

**THE DEVELOPMENT OF ECONOMIC SANCTIONS IN THE PRACTICE
OF THE UNITED NATIONS SECURITY COUNCIL**

ROSEMARY ALICE MURPHY

Bachelor of Corporate Law, LLB, LLM

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The United Nations was established in the belief that working together states could curb the use of force and the damage to states and individuals associated with it. Upon its creation the United Nations Security Council became the global policeman enforcing the rules of the Charter aided by the weapons contained in Chapter VII. One of those weapons was the recourse to economic sanctions. In theory, if the economic lifeblood of a state is cut off it will be forced to modify its behaviour without the need for military intervention. As such, economic sanctions are an attractive resource for an institution seeking to avoid recourse to the use of force.

In practice, however, economic sanctions have proven to be a complex tool, which have caused significant damage to those targeted by them. They have caused significant humanitarian difficulties, have been widely breached and have, in some instances, only served as a prelude to the use of force. Literature in this field to date has concentrated on single sanctions regimes or particular aspects of sanctions. It has, therefore, failed to get to the heart of the issue, which is: what has caused these problems, are they being appropriately addressed and how should they be resolved going forward.

This thesis focuses on these issues. By tracing the development of economic sanctions from the establishment of the United Nations to date it offers a unique perspective on how they have evolved. It uses case studies and illustrative examples supported by a wide range of legal, political, historical and economic material to show the context in which economic sanctions are taken. It also critically analyses the difficulties that have arisen with sanctions regimes and the attempts that have been made to resolve them. Aligned to the consideration of economic sanctions is a reflection on the extent to which the power of the United Nations Security Council has developed during this time period. It suggests that the United Nations use of economic sanctions, in light of recent judicial decisions, is under threat and offers a solution in the form of a proposal for two new institutions, which would support the United Nations in its use of economic sanctions.

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1948

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1964

UNSC Resolution 190 (9 June)

1965

UNSC Resolution 202 (6 May)

UNSC Resolution 216 (12 November)

UNSC Resolution 217 (20 November)

1966

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

UNSC Resolution 221 (9 April)

UNSC Resolution 232 (16 December)

1968

UNSC Resolution 253 (29 May)

1969

Vienna Convention on the Law of Treaties

1970

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- UNSC Resolution 288 (17 November)

1972

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- UNSC Resolution 318 (28 July)
- UNSC Resolution 320 (29 September)

1973

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- UNSC Resolution 326 (2 February)
- UNSC Resolution 327 (2 February)
- UNSC Resolution 328 (10 March)
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1976

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1979

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- UNSC Resolution 448 (30 April)
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UNSC Resolution 1822 (30 June)

2009
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2010
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Abbreviations

AFSC	American Friends Service Committee
AJIL	American Journal of International Law
AU	African Union
AWB	Australian Wheat Board Limited
BSAC	British South Africa Company
BYIL	British Yearbook of International Law
CESCR	Committee on Economic, Social and Cultural Rights
CTC	Counter-terrorism Committee established under UNSC Resolution 1373
CFI	Court of First Instance
EC	European Community
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
EU	European Union
FATF	Financial Action Task Force
FRY	The Former Yugoslavia
GC	General Court
JNA	Yugoslav's People's Army
IAEA	International Atomic Energy Agency
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFY	International Conference on the Former Yugoslavia
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee for the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMF	International Monetary Fund
IPC	Iraqi Petroleum Company
MLR	Modern Law Review
NATO	North Atlantic Treaty Organization
OAU	Organisation of African United
OPEC	Organization of Petroleum Exporting Countries
OSCE	Organization for Security and Cooperation in Europe
P-5	Five permanent members of the United Nations Security Council (China, France, Russia, United Kingdom and United States)
RCC	Revolutionary Command Council (Iraq)
RUF	Revolutionary United Front (Angola)
SAM	Sanctions Assistance Missions
SAMCOMM	The Sanctions Assistance Missions Communications Centre
SR	Socialist Republic
UDHR	Universal Declaration of Human Rights
UDI	Unilateral Declaration of Independence
UNGA	United Nations General Assembly
UK	United Kingdom
UKSC	United Kingdom Supreme Court
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNITA	National Union for Total Independence of Angola
UNMOVIC	United Nations Monitoring, Verification and Inspection Commission
UNSC	United Nations Security Council
US	United States of America
WEU	Western European Union
ZANU	Zimbabwe African National Union
ZAPU	Zimbabwe African Peoples Union

Economic Sanctions in the UN Framework

'I believe to a certainty that the passage of the sanctions law and the heightening of international efforts to isolate South Africa's apartheid government contributed significantly to the watershed political changes that have occurred on that portion of the African continent.

*As I stood in Pretoria to witness the inauguration of President Nelson Mandela, I reflected on the positive contribution that the international sanctions effort had made in accelerating the inevitable coming to power of a government in South Africa based on the principle of nonracial democracy. What also seemed clear was that the timely and deliberate use of economic sanctions had mitigated against the possibility that this inevitable victory might have come as a result of a further protracted and deadly violent armed struggle, fought to a bitter conclusion with all of the lingering consequences that would militate against reconciliation and national development.'*¹

Economic sanctions are the most significant non-military measures imposed by states and international organisations against other states, entities or individuals. As elucidated, in the quotation above, by former US congressman Ronald Dellums, economic sanctions are seen by their supporters as measures that can prompt significant political change whilst avoiding the collateral damage inherent in armed conflict. This thesis concentrates on the evolution of international economic sanctions within the UN framework, which it contends has occurred in a reactionary fashion. It demonstrates this reactionary development by tracing the UNSC's use of economic sanctions from its first case to date. On examination, it becomes clear that, where UN economic sanctions have evolved, that evolution has been as a direct result of difficulties seen in previous sanctions regimes.

This reactionary development reflects Charlesworth's commentary on the development of international law.² She suggests that international law, as it stands today, has been shaped by crisis. Through the lens of NATO's intervention in Kosovo, she suggests that, international lawyers 'revel in a good crisis'³ and argues that when a crisis arises the reaction of the international community to that crisis constitutes a development to international law. She describes the events in Kosovo in 1998-99 as 'a paradigm of a meaty international law crisis, a real-life Jessup moot problem', which has led to extensive debate amongst international lawyers at conferences and in articles and books.⁴ Charlesworth attributes this focus on crisis, which causes reactionary development, to the questions posed by crisis, which she notes in the case of Kosovo included *inter alia*: sovereignty and self-determination; grave human rights abuses and expulsions; international peace-keeping; and the role of international

¹ Ronald V Dellums, 'Foreword' in David Cortright and George A Lopez (eds) *Economic Sanctions, Panacea or Peacebuilding in a Post-Cold War World?* (Westview Press 1995) vii.

² Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* 377.

³ *ibid.*

⁴ *ibid.* 379.

tribunals.⁵ This she suggests gives ‘international lawyers a sense of relevance, of being exhilaratingly close to the heart of grand and important issues of our time.’⁶

UN economic sanctions also raise issues of fundamental importance to the development of international law. They have raised issues in relation to the balance of international security and human rights, the supremacy clause in the UN Charter and the limitation of UNSC power, all of which are discussed in this thesis. It is, therefore, of little surprise that UN economic sanctions have developed in a reactionary fashion. Furthermore, to some extent it is also necessary that UN economic sanctions develop in a reactive fashion as it allows problems to be addressed as they arise.

However, Charlesworth notes that this reactionary development comes with ethical costs, two of which are also visible in UN economic sanctions. Firstly, it ‘promotes a narrow agenda’⁷ for economic sanctions. This has meant that the development of UN economic sanctions has rarely been discussed in a panoramic fashion in isolation to a crisis, instead only being modified on the occurrence of a new crisis. The result has been that developments may, in resolving one problem, create further difficulties.

Secondly, she notes that during crises concentration is focused on ‘the public realm’ noting that by this preoccupation ‘with great crises, rather than the politics of everyday life... international law steers clear of analysis of longer-term trends and structural problems.’⁸ This phenomenon is illustrated in the sanctions realm by the related UN institutional development. Institutional development has occurred in individual sanctions regimes in an attempt to rectify problems seen in each particular regime at a point in time without consideration of institutional development in the UN sanctions system as a whole. This piecemeal development has meant that the roles of certain institutions have been overlapping and that there has been considerable duplication of work with previous institutions remaining in place as new institutions are developed. The UN has also suffered from a lack of accountability as institutions have proliferated.

Each UN economic sanctions regime has raised unique, interesting and difficult questions with respect to international law. As such, the international community has treated each regime as an individual crisis. The issues that have arisen in one crisis have informed the establishment of the rules of the next regime, until it too becomes a crisis. Once it does, the significant issues that it raises are

⁵ *ibid.*, 381.

⁶ *ibid.*

⁷ *ibid.*, 386.

⁸ *ibid.*, 388-389.

used to form the basis of the next regime, without retaining the lessons learnt from the preceding crisis. This has led to episodic development of UN economic sanctions.

This thesis is written chronologically. It considers four major economic sanctions regimes in detail – Southern Rhodesia, Iraq and the two main targeted economic sanctions regimes, the 1267 regime and the Counter-terrorism regime. It also illustrates the transition to targeted economic sanctions by considering many of the other UN economic sanctions regimes that have been adopted. It focuses on the challenges that have been raised by each sanctions regime (or crisis) and uses this focus to demonstrate that economic sanctions have developed in a reactionary fashion. In the early stages this reactionary development allowed sanctions to progress and become more refined. However, it becomes clear in the latter stages of the thesis that, by failing to deal with challenges in a holistic fashion rather on a case-by-case basis, significant issues of concern have not been afforded proper consideration in the development of sanctions regimes. The result is that targeted economic sanctions are now facing judicial challenges that impact on their very foundations. This thesis argues that these challenges can only be resolved by significant institutional change. Such institutional change is necessary if the UNSC is to continue to use economic sanctions in a meaningful way. It ultimately proposes the development of two new institutions for that purpose.

This chapter sets out the background to the thesis. It outlines the definition of economic sanctions that is used for the purpose of this thesis. It then examines the basis, purposes and use of economic sanctions under the UN Charter.⁹ Finally it discusses the key characteristics of UN economic sanctions.

1.1 Defining Economic Sanctions

How to define economic sanctions has been the subject of academic debate. Different commentators have put forward different definitions as to what economic sanctions are. At the end of the 1990's Drezner defined 'economic coercion', in which he includes economic sanctions, as 'the threat or act by a nation-state or coalition of nation-states, called the sender, to disrupt economic exchange with another nation-state, called the target, unless the targeted country acquiesces to an articulated political demand.'¹⁰ However, Drezner's work at that time focused exclusively on non-institutional measures. In

⁹ Charter of the United Nations (1945) 892 UNTS 119 ('UN Charter').

¹⁰ Daniel Drezner, *The Sanctions Paradox Economic Statecraft and International Relations* (Cambridge University Press 1999) 2.

2001 this approach was called into question by Professors James Crawford and Georges Abi-Saab in their provocative debate on the definition of economic sanctions as contained in Vera Gowlland-Debbas's collection on UN sanctions.¹¹

Professor Abi-Saab's definition of an economic sanction in that work contains three elements. It is defined as a coercive response to an internationally wrongful act authorised by a competent social organ.¹² In his response, Crawford queries whether the UNSC, which he suggests must come within the definition of a 'competent social organ', is authorised to take economic sanctions as defined by Abi-Saab.¹³ This is because the UNSC is authorised to respond to threats to or breaches of the peace, which Crawford submits, save in circumstances where there is a determination of an act of aggression, do not necessarily amount to 'internationally wrongful acts'.¹⁴ However, a more fundamental criticism may be made of the suggestion that economic sanctions can only be taken in circumstances where an internationally wrongful act has occurred. This suggestion does not reflect the use of economic sanctions in practice, either traditionally or since the creation of the UN nor is it mandated by the provisions of the UN Charter.

To consider an early example of economic sanctions, in 432 BC the city of Athens excluded citizens of a neighbouring city, Megara, from the market of Athens in response to the kidnapping of three Aspasian women.¹⁵ As such, economic sanctions were being taken in a situation where there had been no internationally wrongful act. This has continued to date with examples including: US sanctions against Japan between 1917 and 1918, which were taken in an attempt to restrain its commercial expansion into the Far East;¹⁶ Arab League sanctions against Canada in 1979, which had the intention of deterring the planned move of an embassy in Israel from Tel Aviv to Jerusalem;¹⁷ and Greece taking sanctions against Macedonia in 1994 in an effort to force it to change its name.¹⁸ Given that economic sanctions generally do not require there to have been an internationally wrongful act it is unclear why

¹¹ Vera Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (Kluwer Law International 2001).

