as complete or partial disruption of economic relations.

[2] The ambiguity in the phrase *threat to the peace* has raised some concerns about the specific situations in which the Security Council may pass sanctioning resolutions. In practice, however, it is widely accepted that any S.C.R. that is passed under Chapter VII include an implied Article 39 determination, even though most resolutions passed under Article 41 do not explicitly refer to Article 39 and merely indicate that they were passed under Chapter VII of the Charter. *See generally* Richard Gordon et al., Sanctions Law 12 (2019).

[3] *Pacta sunt servanda* or the rule that any treaty in force is binding on the parties and must be carried out in good faith, is enshrined in the Vienna Convention on the Law of Treaties [hereinafter V.C.L.T.] (Article 26 V.C.L.T. 1969), as well as the Preamble and Article 2 of the U.N. Charter and is frequently invoked in international jurisprudence. *See generally* Freya Baetens, *Pacta Sunt Servanda*, *in* Elgar Encyclopedia of International Economic Law 283 (Edward Elgar Publishing, 2017) (U.K.).

Security Council must be implemented by all U.N. Member States, as the International Court of Justice [hereinafter I.C.J.] has also frequently advised so.[4]

In addition, according to Article 103 of the U.N. Charter, the obligations of Member States under the U.N. Charter take precedence over other obligations under separate international treaties. In this regard, the I.C.J.'s two *Lockerbie* cases, more than affirming this supremacy, also demonstrate that the I.C.J. is authorised to review the Security Council's decisions.[5] The I.C.J. also held that the obligations under Article 103 give effect to Chapter VII's measures and take precedence over other multilateral or bilateral treaties.[6] Furthermore, the rule of *lex specialis* has confirmed that any S.C.R. has precedence over other treaties.[7]

The supremacy of S.C.R.s over the U.N. Charter, which is this Article's challenging foundation, is not ruled out. Thus, the main issue is whether the embargoes imposed by the Security Council should be reconsidered in light of their compliance with the U.N. Charter. The other issue is whether the Security Council should adhere to the boundaries of due process established by Customary International Law [hereinafter C.I.L.] when imposing targeted sanctions to safeguard the substantive and procedural rights of the listed targets during the administrative reconsideration and judicial review phases.

[4] For example, I.C.J. in *Namibia* held that the S.C.R.s are binding on all the U.N. Member States, which are thus under obligation to accept and carry them out. *See* Legal Consequences for States of South Africa's Continued Presence in Namibia (South West Africa) Notwithstanding Security Council Resolution, Advisory Opinion, 1971 I.C.J. Rep. 16, 50 ¶ 115 (June 21) [hereinafter Namibia]. This Advisory Opinion was a reaffirmation of the I.C.J.'s previous opinion. *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, ¶ 178 (Apr. 11) [hereinafter Reparation].

[5] The I.C.J.'s two *Lockerbie* cases which initiated against the United States [hereinafter U.S.] and the United Kingdom [hereinafter U.K.] were concerned the interpretation of Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177. Libya requested I.C.J. to issue a preliminary decision to halt the two countries' efforts to impose U.N. embargoes on Libya. The basis was due to the alleged involvement of Libya in the attack on a civilian plane and the deaths of many passengers. The two cases raised a complicated issue about the relationship between the U.N.'s two main organs, the I.C.J. and the Security Council. *See* Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), Provisional Measures, 1992 I.C.J. 114 (Apr. 14), https://www.icj-cij.org/case/89/provisional-measures (Last visited Jul. 4, 2023); *see also* Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Provisional Measures, 1992 I.C.J. 3 (Apr. 14), https://www.icj-cij.org/en/case/88 (Last visited Jul. 4, 2023).

[6] *See id.*

[7] *See* Masahiko Asada, *Definition and Legal Justification of Sanctions*, *in* Economic Sanctions in International Law and Practice 3, 6 (Asada Masahiko ed., 2019) (U.K.).

1. BOUNDARIES OF THE UNITED NATIONS' EMBARGOES

As an alternative to using force, then-U.S. President Woodrow Wilson introduced the idea of an economic weapon in 1917 to emphasise the significance of joining the League of Nations. He underlined stated, "[a]pply this economic, peaceful, silent, deadly remedy, and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted, but it brings pressure upon the nation which, in my judgement, no modern nation could resist".[8] This assertion was the entire point of using sanctions at the time - implying that the only factor that did not matter, at all, was the rights of people in targeted countries.

One could argue that this logic is still prevalent - given the fourteen continuing sanction regimes in place at the U.N. level - the majority of which are embargoes.[9] Although the number of these regimes appear to be low in comparison to those sanctions imposed *unilaterally* by individual states or international organisations against non-Members,[10] there are several challenging grounds about the rights-based deficiencies of these regimes and their legality status and boundaries under international law; particularly regarding the extent to which these sanctions are implemented domestically by individual states.

While the Security Council's sanctioning resolutions supersede any conflicting treaty, the Security Council's embargoes are also subject to the U.N. Charter's boundaries. As a result, the notion that the U.N.S.C. is unbound by law is factually inaccurate. The fundamental issue is that the Security Council's sanctioning power should be limited, and, accordingly, in cases of imposing embargoes, the Security Council needs to act within the U.N. Charter's bounds. These boundaries include the U.N.'s primary purpose, as stated in the Charter's Preamble, as well as the other conditions stated in the Charter's Articles. Following such, both the principle of proportionality and the U.N. boundaries based on fundamental rights will be examined.

[8] Robert A. Pape, *Why Economic Sanctions do not Work*, Int'l Sec., Oct. 1997, at 90, 90-93.

[9] The current U.N. sanctions are against Somalia, Al-Qaida, the Islamic State of Iraq and the Levant [hereinafter I.S.I.L.], Iraq, Liberia, Congo, Sudan, Lebanon, the Democratic People's Republic of Korea [hereinafter D.P.R.K.], Libya, Afghanistan, Guinea-Bissau, the Central African Republic, and South Sudan, with the objectives of advancing conflict resolutions, nuclear non-proliferation, and counterterrorism. Notably, a sanctions committee chaired by a non-Permanent Member of the Security Council oversees each regime. As of March 3, 2023, eleven of the fourteen sanctions committees are supported by ten monitoring groups, teams, and panels. *See* Sanctions, United Nations Security Council, https://www.un.org/securitycouncil/sanctions/information (Last accessed Jul. 4, 2023).