¹² Georges Abi-Saab, 'The Concept of Sanction in International Law' in Vera Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (Kluwer Law International 2001) 39.

¹³ James Crawford, 'The Relationship Between Sanctions and Countermeasures' in Vera Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (Kluwer Law International 2001) 57-58 ('Crawford, 'The Relationship Between Sanctions and Countermeasures').

¹⁴ *ibid.* 57.

¹⁵ Gary Clyde Hufbauer, Jeffrey Schott, Kimberly Ann Elliot and Barbara Oegg, *Economic Sanctions Reconsidered* (3rd edn, Peterson Institute for International Economics 2007) 9.

¹⁶ Jeffrey Safford, 'Experiment in Containment: The United States Steel Embargo and Japan, 1917-1918' (1970) 39 *Pacific Historical Review* 439.

¹⁷ Jean-Marc F Blanchard and Norrin M Ripsman, 'Lightning Rods Rather Than Light Switches: Arab Economic Sanctions against Canada in 1979' (2002) 35 *Canadian Journal of Political Science* 151.

¹⁸ 'Greece Closes Macedonia's Main Trade Route' *New York Times* (New York 18 February 1994).

they would do so solely when they are taken by the UN. In this regard, it should be noted that in her 2004 work Gowlland-Debbas herself acknowledges that ‘the use of sanctions to designate enforcement measures under Chapter VII, however is in accordance with the current practice of States and the term has, moreover, crept into the vocabulary of Council resolutions... as well as confirmed by regular reference to “Sanctions Committees”, and the current use of the term “targeted sanctions”’.¹⁹

The cases outlined above also demonstrate that Abi-Saab’s opinion, that economic sanctions necessitate there being collective as opposed to individual action, is a fallacy. It is clear that economic sanctions existed prior to the development of ‘competent social organs’ such as the UN or League of Nations and that states have continued to take economic sanctions individually since the development of those institutions. In fact, in 1931, the League of Nations discussed China’s boycott of Japanese goods, which had been instigated as a result of Japan’s invasion of Manchuria, and considered that it was justified as a measure of reprisal against Japan for its unlawful invasion.²⁰ Lowenfeld offers two reasons why economic sanctions do not have to be collective measures.²¹ Firstly, he indicates that states do in practice both take unilateral sanctions and tolerate unilateral sanctions taken by other states. Secondly, he notes that whilst states are not obliged to impose sanctions in circumstances where the UNSC has considered and rejected the imposition of such measures, neither are they precluded from doing so.

With respect to Abi Saab’s third criterion it should be noted that, as will be discussed later in this chapter, economic sanctions are not always coercive measures. They are, in fact, also employed as punitive and symbolic measures.

It is suggested, therefore, that a more functional approach to the definition of economic sanctions is appropriate. The most suitable definition for economic sanctions as they are currently invoked is the prohibition on economic interaction with any state, entity (including commercial entities) or individual. This definition reflects the process of economic sanctions whilst acknowledging that they may be taken in a variety of situations by a variety of actors. However, the definition for the purpose of this thesis is more nuanced as this work deals only with UN economic sanctions. Therefore,

¹⁹ Vera Gowlland-Debbas, ‘Sanctions Regimes Under Article 41 of the UN Charter’ in Vera Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions A Comparative Study* (Martinus Nijhoff Publishers 2004) 5.

²⁰ League of Nations Official Journal, 13 (1932) 1883-1884.

²¹ Andreas Lowenfeld, ‘Unilateral Versus Collective Sanctions: An American’s Perception’ in Vera Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (Kluwer Law International 2001) 96.

the definition that will be adopted for this purpose of this thesis is the prohibition by the UNSC on economic interaction with any state, entity or individual.

UN measures, as opposed to state or regional measures, have been selected because of their immense potential. The UN was born out of a belief that a peaceful world is possible. UN economic sanctions could help in the fulfilment of that ideal by being used in place of military sanctions and by being used to stifle individual states' attempts to use force. They, have two primary advantages over economic sanctions taken by individual states or regional organisations.

Firstly, UN economic sanctions could be used effectively against any state. It is difficult for an individual state to take effective economic sanctions against another states. In order for such measures to be effective the sanctioning state would have to be the target state's main source of both imports and exports. If not the target will be able to import goods from and export goods to other states, thus negating the intended impact of the economic sanctions. In contrast, if UN economic sanctions are taken, then all Member States are obligated to implement the measures. Assuming that there are no significant breaches of UN economic sanctions, a targeted state must rely on its own self-sufficiency to negate the effects of such measures.

Secondly, UN economic sanctions, as a collective measure, are perceived as having greater legitimacy than sanctions taken by individual states or regional organisations. Van Genugten and de Groot suggest that 'the appearances are against bilateral sanctions' because they lack the legitimacy that multilateral economic sanctions such as those taken by the UN have.²² They note that the legitimacy of economic sanctions increases when more countries support them and provide that they are less open to misuse the more states that support them.²³ Whilst UN economic sanctions are adopted by the UNSC, it has been the case that in circumstances where non-UNSC Member States are opposed to a particular sanctions regime it has not been adopted, even in situations where such a regime has received P-5 support.²⁴ When they are taken, therefore, they are reflective of international censure of the behaviour against which they are adopted.

UN economic sanctions are also considered here because it is argued that some significant changes to them need to take place if they continue to be employed by the UNSC. Despite their

²² Willem van Genugten, Gerard de Groot and Saskia Lavrijssen, 'Guidelines on the Future Use of Sanctions: An Evaluation' in Willem JM van Genugten and Gerard A de Groot (eds), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights, A Multi-disciplinary Approach* (Intersentia 1999) 149-150.

²³ *ibid.*

²⁴ See for example the proposed sanctions against Zimbabwe discussed in section 1.4.3, which were rejected albeit that both the US and the UK had domestic sanctions in place against them.

potential advantages over economic sanctions taken by other actors, there have been some difficulties when UN economic sanctions have been implemented by states. They have had significant humanitarian consequences for citizens of states targeted by them, most visibly in the case Iraq.²⁵ Domestic and regional courts are now criticising the impact that targeted economic sanctions have on those subjected to them.²⁶ Yet, these difficulties have not been adequately addressed and the UNSC continues to adopt economic sanctions. Recommendations for the development of the UN economic sanctions framework are made in chapter 5 and 6 of this thesis.