[10] Seyed M. Rowhani, *Rights Based Boundaries of Unilateral Sanctions*, 32 Washington International Law Journal 127 (2023), https://digitalcommons.law.uw.edu/wilj/vol32/iss2/3 .

1.1. HUMAN RIGHTS BOUNDARIES

As specified in Article 1(3) and the U.N. Charter's Preamble, the Charter preserves fundamental human rights. The Charter also safeguards the pledges of Member States who vow to employ international mechanisms to promote the economic and social advancement of all peoples. It mentioned that one of the U.N.'s purposes is to promote and encourage respect for human rights and fundamental freedoms.[11] As a result, it is reasonable to assume that the primary policy objective for the U.N. sanctioning implementation should be settling global economic, social, cultural, or humanitarian issues.[12] This objective, which can also be interpreted as a boundary, is suggested in the U.N. Charter. Accordingly, the Security Council's primary responsibility is to "maintain peace and security".[13]

However, the negative effects of embargoes could themselves jeopardise peace and security. Implementation of embargoes would endanger the U.N.'s major goal of promoting a higher standard of living and preserving the conditions of economic and social progress and development and upholding the universal observance of human

[11] *See* U.N. Charter art. 1, ¶ 3.

[12] *Id.* ¶ 1.

[13] *Id.* art. 24, ¶ 2. The U.N. has so far established thirty sanctioning regimes, including as embargoes and targeted sanctions to maintain peace and security. As of March 7, 2023, in Southern Rhodesia, *See* S.C. Res. 253 (May 29, 1968) (declaration of independence by white minority regime); S.C. Res. 421 (Dec. 9, 1977) (Apartheid regime); S.C. Res. 713 (Sept. 25, 1991) (Outbreak of internal fighting); S.C. Res. 841 (June 16, 1993) (Military coup); S.C. Res. 661 (Aug. 6, 1990) (Kuwait's invasion); S.C. Res. 1483 (May 22, 2003) (Deposed Iraqi regime); S.C. Res. 864 (Sept. 15, 1993) (Internal political conflict); S.C. Res. 1011 (Aug. 16, 1995) (Civil war and genocide); S.C. Res. 1132 (Oct. 8, 1997) (Civil war); S.C. Res. 733 (Jan. 23, 1992) (Internal violence); S.C. Res. 1160 (Mar. 31, 1998) (Serbian forces violence and terrorist acts of Kosovo Liberation Army); S.C. Res. 1298 (May 17, 2000) (Conflict between Eritrea and Ethiopia); S.C. Res. 985 (Apr. 13, 1995) (Liberian civil war); S.C. Res. 1343 (Mar. 7, 2001) (Liberian support for rebels in Sierra Leone); S.C. Res. 1521 (Dec. 22, 2003) (Internal violence); S.C. Res. 985 (Apr. 13, 1995) (Liberian civil war); S.C. Res. 1343 (Mar. 7, 2001) (Liberian support for rebels in Sierra Leone); S.C. Res. 1521 (Dec. 22, 2003) (Internal violence); S.C. Res. 1572 (Nov. 15, 2004) (Internal conflict); S.C. Res. 1556 (Jul. 30,2004) (Atrocities committed by Janjaweed militia); S.C. Res. 1636 (Oct. 31, 2005) (Investigations into assassination of Rafiq Hariri by The International Committee on Census Coordination); S.C. Res. 1718 (Oct. 14, 2006) (Nuclear program); S.C. Res. 1737 (Dec. 26, 2006) (Uranium enrichment program); S.C. Res. 748 (Jan. 21, 1992) (Bombing the Pan American flight over Lockerbie); S.C. Res. 1970 (Feb. 26, 2011) (Internal conflict and use of force against civilians); S.C. Res. 2048 (May 18, 2012)(Military coup); S.C. Res. 2140 (Feb. 26, 2014) (Terrorist attacks inside Yemen); S.C. Res. 2206 (March 3, 2015) (Internal conflict between the government and opposition forces); S.C. Res. 2374 (Sept. 5, 2017) (Violations of the 2015 Agreement on Peace and Reconciliation); S.C. Res. 1988 (June 17, 2011) (Taliban activities in Afghanistan); S.C. Res. 1493 (July 28, 2003) (Domestic conflict and exploitation of natural resources); S.C. Res. 2127 (Dec. 5, 2013) (Breakdown of law and order and domestic conflict); S.C. Res. 1267 (Oct. 15, 1999) (International terrorism). It should be noted that the Security Council on October 21, 2022, by introducing the specific term of "targeted arms embargo," established a new regime against those who are responsible for the instability of Haiti. *See* S.C. Res. 2653, ¶ 11-14 (Oct. 21, 2022). According to the S.C., targeted arms embargoes are put in place against individuals and entities that the Committee has designated as being responsible for, complicit in, or engaged directly or indirectly in actions that threaten Haiti's peace, security, or stability. *See id.* ¶ 15.

rights and fundamental freedoms.[14] Accordingly, all U.N. embargoes must be designed by the Security Council in compliance with the framework of the U.N. Charter.

One may argue that the U.N. Charter only calls for the U.N. *Member States* to implement S.C.R.s and does not oblige the Security Council.[15] In response, it could be claimed that a U.N. organ cannot act in violation or *ultra vires* of the U.N. Charter, and since the U.N. Charter requires upholding human rights standards, both Member States and the Security Council are obliged. Nonetheless, the Article tries to establish that member states are required to carry out and domestically implement only those S.C.R.s that are in accordance with the Charter. Consequently, since the use of comprehensive embargoes violates the Charter's human rights principles, these Resolutions are not binding.[16]

Comprehensive embargoes imposed by the U.N., such as those imposed on Iraq during the *sanctions decade* will be considered illegal, because it would be impossible to uphold the Charter's obligations while implementing these measures.[17] In other words, if S.C.R.s violate the U.N.'s purposes or, more broadly, human rights obligations, they possibly would be in violation of the Charter.

[14] *See* U.N. Charter, *supra* note 11, art. 55.

[15] *Id.* art. 24-25.

[16] The U.N. had already imposed comprehensive embargoes on five occasions: in Southern Rhodesia S.C. Res. 232 (Dec. 16, 1966), Iraq S.C. Res. 661, *supra* note 13, Yugoslavia (Former), S.C. Res. 757 (May 30, 1992), Bosnia and Herzegovina S.C. Res. 820 (Apr. 17, 1993), and Haiti S.C. Res. 841, *supra* note 13.

[17] The sanctions decade began on August 2, 1990, four days after the Kuwait invasion, when the U.N.S.C. imposed a series of embargoes on Iraq. The Shatt-al-Arab waterway in southern Iraq was closed, and all vessels approaching the Jordanian port of Aqaba were boarded and inspected. It banned the importation of all products and commodities into Iraq, as well as the exportation of all commodities originating from Iraq. The Iraqi regime included a trade embargo; an oil embargo; freezing of Iraqi Government financial assets; arms-targeted sanctions; the suspension of international flights; and the ban of financial transactions. These embargoes were intended to force Iraq to remove its troops from Kuwait, to begin the reparation process, and, finally, to assure the termination of its alleged weapons of mass destruction programs. Iraqi embargoes remained in place until Saddam Hussain was overthrown in 2003.

This assertion is not applicable with limited embargoes or targeted sanctions that have gone through the proper assessment and implementation process.[18] This position was emphasised by the I.C.J. in *Certain Expenses* as well where it held that even when the Security Council's actions are required to maintain international peace and security, the presumption should be that it is not acting *ultra vires*.[19] Furthermore, the International Tribunal for the Former Yugoslavia (I.C.T.Y.) confirmed in *Prosecutor v. Dusko Tadic* that the Security Council's power is not unlimited and that the Security Council is subject to the boundaries of the Charter in all circumstances.[20]

These boundaries, however, appear to be quite broad and ambiguous. In other words, the Security Council's limitations on imposing embargoes under the Charter may be understood so broadly that they become practically meaningless. Notwithstanding, while the U.N.'s purposes are equivocal and more politically, than legally, defined, the legally binding nature of the U.N.'s purposes is undeniably clear under Article 24(2). As a result, they are clearly specified to be legally protected.

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[18] The Iraqi regime had major collateral humanitarian consequences for civilians. After a few years and by finding the negative consequences of Iraqi embargoes, the U.N.S.C. finally shifted toward designing limited embargoes and targeted sanctions. This first generation of rights-based sanctions targeted political leaders and wrongdoers and armed organisations while exempting other civilians. *See* Colum Lynch, *Sunset for UN Sanctions?* Foreign Policy (Oct. 14, 2021). Denis Halliday, the former U.N. humanitarian coordinator in Iraq, has named the U.N. embargoes against Iraq, as *genocide*. Denis Halliday, *Iraq: The Impact of Sanctions and U.S. Policy*, *in* Iraq Under Siege: The Deadly Impact of Sanctions and War 45 (Anthony Arnove ed., 2000). Also, a large body of legal and political literature labelled the Iraqi regime as a *genocidal tool*, claiming that embargoes imposed by the U.N. on Iraq drastically increased mortality rates. *See* Jeremy Matam Farrall, United Nations Sanctions and the Rule of Law 5 (Cambridge University Press, 2007). This assertion created the argument that the U.N. also should be bound by peremptory norms of *jus cogens* in imposing sanctions. *See* David Schweigman, The Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice 197-202 (Erasmus Universiteit Rotterdam, 2001) (Neth.). Holding the U.N., as an international organisation, responsible for the crime of genocide and ascertainment of the *mens rea* and the specific intent of the genocide in the case of adopting collective embargoes seems impossible. It is due to the fact that it is hardly acceptable that the duty to prevent genocide could be extended to the actions of the Security Council, given that the Genocide Convention governs only sovereign states that commit genocide. Also, since genocide is defined as specific "acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group" in Article 2 of the Genocide Convention, and thus requires intent to destroy or *dolis specialis*, the existence of intent to destroy the Iraqi people by the U.N. could not be established. In addition, it is obvious that Iraqis did not die just because they were Iraqis. While Iraqi people died because they were living in Iraq, the U.N. did not impose sanctions to kill them because they were Iraqis and thus, while this is not a moral assertion but based on the *rules* of international law and the plain wording of the Convention, the U.N. did not commit genocide and did not violate *jus cogens*. Relatedly, Professor Gordon, by labeling the collateral situation that was caused by the sanctions on Iraq as the "perfect injustice," mentioned that "[w]hat was probably not foreseen [in the process of drafting Genocide Convention] was the possibility that atrocities might be committed by institutions of international governance, acting in the name of international law and human rights". *See generally* Joy Gordon, *Smart Sanctions Revisited*, 25 Ethics & Int'l Aff. 317-18 (2011); *See also* Joy Gordon, *When Intent Makes All the Difference in the World: Economic Sanctions on Iraq and the Accusation of Genocide*, 5 Yale Hum. Rts & Dev. L. J. 77 (2002).

[19] Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151 (July 20) [hereinafter Certain Expenses].

[20] Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 28 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

The Security Council's actions are limited to the main principles outlined in Articles 1 and 2 of the Charter, as well as the more clearly defined Charter-based fundamental limitations imposed on U.N. Member States and the Security Council. These Charter-based fundamental limitations include the respect to the principle of self-determination;[21] fundamental human rights;[22] sovereign equality;[23] good faith;[24] dispute settlements through peaceful means;[25] refraining from the threat or use of force;[26] and respecting the principle of non-intervention to the Member States' sovereignty.[27]

As such, Article 1(2) states that the U.N.'s founding purpose is "to develop friendly relations among nations based on respect for the principles of equal rights and the self-determination of people".[28] According to the I.C.J. 's Advisory Opinion in *Western Sahara*, the right to self-determination requires a free and genuine expression of the concerned peoples' will.[29] This means each state has the sovereign right to determine its own political structure. This right is also mentioned in Article 2(1) of the Charter through the principle of sovereign equality among all U.N. Members.[30]

While comprehensive embargoes are in place, the infringement of people's rights to self-determination, or even to state sovereignty is inevitable. Acknowledging the will of the people concerned should be considered when designing any sanctioning resolution in order not to violate the genuine expression of their will in choosing their political structure, and subsequently the state's sovereignty. It could be argued that when people freely elect their leaders, the actions of those leaders will be judged in accordance with the people's will. However, for the majority of scenarios where embargoes are imposed against those states, the actions of their leaders differ over time - implying that the concerned people may freely elect their leaders, but the leaders' actions will differ after the election.