The final reason for the focus on UNE economic sanctions in this thesis is that they are an institutional measure whose development mirrors and therefore serves to illustrate some of the wider developments within the UN framework. The powers of the UNSC have expanded over the life of the UN and the move to targeted UN economic sanctions serves to demonstrate this. The sanctioning of individuals by the UN has pushed its powers to their limits and the repercussions of this are important for any meaningful discussion of the UNSC, as well as for UN economic sanctions themselves. Furthermore, there has been a proliferation of institutions surrounding the development of economic sanctions within the UN framework.

1.2 The Basis for Economic Sanctions in the UN Charter

The UN was founded against the background of World War II and following the failure of the League of Nations. Whilst the objective of the UN was the maintenance of international peace and security, there was a need to have a means in place to address conflict when it did arise. The means of dealing with such conflict was provided for in Chapter VII of the Charter.

Chapter VII endows the UNSC with powers to decide measures to be taken should there be ‘a threat to the peace, breach of the peace, or an act of aggression’ in order to prevent that threat or breach from progressing.²⁷ Aside from the option of calling upon a transgressor to comply with provisional measures,²⁸ the UN can take military sanctions under Article 42 or non-military action under Article

²⁵ Peter L Pellett, ‘Sanctions, Food, Nutrition, and Health in Iraq’ in Anthony Arnove (ed), *Iraq Under Siege The Deadly Impact of Sanctions and War* (2nd edn, South End Press 2002).

²⁶ Joined cases C-402/05 P & C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351 (‘Kadi (Decision of the ECJ)’); *Her Majesty’s Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants) Her Majesty’s Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant) R (on the application of Hani El Sayed Sabari Youssef) (Respondent) v Her Majesty’s Treasury (Appellant)* [2010] UKSC 2 (‘A. K. M v HM Treasury (No 1)’).

²⁷ Article 39, UN Charter.

²⁸ *ibid.*, Article 40.

41. Article 41 embodies David Kennedy's belief that 'rather than operating as a stasis against violence, institutional energy must be harnessed to do the work of war without violence, or to deploy violence on behalf of peace.'²⁹

Article 41 states that '[t]he 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. This may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.' As such, the invocation of economic sanctions within the UN relies on action by the UNSC.

It was clear from the decision to give the UNSC so much power with respect to the invocation of economic sanctions that their development within the UN framework would be reactionary. The predecessor to the UN, the League of Nations, also had provisions for economic sanctions in its Covenant.³⁰ Under Article 16 of the Covenant Members of the League of Nations were obligated to automatically cease economic relations with any state that was deemed to have committed an act of war against any other member. This created uncertainty as to how economic sanctions would actually be triggered.³¹ A Committee of Jurists determined that the states themselves would be required to decide when an act of war had occurred that necessitated economic sanctions.³² This led to a situation whereby three states refused to take economic sanctions against Italy for its invasion and colonisation of Ethiopia on grounds that it did not constitute an act of war.³³

In contrast the UN Charter places the decision that economic sanctions are necessary in the hands of the UNSC, with states only responsible at the point of implementing the measures that the UNSC decides upon. This provides a trigger mechanism as to when economic sanctions will be invoked. However, it leaves the power to invoke economic sanctions in the hands of a small minority of states and, as such, economic sanctions (and other measures) may be taken in circumstances that do not reflect the will of the majority of UN Member States.

²⁹ David Kennedy 'The Move to Institutions' (1987) 8 Cardozo Law Review 841 at 867.

³⁰ The Covenant of the League of Nations (1919), 225 Parry 195.

³¹ Jeremy Matam Farrall, *UN Sanctions and the Rule of Law* (Cambridge University Press 2007) 53.

³² Abi-Saab (n12), 40.

³³ George Scott, *The Rise and Fall of the League of Nations* (Hutchinson 1973) 340; Abi-Saab (n7), 40.

Under the UN Charter, UNSC resolutions adopted on non-procedural matters³⁴ require the affirmative vote of all P-5 members plus of at least four non-permanent members.³⁵ This gives the P-5 an absolute veto on the invocation of economic sanctions, which will be discussed later in this chapter. Although not envisaged in the UN Charter, it has become accepted practice that the voluntary abstention from or non-participation in a UNSC vote does not prevent a non-procedural resolution from passing.³⁶ This allows resolutions to pass in situations where states, although not rejecting the measures, are not offering their full support to them.

1.3 The Purposes of Economic Sanctions

The effectiveness of economic sanctions is a contentious issue that has been debated by commentators.³⁷ This thesis, therefore, does not deal with whether or not UN economic sanctions are *per se* effective. However, in order to assess different sanctions regimes, the reasons why UN economic sanctions have developed in certain ways and the best way for them to progress in future, it is necessary to consider whether sanctions, as implemented, have been effective. It is also clear that, irrespective of how effective they actually are, economic sanctions are being used by the UNSC. For that reason the means of making sanctions regimes as effective as possible are considered. In order to consider the effectiveness of economic sanctions the possible purposes of UN economic sanctions may need to be understood. Economic sanctions have three principle purposes: coercion, punishment and symbolism. Often, as is demonstrated in this chapter, systems of sanctions will have more than one underlying purpose.

³⁴ The distinction between procedural and non-procedural matters is not defined in the UN Charter. Simma has commented that 'in practice, decisions are clearly procedural matters if this is stated expressly or if the decision is adopted despite the negative vote of a permanent member of the SC' (Bruno Simma, Stefan Brunner and Hans-Peter Kaul, 'Article 27' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, Oxford University Press 2002) 486.

³⁵ Article, 27(3), UN Charter.

³⁶ Simma, Brunner and Kaul (n 34) 493, 499; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 at 22, para 22 ('*The Namibia Case*').

³⁷ For an extended discussion on the effectiveness of economic sanctions see: Hufbauer, Schott, Elliot and Barbara Oegg (n15); Fred Grunfeld, 'The Effectiveness of United Nations Economic Sanctions' in Willem JM van Genugten and Gerard A de Groot, *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights, A Multi-disciplinary Approach* (Intersentia 1999) 113; Makio Miyagawa *Do Economic Sanctions Work?* (St Martin's Press 1992);.