As a result, determining whether each target is a state with an authoritarian regime or a democratic regime in terms of freely elected officials and the ability to monitor their actions over time is critical. This is especially true when the concerned people democratically elect their leaders who then go on to become authoritarians and commit international wrongful acts. In the latter case, U.N. embargoes should be

[21] U.N. Charter, *supra* note 11, art. 1, ¶ 2.
[22] *Id.* ¶ 3.
[23] *Id.* art. 2, ¶ 1.
[24] *Id.* ¶ 2.
[25] *Id.* ¶ 3.
[26] *Id.* ¶ 4.
[27] *Id.* ¶ 7.
[28] *Id.* art. 1, ¶ 2.
[29] Western Sahara, Advisory Opinion, 1975 I.C.J Rep. 12, ¶ 55 (Oct. 16).
[30] U.N. Charter, *supra* note 11, art. 2, ¶ 1.

targeted and implemented only to the extent that they narrowly change the leaders' wrongdoings; otherwise, the sanctions would be in violation of the Charter.

In addition, Article 1(3) emphasises the importance of preserving "human rights and fundamental freedoms for all, without regard to race, sex, language, or religion".[31] The Security Council is required by this Article to consider the negative consequences of its embargoes on the targeted state's population when drafting and implementing sanctioning resolutions. Yet, since most of the U.N.'s embargoes are aimed at states that have violated the rights of other states or the international community as a whole by engaging in some type of international wrongful act, a short-term rights-based impact can be justified by that state's prior wrongdoing. However, long-term embargoes are illegal because they can impinge on human rights for decades after they are lifted.[32] Relatedly, as most of the U.N.'s embargoes are against states' main sectors and products, they may have long-term effects. For example, Iranian oil embargoes had long-term consequences because the target was unable to reclaim its previous positions in the lawful international oil market once the embargoes were lifted, forcing it to sell in the black market, which led to corruption and its long-term consequences.[33]

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[31] *Id.* art. 1, ¶ 3.

[32] *See* Seyed Mohsen Rowhani, *Corruption the Middle East as a Long-lasting Effect of the U.S. Primary and Secondary Boycotts Against Iran*, 3 ABA Middle East L. Rev. 30-33 (Feb. 22, 2019), https://www.researchgate.net/publication/331286560_CORRUPTION_IN_THE_MIDDLE_EAST_AS_A_LONG-LASTING_EFFECT_OF_THE_US_PRIMARY_AND_SECONDARY_BOYCOTTS_AGAINST_THE_ISLAMIC_REPUBLIC_OF_IRAN.

[33] U.N. embargoes against Iran specifically aimed to put an end to its uranium enrichment program, which was suspected of being part of an effort to develop a nuclear weapon. In 2006, the Security Council demanded Iran to stop its nuclear developments, despite Iran's claims that its program is peaceful and poses no threat. S.C. Res. 1696 (Jul. 31, 2006). Iran did not comply and five months later, the U.N. imposed a broad range of embargoes on Iranian financial sectors, as well as targeted sanctions against identified individuals and entities. S.C. Res. 1737, *supra* note 13. The regime imposed severe restrictions on the supply of goods and services to Iran, as well as freezing the assets of individuals mentioned in the resolution's Annex. *See, e.g.*, *id.* ¶ 12; S.C. Res. 1803, ¶¶ 5, 8 (Mar. 3, 2008); S.C. Res. 1929, ¶¶ 11-12, 19 (Jun. 9, 2010). Although the sanctions were a mix of embargoes and targeted sanctions, based on the Article's definition, and because they primarily targeted Iran's main sectors entities and industries, they are labelled as embargoes. Furthermore, it is because the Security Council had urged states to be vigilant in their dealings with Iranian banks, including the Central Bank of Iran, and in providing financial services to Iranian companies and their citizens, which greatly caused the issue of over compliance of international market in importing oil from Iran. *See* S.C. Res. 1803, *supra* note 33, ¶¶ 3,9,10; S.C. Res. 1929, *supra* note 33, ¶¶ 14,21,23,24. The Joint Comprehensive Plan of Action [hereinafter J.C.P.O.A.] agreed to by Iran and the five Permanent Members of the Security Council and Germany entered into effect on July 14, 2015. Based on the J.C.P.O.A., Iran agreed inter alia to reduce its stockpiles of enriched uranium substantially in return for lifting the U.N. embargoes and easing the E.U. and U.S. unilateral embargoes. Notably, J.C.P.O.A. is not a legally binding treaty because some of the parties were volunteers in implementing the measure. *See* S.C. Res 2231, Annex A (July 14, 2015) (Joint Comprehensive Plan of Action). The provisions for the termination were specified in U.N. Doc. S/RES/2231 ¶ 7(a), (2015). The JCPOA has a *snapback* procedure to be implemented if any party files a complaint concerning Iran's noncompliance. If the snapback procedure is triggered, all the UN embargoes against Iran would be reactivated immediately. *Id* at ¶¶¶ 11, 12, 13. Although the U.S. withdrew from the J.C.P.O.A. on May 8, 2018, the other parties remained committed to the agreement, and all members, including the U.S., are currently negotiating to resurrect the J.C.P.O.A. as of Mar. 7, 2023. Iran's embargoes were lifted on January 16, 2016, following the UN's approval of the J.C.P.O.A., but its effects are still being felt by Iranians.

1.2. THE PRINCIPLE OF PROPORTIONALITY

As stressed by the late Thomas Franck, the principle of proportionality has traditionally not been recognized as one of the general principles under C.I.L., and it remains to be seen if proportionality is fit to function as a self-standing principle in its own right.[34] The principle is acknowledged as a general concept of law by major legal systems. It states that the law should be proportionate to the situation, respond in a measured and reasonable manner, and not go beyond what is required to accomplish the objective of doing justice.[35]

Regardless of being addressed in International Humanitarian Law [hereinafter I.H.L.] and countermeasure codification by the International Law Commission (I.L.C.), the Article endeavours to establish the Security Council's boundaries in imposing sanctions in accordance with the U.N. Charter's principle of proportionality. It is because U.N. sanctions do not simply fit into the category of countermeasures, even though one may describe them as such and conclude that they must be aligned with the proportionality outlined in the Draft Articles on State Responsibility for Internationally Wrongful Acts [hereinafter A.R.S.I.W.A.].[36]

Also, relying on I.H.L., which is normally applicable in times of war, conflicts with the fact that sanctions are rarely considered as a use of force. It is because sanctions normally are imposed in times of peace.[37] Some commentators contend that the I.H.L. proportionality, which requires an assessment as to "whether the overall evil a war would cause was balanced by the good that would be achieved," can be applied in sanctions or a non-war situation.[38] They believe that even though the U.N. is not a state subject to the Geneva Convention, it cannot violate the laws of war as its Member States may do, otherwise the U.N.'s purpose of maintaining world's peace will be compromised.[39] Others assert that the effects of both wars and some embargoes were

[34] Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715 (2008); *See also* Thomas M. Franck, *Proportionality in International Law*, 4 L. ETHICS HUM. RTS. 229 (2010).

[35] *See generally* NEWMAN RALPH ABRAHAM, EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY DEDICATED TO RENE CASSIN (Bruylant, 1973) (Belg.).

[36] Article 49 of A.R.S.I.W.A. defines countermeasures as a state's failure to comply with international commitments in response to an international wrongful act committed by another state that is justifiable in specific situations. However, sanctions, which an international organisation may be entitled to adopt against its Members according to its rules, are lawful measures and cannot be assimilated to countermeasures. *See* Denis Alland, *The definition of Countermeasures*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 1135, Oxford University Press (Crawford, Pellet & Olleson eds., 2010) (U.K.).

[37] This issue will almost certainly encounter conceptual difficulties due to the normative understanding of I.H.L. that deems only to govern during armed conflicts. *See* Pierre-Emmanuel Dupont, *Human Rights Implications of Sanctions*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE 39, 42 (Asada Masahiko ed., 2019) (U.K.).

[38] *See* Judith Gail Gardam, *Proportionality and Force in International Law*, 87 Am. J. Int'l L. 391, 395 (1993).

[39] The U.N. previously authorised the use of force by peacekeeping forces in the event of humanitarian law violations such as in the U.N.'s armed intervention in Somalia; thus, principles and rules of I.H.L. are applicable to U.N. forces in enforcement actions, or in peacekeeping operations. *See* Secretary-General's Bulletin, Observance by United Nations Forces of International Humanitarian Law (Aug. 6, 1999), https://www.refworld.org/docid/451bb5724.html.

regarded as similar to military blockades and armed conflicts.[40] Thus, the practice of those embargoes is considered "tantamount to a peacetime blockade".[41]

While several commentators have referred to embargoes as a political weapon or economic warfare, it is preferable not to compare them to any type of armed force. This is due to the fact that economic sanctions, in general, were designed to prevent military aggressions and wars in the first place. Furthermore, taking proportionality from C.I.L. and labelling it as a countermeasure to expand the scope of the Security Council's boundaries in imposing embargoes is erroneous. Not only does the U.N. Charter implicitly address the principle of proportionality, but the I.C.J. and other international tribunals have repeatedly highlighted and recognized it. The I.C.J.'s decision in the *North Sea Continental Shelf* in 1969,[42] and the *Naulilaa* arbitration between Portugal and Germany in 1928 are two key examples.[43]

Within the U.N. Charter, the principle of proportionality applies equally to the practice of the Security Council, as a legal principle falling under the category of *principles of justice and international law*. These principles, which are mentioned in Article 1(1) of the Charter, have also been recognised by several commentators.[44] Accordingly, Chapter VII's measures must prevent disproportionality in achieving its objectives and must not adversely affect other interests in a disproportionate manner.[45] The Security Council has considerable latitude in deciding whether Chapter VII's measures are proportionate to the objectives pursued. It means that the Security Council must

[40] *See generally* Richard Garfield et al., *The Health Impact of Economic Sanctions*, 72 Bull. N.Y. Acad. Med. 452, 458-62 (1995).

[41] U.N. Human Rights Council, Rep. of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights (2018), ¶ 34, U.N. Doc. A/HRC/39/54 (Sep. 10, 2018) [hereinafter U.N. Special Rapporteur]. The U.N. Special Rapporteur emphasised that "legal rights holders in target countries where the negative impact of such measures is particularly acute could be considered as in a war zone". *Id.* ¶ 42. Also, some I.H.L. rules such as the prohibition of civilian hunger and the unrestricted movement of essential food and medication, are identical to the situation with some comprehensive embargo regimes. The differentiation between civilian and military targets and the prohibition on causing unnecessary suffering to combatants are the other principles of I.H.L. which may be used in the case of sanctions as well, making I.H.L. to "serves as the most appropriate paradigm through which economic sanctions should be governed, even when implemented outside the armed conflict context". *See also* W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 Eur. J. Int'l L. 86, 95 (1998).

[42] Where the I.C.J. determined that proportionality was a factor to be considered in the delimitation of the continental shelf and stated, "whereas the Federal Republic considered that such an outcome would be inequitable because it would unduly curtail what the Republic believed should be its proper share of [the] continental shelf area, on the basis of proportionality to the length of its North Sea coastline". *See* North Sea Continental Shelf Judgment, 1969 I.C.J. 17 (Feb. 20).

[43] Naulilaa Award (Port. v. Ger.), vol. 2 at 1011, (UN Rep. Int'l Arb. Awards 1928); Gabcikovo-Nagymaros Project, Hungary v. Slovakia, Judgment Merit, 1997 I.C.J. 7 (Sep. 25); *see also* Lori F. Damrosch, Enforcing International Law Through Non-Forcible Measures 57-59 (1998).

[44] Nicolas Angelet & Vera Gowland-Debbas, *International Law Limits to the Security Council, in* United Nations Sanctions and International Law 71-82 (Mariano Garcia Rubio & Hassiba Hadj-Sahraoui eds., 2001) (Neth.).

[45] *See* Frederic L. Kirgis, *The Security Council's First Fifty Years*, 89 Am. J. Int'l L. 506 (1995).

consider the proportionality principle to guarantee that its measures are proportionally designed. The Permanent Members of the Security Council also reaffirmed its significance by stating that all the future U.N. sanctions "should be directed to minimise unintended adverse side-effects of sanctions on the most vulnerable segments of targeted countries,"[46] and they should be "in support of clear objectives and [be] implemented in ways that balance effectiveness against possible adverse consequences".[47]

It is difficult to determine the precise scope of the proportionality principle as it applies to the Security Council. However, it is in this context that international human rights law can play a crucial role to advise on the scope of a procedural constraint rather than constituting a substantive limit for the Security Council as a matter of law.[48] Human rights laws may evaluate proportionality within the framework of the Security Council with a particular emphasis on how it should take this principle into account when designing sanctions adopted in accordance with Article 41 of the U.N. Charter. The Security Council should make a distinction between subjective wrongdoers and other civilians in order not to go beyond the targets. In this context, proportionality refers to the requirement to make sure that the effects of the Security Council's sanctions on civilian populations are proportionate to the harm caused by the target's wrongdoing and are consistent with the sanctions' objectives.