1.3.1 Coercion

Coercive economic sanctions are taken in the belief that economic sanctions may persuade a state, person or entity to amend their behaviour. The intended coercive effect of economic sanctions taken within the UN framework is that they will be used to force states to abstain from or to cease threatening or breaching international peace and security. This is clear from the fact that the UN Charter endows the UNSC with the power to take economic sanctions for the purpose of '[maintaining] or [restoring] international peace and security.'³⁸

Barber has stated that '[i]n each case in which sanctions have been applied there appear at first sight to be clear objectives relating to changes in the behaviour of the government against whom they are directed'³⁹ and this position reflects UN behaviour. UNSC resolutions will always cite coercive reasons for the invocation of economic sanctions and this has caused comment that 'the generally accepted purpose and emphasis of such sanctions lies in modifying behaviour'.⁴⁰

For example, with respect to economic sanctions taken against Libya, states were required to take economic sanctions until such time as the UNSC determined that the Libyan Government had committed to ceasing all forms of terrorist action and assistance and responded to requests by various states in relation to the legal procedures related to the attacks carried out against Pan Am flight 103 and Union de transports aeriens flight 772.⁴¹

Equally, economic sanctions were put in place against Haiti following the overthrow of the legitimate Government led by President Jean-Bertrand Aristide. Resolution 841 set out the measures, which it said would be put in place if attempts, being undertaken at that time by the UN Special Envoy for Haiti and the Organization of American States, to establish a political dialogue with the Haitian parties, failed.⁴² These examples show that UN economic sanctions are adopted for coercive purposes. They also demonstrate that coercion may be pre-emptive in the sense of economic sanctions being threatened if certain issues are not resolved within a specified timeframe, as well, as being taken immediately in response to the occurrence of undesired behaviour.

However, further analysis shows that in practice the UN's use of economic sanctions as coercive measures is somewhat uneven. For example, economic sanctions against Southern Rhodesia,

³⁸ UN Charter, Article 39.

³⁹ James Barber, 'Economic Sanctions As a Policy Instrument' (1979) 55 International Affairs 367, 368.

⁴⁰ August Reinisch, 'Developing Human Rights and Humanitarian Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 AJIL 851.

⁴¹ UNSC Res 748 (31 March 1992) UN Doc S/RES/748 ('UNSC Resolution 748').

⁴² UNSC Res 841 (19 June 1993) UN Doc S/RES/841 ('UNSC Resolution 841').

which will be discussed in considerable detail in chapter 2, were clearly intended to have a coercive effect. They were put in place for the purpose of bringing an end to illegal white rule in Southern Rhodesia and remained in place until there was regime change at which point they were lifted.⁴³ In contrast, economic sanctions against Iraq, discussed in chapter three, were on their face coercive in that they were stated to be for the purpose of forcing Iraq to withdraw from Kuwait, which it had invaded.⁴⁴ However, even following its withdrawal from Kuwait economic sanctions against Iraq remained in place. As such, it is clear that they were intended to have a purpose beyond coercion.

It is important to note that, in order for an economic sanctions regime to have coercive power, the economic sanctions put in place must have such a detrimental effect on the target that it perceives that detriment to outweigh the advantages it was getting as a result of the undesired behaviour that resulted in sanctions being put in place.

1.3.2 Punishment

Economic sanctions are inherently punitive.⁴⁵ The use of the word 'sanction', itself connotes a form of punishment even in cases where the purpose of the measures put in place is not simple punishment.⁴⁶ This belief in the punitive nature of economic sanctions was also reflected in US Secretary of State, Hillary Clinton's, assertion in 2009 that Iran would, if diplomacy failed to bring about a favourable outcome, be subjected to 'crippling' sanctions.⁴⁷ An example of purely punitive economic sanctions was the provision for reparations by Germany contained in the Treaty of Versailles following World War I.⁴⁸ In Part VIII of the Treaty Germany accepted responsibility for causing 'all the loss and damage' to the allied countries, to the associated governments and to their nationals and agreed to make compensation for damage to the civilian population of the allies and associated states and to their property. Compensation was available not only for damage caused by Germany itself but also damage caused by its allies.⁴⁹ These provisions were purely punitive in nature because the action that had

⁴³ UNSC Res 217 (20 November 1965) UN Doc S/RES/217 ('UNSC Resolution 217').

⁴⁴ UNSC Res 661 (6 August 1990) UN Doc S/RES/661 ('UNSC Resolution 661').

⁴⁵ Padraic Foran, 'The Cuban Embargo and Human Rights: Intercultural Human Rights Law Review Annual Symposium: October 24, 2008: Why Human Rights Confuse the Sanctions Debate: Towards a Goal-Sensitive Framework for Evaluating United Nations Security Council Sanctions' (2009) 4 Intercultural Human Rights L Rev 123.

⁴⁶ Steve Charnovitz, 'Rethinking WTO Trade Sanctions' (2001) 95 AJIL 792.

⁴⁷ Tim Reid, 'Hilary Clinton: US will organise 'crippling' Iran sanctions if diplomacy fails' *Times Online* (22 April 2009) available at: http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6149692.ece [last accessed 17 January 2011].

⁴⁸ Treaty of Versailles (1919), Reparations, Part VIII, Annex I.

⁴⁹ *ibid.*

caused their invocation was in the past and had ceased by the time that the sanctions were taken so they had no coercive value and there was little benefit that Germany could gain from complying with the measures.

Commentators dispute the punitive quality of UN economic sanctions. In order for a state, person or entity to be punished it must have committed a wrong for which it is punished. Abi-Saab states that UN economic sanctions are based on a 'finding' of wrongdoing by the UNSC, which would be consistent with sanctions having a punitive function.⁵⁰ And Al-Anbari has described the invocation of UN economic sanctions under Articles 39 and 41 of the UN Charter as 'the equivalent to a judgment'⁵¹ that a wrong has been committed. This contrasts with Crawford's position as has already been noted. He states that no international wrong need be committed in order for economic sanctions to be taken in accordance with the UN Charter.⁵²

An example of punitive UN economic sanctions are the economic sanctions put in place against Iran for its purported involvement in the development of nuclear technology for use in nuclear weapons.⁵³ These sanctions are coercive in that they aim to force Iran to conform to the terms of the non-proliferation treaty. However, they must also be perceived as having a punitive element as, whilst they are taken as a result of the failure to adhere to the terms of the treaty, they have not been taken against states that are known to have nuclear weapons and, as such, there is inherent condemnation of Iran itself, and not simply of its nuclear policies, in the invocation of UN economic sanctions against it.