The principle of proportionality requires that the collateral negative effects of employing sanctions on innocent civilians be minimised. On this path, the Secretary-General and the sanctions committees should be held responsible in executing sanctions in the pursuit of proportionality and assessing the objective and commensurate response while taking fundamental human rights into account.

2. BOUNDARIES OF THE UNITED NATIONS' TARGETED SANCTIONS

Targeted sanctions, according to the Article's definition, are those that impose economic and/or travel restrictions on natural and legal persons who are not associated with the state, or those that have minor effects on the people at large. While targeted sanctions are preferable in comparison to embargoes, still it is likely that targeted sanctions may

[46] Rep. of the S.C., at 2, U.N. Doc. S/1995/300 (1995).
[47] Rep. of the S.C., U.N. Doc. S/PRST/2006/28 (2006).
[48] *See* Christopher Michaelsen, *Human Rights as Limits for the Security Council: A Matter of Substantive Law or Defining the Application of Proportionality?*, 19 J. Conflict & Sec. L. 451, 468 (2014).

infringe some substantive and procedural rights of the targets. As such the rights to property; privacy and reputation; freedom of movement; and the right to a fair and public hearing and an effective remedy by an impartial tribunal; or due process rights, are the most vulnerable to targeted sanctions.

This Article seeks to establish a pattern of rights-based considerations for future designations in designing targeted sanctions.[49] In this regard, the fundamental concern stems from the basis for determining the existence of a threat to international peace and security that allows a U.N. sanctions committee to list a target in a sanctioning regime.[50] Even though Article 39 of the U.N. Charter's determination criteria in assessing a threat to international peace and security is unclear, those Security Council's sanctioning resolutions that do not include a prior Article 39 determination could be considered non-binding under Chapter VII of the Charter.

The ambiguity is exacerbated by the fact that several of U.N.'s targeted sanctions on individuals and entities are based on classified evidence and undisclosed information.[51] To address this lack of transparency, the procedural boundaries in sanctioning designations, the infringements of which could result in a violation of due process, should be analysed. Notably, these procedural boundaries are recognised in domestic laws as customary international norms as well.[52]

In addition, the right to a fair and transparent listing procedure was stressed as a Security Council commitment in S.C.R. 1730 in 2006.[53] It is because when mistakes in listings based on false evidence occur, the individuals who are wrongly sanctioned will find their funds and assets frozen without having any realistic prospect of being delisted.[54]

[49] Since 1999, the main U.N. targeted sanctions regime, which encompasses a package of sanctions targeting the Taliban, has been in place, and since then it has become one of the most challenged regimes. It was mainly because of the bombing of the U.S. embassies in Dar-el-Salam in Tanzania and Nairobi in Kenya. It blocked the funds of the Taliban because it was protecting Osama Bin Laden. The Resolution demanded that the Taliban turn over Bin Laden and ordered that all the Taliban's assets be frozen. S.C. Res. 1267, *supra* note 13, ¶ 3. Following the September 11, 2001 terrorist attacks, the Security Council amended that regime by compiling a list of individuals, including Osama Bin Laden and individuals or entities associated with him, as well as Al-Qaida.

[50] The task of deciding on listings at the U.N. level is often delegated to the Sanctions Committee: a body entrusted with managing the sanctions regime. Because designated persons feature as entries on blacklists, sanctions are easy to modify, and designations can be added to or removed from the list without fundamentally altering the sanctions regime. *See* Gordon et al., *supra* note 2, at 30.

[51] *See* Thomas Biersteker, *Targeted Sanctions and Individual Human Rights*, 65 Int'l J.: Canada's J. Glob.Pol'y Analysis 109 (2010). *See also* Thomas Gehring & Thomas Dörfler, *Division of Labor and Rule-based Decisionmaking Within the UN Security Council: The Al-Qaeda/Taliban Sanctions Regime*, 19 Glob. Governance 567 (2013).

[52] It is a recognized rule that a judgement cannot be executed if it was obtained in a way that did not comport with the principles of due process. For example, in the U.S. legal precedent see Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1410, 1412 (9th Cir. 1995).

[53] *See generally* Thomas Biersteker et al., *Addressing Challenges to Targeted Sanctions: An Update of Watson Report*, The Graduate Institute of U.N. Academia 20-21 (2009).

[54] *See* HM Treasury v. Mohammed Jabar Ahmed and Others (FC) ¶ 182.

2.1. ADMINISTRATIVE RECONSIDERATIONS

According to Resolution 1730, the Focal Point for De-listing, as a dedicated part of the U.N.'s Secretariat, is responsible for receiving and processing de-listing requests from U.N. Member States and individual petitioners, as well as serving as the primary source for preserving the due process of targeted individuals and entities.[55] The Resolution stated that the Security Council is committed to ensuring a fair and clear procedure for listing and de-listing individuals and entities, as well as granting humanitarian exemptions.[56] Because of this obligation,[57] the Security Council passed Resolution 1735 to protect fundamental rights and increase the level of scrutiny for states proposing additional individuals or entities to be sanctioned.[58] In this regard, Resolution 1735 emphasised that after listing a new target, states should make a releasable portion of the statement available to the public.[59]

Despite these attempts, there have been complaints about how the de-listing mechanism works, including one from the then-President of the Security Council, who described the Resolution as "very modest and weak" which "does not at all constitute an effective means of fairness".[60] Due to these flaws, the U.N. Focal Point for Delisting was replaced on December 17, 2009, by the Office of the Ombudsperson, which exists solely to review designations under S.C.R. 1267.[61]

In order to improve the fairness of de-listing requests, the U.N. also established an additional review panel for complaints of people and entities that were incorrectly listed under the 1267 regime.[62] A significant step was taken to increase the fairness and

[55] The other function of the Focal Point for De-Listing is to facilitate communication during the de-listing process. To find the procedure of de-listing see U.N. Security Council, Focal Point for De-listing, https://www.un.org/securitycouncil/sanctions/delisting/ (last visited Jul. 4, 2023).

[56] G.A. Res. 60/1, ¶ 109 (Oct. 24, 2005).

[57] It was passed only three days after Resolution 1730. S.C. Res. 1735 (Dec. 22, 2006).

[58] For example, in some domestic cases like *H.M. Treasury*, Lord Roger, made specific reference to the veto power of the Committee members, and has expressed his concern by stating that "if a State applies on their behalf, the name will still not be removed unless all members of the Committee agree. There is an obvious danger that States will use listing as a convenient means of crippling political opponents whose links with, say, Al-Qaeda may be tenuous at best". *See* HM Treasury v. Mohammed Jabar Ahmed and Others (FC), ¶ 181.