The premise behind economic sanctions taken against states is that, once the civilian population feels their effects it will seek to change its leadership to one that behaves in accordance with required norms. The difficulty with punitive economic sanctions is that they may have the undesired side effect of prompting the citizens of a country to offer support to the regime being targeted if they feel that economic sanctions are in some respect unfair. This occurred in Southern Rhodesia when the white elite modified their behaviour on the basis of economic sanctions where they felt that the sanctions were unreasonable. This behaviour modification led to economic sanctions being less effective in that instance than they would otherwise have been.⁵⁴ The punitive intent of economic sanctions, may also be diminished in circumstances where a black market economy develops, as those

⁵⁰ Abi-Saab (n 12), 39.

⁵¹ A Amir Al-Anbari, 'The Impact of United Nations Sanctions on Economic Development' in Vera Gowlland Debbas (ed) *United Nations Sanctions and International Law* (Kluwer Law International 2001) 371-372.

⁵² Crawford, 'The Relationship Between Sanctions and Countermeasures' (n 13) 57.

⁵³ UNSC Res 1737 (27 December 2006) UN Doc S/RES/1737.

⁵⁴ See section 2.4.2.2.1.

involved in such a market may actually benefit from the impact of economic sanctions thus defeating their punitive intent.⁵⁵

1.3.3 Symbolism

It has been said of economic sanctions that ‘they reinforce public commitment to the norm that has been violated and generate a sense of civic virtue, without incurring unacceptable domestic political costs’ and that a ‘militant sense of virtue and moral superiority... attaches to the application of economic sanctions’.⁵⁶

Economic sanctions have a symbolic value and may be established for the purpose of conveying a particular message rather than achieving a tangible result, such as behaviour modification or punishment. Symbolic economic sanctions may be used in two ways. Firstly, they may be used to convey to a target that its behaviour is being viewed unfavourably. Secondly, they may be used to convey to the wider public, which has raised concerns about the target’s behaviour, that their concerns are being taken seriously by the sender state or organisation. The symbolic value of economic sanctions may therefore explain why they are sometimes taken in instances where they seem extremely unlikely to succeed.

Commentators support the opinion that economic sanctions are used for symbolic purposes. Eland has stated that ‘policymakers believe sanctions have utility as foreign policy tools, even if stated compliance goals are not likely to be met.’⁵⁷ He offers the statements of President Carter at the time of the US grain embargo against the Soviet Union for its invasion of Afghanistan, which he states ‘seem to suggest that [Carter] wanted to use sanctions to demonstrate U.S. resolve and to deter the Soviets from further aggression into more strategic areas’ as an example of symbolic sanctions.⁵⁸ He further states, ‘[i]n an anarchic and chaotic international environment, symbolic goals are important and may even be vital.’⁵⁹

⁵⁵ Sven Kuhn von Burgsdorff, ‘The Cuban Embargo and Human Rights: Intercultural Human Rights Law Review Annual Symposium; October 24, 2008: The Effectiveness of Economic Sanctions: The Case of Cuba’ (2009) 4 Intercultural Human Rights Law Review 31.

⁵⁶ W Michael Reisman and Douglas L Stevick, ‘The Applicability of International Law Standards to United Nations Economic Sanctions Programmes’ (1998) 9 EJIL 86 at 94.

⁵⁷ Ivan Eland, ‘Economic Sanctions as Tools of Foreign Policy’, in David Cortright and George A Lopez (eds), *Economic Sanctions, Panacea or Peacebuilding in a Post-Cold War World?* (Westview Press 1995) 30.

⁵⁸ *ibid.*

⁵⁹ *ibid.* 31.

Barber has suggested that there are two aspects to symbolic sanctions.⁶⁰ The first is that symbolic sanctions 'demonstrate a willingness and capacity to act' and the second is that they 'anticipate or deflect criticism.'⁶¹ Furthermore, he states that '[i]t is generally important for governments to be seen to be concerned and busy.'⁶² This reflects the fact that where one state has behaved in a manner which could warrant economic sanctions, other states have to consider their own reputations in relation to whether or not they should take some sort of action. This is particularly relevant to states that consider themselves to be world leaders in political, military or social terms as they have often placed themselves in a position that would be undermined if they stood by and ignored the undesirable actions of another state particularly if those actions threaten citizens. This is a view held by Galtung who states, '[w]hen military action is impossible for one reason or another, and when doing nothing is seen as tantamount to complicity, *then something has to be done to express morality*, something that at least serves as a clear signal to everyone that what the receiving nation has done is disapproved of. If the sanctions do not serve instrumental purposes they can at least have *expressive functions*.'⁶³

It should be noted, however, that not all commentators agree that economic sanctions are often invoked for symbolic purposes. Drezner argues strongly against this theory.⁶⁴ He relies heavily on three studies⁶⁵ to say that 'the empirical support for the [invocation of symbolic sanctions] is weak at best and insignificant at worst.'⁶⁶ However, his position can be criticised on two grounds. Firstly, Drezner relies on there being a single, visible motivation for economic sanctions. Elliot contradicts this position suggesting that the actual goal of economic sanctions may have little or no relation to the stated aim of behaviour modification and proposing such alternative goals as deterring third states from engaging in undesirable behaviour, 'enhanc[ing] the sender's credibility amongst its allies' and 'as a response to

⁶⁰ Barber (n 39), 380.

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ Johan Galtung, 'On the Effects of International Economic Sanctions: With Examples from the Case of Rhodesia', (1967) 19 World Politics 378 at 411-412.

⁶⁴ Drezner (n 10), 60-68.

⁶⁵ James Blessing, 'The suspension of foreign aid by the United States, 1927-1948' (PhD thesis, State University of New York at Albany 1975); Richard Ellings, *Embargoes and World Power: Lessons From American Foreign Policy* (Westview Press 1985); Alfred Cooper Drury 'Economic sanctions and presidential decisions: models of political rationality' (PhD thesis, Arizona State University 1997).

⁶⁶ Drezner (n 10), 67.

domestic political pressure.’⁶⁷ In practice it is clear economic sanctions do not always have only one aim⁶⁸ and symbolism should not be disregarded as a secondary motivation behind their adoption.

Secondly, Drezner limits his consideration to economic sanctions taken by a single state and expressly excludes sanctions taken by international organisations.⁶⁹ As action taken by the UN is a collective measure, agreed by states, they have a stronger symbolic value than sanctions taken by a single state.

Whilst it is submitted here that economic sanctions can and do have symbolic purposes it must be noted that the symbolic purpose of an economic sanctions regime will not be indicated on the face of the resolution adopting such a regime and may not be readily apparent from consideration of the regime.