[59] The obligation has been strengthened by the S.C. Res. 1822 (June 30, 2008) which mentions:

> For each such proposal Member States shall identify those parts of the statement of case that may be publicly released, including for use by the Committee for development of the summary [to be placed on the committee's website] or for the purpose of notifying or informing the listed individual or entity, and those parts which may be released upon request to interested States.

[60] *See* U.N. SCOR, 5599th mtg. at 4, U.N. Doc. S/PV.5599 (Dec. 19, 2006).

[61] It should be noted that applications for review of other U.N. sanctions regimes can still be submitted to the relevant Focal Point. According to the S.C. Res. 1904 ¶ 22 (Dec. 17, 2009): "the Focal Point shall continue to receive requests from individuals and entities seeking to be removed from other sanctions lists".

[62] *See* Rep. of the High-level Panel on Threats, Challenges and Changes addressed to the UN Secretary General, UN Doc A/59/596 (Dec. 1, 2004).

transparency of the sanctions regime when the Security Council stated in the Preamble of S.C.R. 1989 that it intended to guarantee due process rights and fair and transparent procedures.[63] The Ombudsperson was also given the authority to preserve the due process by recommending the Committee to review a de-listing request, and thereafter, the Committee must unanimously vote to maintain the listing if the Ombudsperson considers de-listing.[64] Furthermore, because the Al-Qaida Sanctions and Taliban Committee was assumed to make all decisions by consensus, it gave each Member of the Committee veto power over a de-listing request, paving the way for a more rights-based administrative reconsideration procedure.[65] The Ombudsperson was also tasked in this procedure with providing anyone who requested, with openly releasable, non-classified information about Al-Qaida and Taliban Sanctions Committee procedures, as well as informing individuals or entities about the status of their listing and submitting biannual reports to the Security Council.[66] Still, the Security Council was expected to incorporate new advancements into the sanctions regime founded by this Resolution.[67]

One of the main goals in this direction was to reduce the negative effects of targeted sanctions on humanitarian aid delivery through humanitarian organisations. The effects were brought on by the fact that most donors are overly compliant with sanctions regulations because they are so worried about the repercussions of sanctions violations. Furthermore, the frustration caused by the lengthy licensing process discourages them from transferring humanitarian aid to the targets. In this regard, and after several years, the adoption of S.C.R. 2664 on December 9, 2022, which was primarily drafted by the United States and Ireland, is the most admirable Security Council milestone.[68] Accordingly, for all current and future U.N. sanctioning regimes, including the 1267 regime, a cross-cutting humanitarian exemption has been established (unless otherwise decided), ensuring the timely and effective conduct of providing humanitarian aid. This S.C.R. affirms that any financial transactions or provision of goods and services required for humanitarian assistance and fundamental human needs are authorised, and that these assistances do not violate the sanctions. While this general exemption will not solve all of the concerns associated with providing

[63] U.N. SCOR, 6247th mtg., UN Doc S/PV.6247 (Dec. 17, 2009).
[64] Regarding the delisting request by the petitioner, the task of the Ombudsperson consists of three main levels: Information gathering in two months that is extendable to four months, making dialogue in two months that is extendable to four months, committee discussion and decision in two months. *See* Gordon et al., *supra* note 2, at 6-9.
[65] S.C. Res. 1904, Annex II (Dec. 17, 2009). Specified the Ombudsperson tasks.
[66] *Id.* at 15.
[67] S.C. Res. 1989, (Jun. 11, 2011).
[68] S.C. Res. 2664, (Dec. 9, 2002).

humanitarian assistance, it demonstrates the Security Council's solid *intention* to shift toward a more rights-based model of sanctions.

2.2. JUDICIAL REVIEW

The *domestic implementation* of the U.N. targeted sanctions may face a number of judicial reviews and legal challenges in various domestic and international courts. These judicial reviews primarily determine whether these sanctions violate rights-based boundaries while also contesting their legal status. By highlighting these inadequacies, this article aims to draw attention to the issue of the U.N. needing to establish a specialised judicial organ in order to achieve a rights-based model of sanctions.

Whereas the validity of the I.C.J.'s judicial review power to challenge the violation of S.C.R. boundaries is still debated,[69] based on *Lockerbie,*[70] and the absence of any exclusion of the I.C.J. 's power over the Security Council's decisions, the I.C.J. should be regarded as the primary available judicial forum for states with proper standing to determine whether rights-based boundaries have been violated by S.C.R.s. This assertion also could be understood by other cases such as *Certain Expenses* where the U.N. General Assembly asked the I.C.J. to provide an Advisory Opinion on whether the U.N. Member States were responsible for the expenses of the U.N. operations in Congo in 1960-1961 and in the Middle East in the 1950s.[71] Also according to *Namibia*, the I.C.J. confirmed that it has the power to decide whether a S.C.R. is in conformity with the Charter.[72]

[69] *See* S. Ghasem Zamani & Mazaheri Jamshid, *The Need for International Judicial Review of UN Economic Sanctions, in* Economic Sanctions Under International Law 219, 227-28 (Ali Z. Marossi & Marisa Bassett eds., 2015).
[70] *Lockerbie*, *supra* note 7.
[71] *Certain Expenses, supra* note 19, at 151. In response the I.C.J. recognized the expenses are related to the purpose of the U.N. and needs to be paid.
[72] Namibia, *supra* note 4, at 22.

Outside the I.C.J., the most well-known of these rights-based challenges began in 2008 when the European Court of Justice [hereinafter E.C.J.] overturned a decision by the European Community [hereinafter E.C.] in implementing U.N. targeted sanctions against *Kadi* and *Al-Barakaat* - resulting in the first court-ordered disobedience for domestic employment of a U.N. targeted sanctions.[73] These cases initially filed in 2005 before the European Court of First Instance [hereinafter C.F.I.], also known as the European General Court (E.G.C.), concerned the legality of the European Union's [hereinafter E.U.] *implementation* of the U.N. sanctions.[74] It challenged implementing U.N. targeted sanctions imposed through S.C.R. 1267 at the E.U.-level without informing Yasin Kadi and the Yusuf and Al Barakaat International Foundation about the basis for the freezing of their assets and without following due process.[75]

The claimants argued that the designation violated their due process rights, and specifically the rights to a fair hearing, property, and effective judicial protection.[76] Following that, the C.F.I. declared that the E.U. judicial system prioritised the E.U.'s constitutional identity.[77] The C.F.I. also noted that, in the event of procedural challenges, the E.U. is not legally bound domestically to implement the Security Council's resolutions because it is not a Member of the U.N.; however, it ultimately rejected the annulment request.[78] As a result of this rejection, Kadi and Al Barakaat filed a joint appeal with the E.C.J., which successfully reversed and set aside the two C.F.I. judgements.[79] It broadened the possible grounds and rights-based boundaries of U.N.