1.4 The Use of UN Economic Sanctions

Although economic sanctions were included in the UN Charter from its inception, they were not invoked by the UNSC until twenty years later.⁷⁰ Even then it was not until the 1990’s that economic sanctions were taken with any frequency. This section discusses the background to this uneven adoption of economic sanctions by the UNSC.

1.4.1 The Cold War

The Cold War paralysed the collective security system envisaged by the UN Charter ‘because it depended on a community of interests among the major powers that did not then exist.’⁷¹ This had a profound effect on the work of the UNSC during that time. The main states involved in the Cold War, the US and the Soviet Union, were P-5 members and, as such, could, and did, use their veto powers to prevent the passing of resolutions supported by their Cold War counterpart. That this was occurring seems evident from the inactivity of the UNSC during that time period⁷² and is also born out by a

⁶⁷ Kimberly Ann Elliot, ‘Factors Affecting the Success of Sanctions’ in David Cortright and George A Lopez (eds), *Economic Sanctions. Panacea or Peacebuilding in a Post-Cold War World?* (Westview Press 1995) 51.

⁶⁸ For example, to return to the case of economic sanctions against Iraq, they had the stated purpose of forcing Iraq to withdraw from Kuwait but remained in place after that had occurred. As such, they clearly had more than one purpose.

⁶⁹ Drezner (n 10), 104.

⁷⁰ UNSC Resolution 217 (n 43).

⁷¹ Michael J Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War* (United States Institute of Peace Press 2006) 5 (‘Matheson, *Council Unbound*’)

⁷² There were 647 UNSC resolutions during the first 45 years that the UN was in existence a figure that was almost met during the next 10 years when 620 resolutions were made – David Cortright and George A Lopez, *The*

statistical analysis of the vetoed resolutions. In the period between 1946 and 2002 there were 294 vetoes of resolutions by the UNSC with only 7 of those coming from the post-cold War period 1991-2002.⁷³ Despite rhetoric to the contrary, once resolutions relating to the election of either a new Secretary General or new members are removed from the analysis, the bulk of those vetoes were almost equally distributed between the US and the USSR with the former exercising its power on 70 occasions and the latter 71 times.

Action was taken by the UNSC in response to North Korea's invasion of South Korea in 1950.⁷⁴ This was only made possible by the USSR's boycott of the UNSC during that period in response to the inclusion of Nationalist China rather than the People's Republic of China. It was a mistake that the USSR vowed never to repeat.⁷⁵

This combination of a relatively inactive UNSC and its frequent resort to its power of veto was detrimental not only to the functioning of the UN system but also to the resolution of international disputes. Upon the founding of the UN, the UNSC was charged with responsibility for international peace and security. In the absence of it functioning as intended, there was no provision for any other organ to perform its role and, as such, during the Cold War the 'international community struggled from conflict to conflict with no other legal basis for action but the inadequate authority of other UN organs, the uncertain authority of regional organizations, occasional authority drawn from specific treaties and the residual sovereign powers of states.'⁷⁶

The result was that during the Cold War period only two cases of economic sanctions were taken by the UNSC. Southern Rhodesia, as already mentioned, was one and South Africa, against whom an arms embargo was taken,⁷⁷ was the other. In contrast, following the Cold War, from 1990 to 1999, the UNSC adopted economic sanctions regimes against twelve states.⁷⁸ This disparity highlights the extent to which the political situation at a given time can impact on the adoption of economic sanctions.

Sanctions Decade Assessing UN Strategies in the 1990s (Rienner 2000), 1 ('Cortright and Lopez, *The Sanctions Decade*').

⁷³ Peter Wallensteen and Patrik Johansson, 'Security Council Decisions in Perspective' in David M Malone (ed), *The Security Council From the Cold War to the 21st Century* (Rienner 2004) 20.

⁷⁴ UNSC Res 82 (25 June 1959) UN S/RES/82.

⁷⁵ Paul Kennedy, *The Parliament of Man The United Nations and the Quest for Global Governance* (Penguin Books 2006), 56.

⁷⁶ Matheson, *Council Unbound* (n 71) 5.

⁷⁷ UNSC Res 181 (7 August 1963) UN Doc S/RES/181 ('UNSC Resolution 181').

⁷⁸ The states sanctioned between 1990 and 1999 were: Iraq, the former Yugoslavia, Libya, Liberia, Somalia, parts of Cambodia, Haiti, parts of Angola, Rwanda, Sudan, Sierra Leone and Afghanistan. Cortright and Lopez, *The Sanctions Decade* (n 72), 1-2.

1.4.2 Situations Where UN Economic Sanctions are Used

At the time of the founding of the UN the focus of the world, in the aftermath of World War II, was on the cessation and prevention of inter-state conflict. In fact, one of the motivations behind the US support for the UN was the hope that it could avoid involvement in future wars.⁷⁹ That the drafters did not envisage that the UNSC would interfere in internal conflicts can be seen in the reservation of powers to resolve such disputes to the states in which they were occurring.⁸⁰ It may be assumed that the drafters of the UN Charter intended that economic sanctions would be used, as they were against Iraq,⁸¹ in a situation where one state used force against another, because the UN itself was established for the purpose of avoiding such conflicts. However, the drafters of the UN did not envisage that the Cold War would stifle the use of economic sanctions for more than four decades, nor, that by the time economic sanctions were being used that the political landscape would have changed to the extent that it did with a resulting impact on the situations in which economic sanctions were invoked.

The first change was the speed at which decolonisation took place. Antonio Cassese has said that at San Francisco it was 'generally believed that the UN could achieve general disarmament in a decade, whereas decolonialization would take a century.'⁸² In fact, disarmament may never happen whereas decolonisation began almost immediately after the foundation of the UN with the Philippines and Jordan in 1946, peaked in the 1960s and continued until East Timor regained its independence in 1999. Few territories now remain as colonies.⁸³

This decolonisation process impacted on the situations in which economic sanctions were taken. This can be seen in the very first case of economic sanctions, which will be discussed in the next chapter. In the early to mid 1960s Southern Rhodesia, which had been under British control was slowly gaining independent powers. In 1965 Ian Smith, leader of the ruling white minority party, made a UDI, which was contrary to the wishes of the black majority at that time. The purpose of sanctions in that instance was to force the Smith government and white minority in Zimbabwe to allow the majority of Zimbabweans to gain their independence.

⁷⁹ Robert C Hilderbrand, *Dumbarton Oaks, The Origins of the United Nations and the Search for Postwar Security* (University of North Carolina Press 1990) 5.