[73] Joined Cases C-402/05 P and C-415/05 P Yassin v Council of the European Union and Commission of the European Communities, 2008 E.C.R. I-6351.

[74] See Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No. 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan - strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, annex 1, 2002 O.J. (L 139) 9-22.

[75] See Council Regulation 881/2002 of 27 May 2002, art. 2 (1), that with regard to states, "[a]ll funds and economic resources belonging to, or owned, or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen".

[76] See cases C-402/05 P and C-415/05 P Yassin v Council of the European Union and Commission of the European Communities, 2008 E.C.R. I-6351, ¶¶ 20-21. Article 230 of the Treaty Establishing the European Community states that "[t]he Court of Justice shall review the legality of acts adopted". *See* Treaty Establishing the European Community arts. 230-231, Nov. 1997, 1997 O.J. (C 340). The Court enumerated the grounds for annulment. As such are infringement of an essential procedural requirement, and infringement of any rule of law relating to its application, or misuse of powers. *See id.* art. 230 ¶ 2.

[77] Case T-315/01, Kadi v. Council of the European Union and Commission of the European Communities, 2005 E.C.R. II-3649, ¶ 192.

[78] *Id.* ¶ 193.

[79] See Cases C-402/05 P and C-415/05 P, *supra* note 76. According to Article 16 of the Statute of the Court of Justice the E.C.J. sits in a Grand Chamber consisting of eleven out of the total of twenty-seven judges, instead of the normal chamber size of three or five judges. *Statute of the Court of Justice*, Article 16, 10 March 2001 O.J. (C 80).

targeted sanctions and granted full reviewability to all European acts, including the domestic implementation of S.C.R.s.[80]

Nonetheless, the E.C.J. rejected the argument that it has jurisdiction over S.C.R.s, emphasising that it only has jurisdiction over the domestic implementation of S.C.R.s.[81] Subsequently, it ruled that the appellants were not fully informed and notified - resulting in a violation of their due process rights. The Court also confirmed that the implementation of the S.C.R.s could be subject to judicial review in order to protect fundamental rights such as property rights, freedom of movement rights, reputation, family, and privacy rights.[82] Finally, the E.C.J. annulled the Council Regulation relating to Kadi and the Al Barakaat International Foundation be annulled.[83]

Nonetheless, based on E.U. law, the E.U. is bound by the U.N. Charter.[84] It means that the E.C.J. lacks the jurisdiction to decide whether the U.N. sanctions are lawful. *Jus cogens*, which cannot be violated by any rules of international law, including Security Council resolutions, are the only exception to the Charter's supremacy.[85] Therefore, only in cases of *jus cogens* violations may E.U. courts assess the legality of U.N. sanctions. Property rights and due process were all categorised by the C.F.I. as *jus cogens*. Although it is established that property rights and due process are among the norms of C.I.L., it is obvious that both Courts idealised and expanded the application of *jus cogens* with regard to these rights. As a result, the most apparent means of preventing domestic courts from redefining and reclassifying international norms is for the U.N. to establish its own

[80] According to Paragraph 326

> [E.C.] judicature must, in accordance with the powers conferred on it by the [E.C.] Treaty, ensure the review, in principle the full review, of the lawfulness of all [E.C.] acts in the light of the fundamental rights forming an integral part of the general principles of [E.C.] law, including review of [E.C.] measures which, like the contested regulation, are designed to give effect to the resolutions of the Security Council under Chapter VII of the Charter of the United Nations.

See Cases C-402/05 P and C-415/05 P, *supra* note 76, ¶ 326.

[81] *Id.* ¶ 287. It mentioned that European Community in their sanction implementations should "communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action". *Id.* ¶ 336.

[82] Notably, if the Security Council fails to meet the procedural requirements for listing the targets, their due process rights, as enshrined in the Universal Declaration of Human Rights [hereinafter U.D.H.R.], may be violated. U.D.H.R. art 8, Dec. 10, 1948 recognised "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights," also, according to U.D.H.R. art 10 "[e]veryone 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".

[83] Cases C-402/05 P and C-415/05 P, *supra* note 76, ¶ 51; Guglielmo Verdirame, *Implementation of UN Sanctions, in* The UN and Human Rights: Who Guards the Guardians? 300, 304 (Cambridge University Press ed., 2011) (U.K.).

[84] Case T-315/01, *supra* note 77, ¶ 193.

[85] *Id.* ¶ 226.

independent judicial organ with jurisdiction over challenging the legality of U.N. targeted sanctions.

CONCLUSION

The U.N. embargoes are presumably permissible under international law. It is primarily due to the fact that the S.C.R.s take precedence over other international treaties. This supremacy, however, is limited only to other treaties, and Member States may argue that they are not obligated to implement U.N. sanctions if doing so would violate the U.N. Charter. The U.N. Charter established the boundaries of human rights and the principle of proportionality between the consequences of sanctions and the subjective wrongdoing. While a short-term impact on a state's sovereignty can be justified by that state's previous wrongdoing, long-term embargoes against states or their main industries contradict the Charter's boundaries. In this regard, the most recent step forward in the U.N.'s sanctioning procedure toward a rights-based model is including a general exemption for conveying humanitarian aid. This general exemption may lead sanctions senders to implement similar considerations in their own current and future sanctioning regimes.

Individuals sanctioned under a targeted sanctions regime based on classified evidence may face violations of due process rights, particularly the right to a fair and transparent listing procedure. The listed individuals have filed challenges in domestic and international tribunals such as the E.U. Courts due to deficiencies in the administrative reconsideration process at the U.N. Office of the Ombudsperson and Focal Point for De-listing. Despite the existence of these fora, this article emphasised the importance of an independent rights-based mechanism and procedure for reviewing Security Council sanctioning resolutions. This mechanism should address shortcomings in upholding the rights-based boundaries of U.N. embargoes, as well as deficiencies in the process of filing an application for delisting and upholding due process.