⁸⁰ Article 2(7), UN Charter.

⁸¹ UNSC Resolution 841 (n 42).

⁸² Antonio Cassese, *International Law* (Oxford University Press 2001) 285.

⁸³ Examples include: Virgin Islands (USA), New Caledonia (France) and Tokelau (New Zealand) and some remaining British overseas territories, such as, the Turks and Caicos Islands, the Cayman Islands and Bermuda. The status of Western Sahara also remains uncertain.

Secondly, the fall of communism in the early 1990s prompted the use of economic sanctions. It caused not only the dissolution of the Soviet Union, which progressed peacefully, but also the dissolution of FRY, which progressed less peacefully. The Socialist Federal Republic of Yugoslavia, was composed of six SRs: SR Bosnia and Herzegovina, SR Croatia, SR Macedonia, SR Montenegro, SR Slovenia and SR Serbia. Upon its dissolution, it became clear that Serbia and Croatia were not satisfied with independence for all SRs along the borders in place at that time.⁸⁴ Of particular interest was the Bosnian territory, which led to fighting on that territory. An arms embargo ensued.⁸⁵ This can be seen as another aspect of conflict arising out of states gaining independence, albeit in this instance as the result of the dissolution of a federated state.

Thirdly, UN economic sanctions have been used in attempts to resolve the internal disintegration of states. In the case of Haiti economic sanctions were used when a military coup overthrew Jean-Bertrand Aristide, the first president to be elected in elections monitored by the international community.⁸⁶ Sanctions were established in the form of a petrol and arms embargo in June 1993.⁸⁷ They were suspended following a negotiated peace agreement in August of that year only to be reinstated following the collapse of that agreement.⁸⁸ Full economic sanctions were instigated in May 1994.⁸⁹ Ultimately, however, the situation was resolved by the deployment of a UNSC authorised multinational force.⁹⁰ Fourthly, economic sanctions were also taken, in the form of an arms embargo, as a result of ethnic cleansing in Rwanda.⁹¹

These cases demonstrate that the UNSC uses economic sanctions in a wide range of situations. Of particular note is that, over time, despite the suggested intention of the drafters that sanctions be used in inter-state conflict and the requirement that the action being condemned should threaten or breach 'international' peace and security, economic sanctions have been invoked increasingly in situations that take place wholly within the borders of one state.

⁸⁴ Allan Little and Laura Silber, *The Death of Yugoslavia* (Revised edn. Penguin 1996) 190-191.

⁸⁵ UNSC Res 713 (25 September 1991) UN Doc S/RES/713 ('UNSC Resolution 713').

⁸⁶ Elizabeth D Gibbons, *Sanctions in Haiti. Human Rights and Democracy under Assault* (Praeger 1991) 1.

⁸⁷ UNSC Resolution 841 (n 42).

⁸⁸ Gibbons (n 86), 5-6.

⁸⁹ UNSC Res 917 (6 May 1994) UN Doc S/RES/917 ('UNSC Resolution 917').

⁹⁰ UNSC Res 940 (31 July 1994) UN Doc S/RES/940 ('UNSC Resolution 940').

⁹¹ UNSC Res 918 (17 May 1994) UN Doc S/RES/918 ('UNSC Resolution 918').

1.4.3 The Absence of Consistent UNSC Practice

As outlined above, the UNSC has used economic sanctions in a variety of situations. The language of Chapter VII was purposefully left open to allow the UNSC to 'take enforcement action in a broad range of cases and not to subject it to severe restrictions in its decision when to act.'⁹² This makes it difficult to precisely ascertain the situations in which economic sanctions may be taken as the range of situations has grown incrementally. However, one way of identifying situations in which economic sanctions may be taken is to consider similar situations in which they were previously invoked. This would of course require that the UNSC behave consistently with respect to the situations in which it invokes economic sanctions, which has not proven to be the case.

The clearest example of the inconsistent UNSC policy was seen during the 2008 rejection of economic sanctions against Zimbabwe. Both the EU⁹³ and the US⁹⁴ have had targeted economic sanctions in place against senior government members and other high-ranking officials in Zimbabwe for some time. On 11 July 2008, the UNSC debated whether it too should take action in the form of a tabled resolution containing an arms embargo and economic sanctions targeted at Robert Mugabe and 13 of his supporters.⁹⁵ In some respects Zimbabwe was an ideal target for economic sanctions given the humanitarian crisis that could be attributed to poor management of the country, the dispossession of citizens' lands and the questionable elections. However, the tabled resolution was defeated. Nine states voted in favour of the resolution, one abstained⁹⁶ and five voted against it, including both China and Russia exercising their veto powers.⁹⁷

Following earlier examples UN economic sanctions could have been invoked against Zimbabwe for two reasons. Firstly, the situation in Zimbabwe did come within the UNSC's previous understanding of Article 39. Although the Russian delegate had raised concerns that the UNSC was 'artificially elevating [the problems of Zimbabwe] to the level of a threat to international peace and

⁹² Jochen Frowein and Nico Krisch, 'Article 41' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, Oxford University Press 2002), 718.

⁹³ Common Position 2004/161/CFSP (OJ L 50, 20.2.2004, p 66); Council Regulation (EC) No 314/2004 (OJ L 55, 24.2.2004, p 1); Interpretative Council statement: OJ L 57, 25.2.2004, p 1. As amended most recently by: Council Decision 2010/121/CFSP (OJ L 49, 26.2.2010, p 30) Notice to listed natural person (OJ C 48, 26.2.2010, p 1) and Commission Regulation (EU) No 173/2010 (OJ L 51, 2.3.2010, p 13)

⁹⁴ Executive Order 13288 of March 6, 2003, Blocking Property of Persons Undermining Democratic Processes or Institutions in Zimbabwe, Federal Register Vol 68, No 46 March 10, 2003; Executive Order 13391 of November 22, 2005, Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe, Federal Register Vol 70, No 226, November 25, 2005; Executive Order 13469 of July 25, 2008, Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe, Federal Register Vol 73, No 146, July 29, 2008.

⁹⁵ UNSC Verbatim Record (11 July 2008) UN Doc S/PV/5933 ('Record of the 5933rd Meeting of the UNSC').

⁹⁶ Indonesia.

⁹⁷ The other states that voted against it were: South Africa, Vietnam and Libya.

security’,⁹⁸ and the activities that provoked economic sanctions were taking place wholly on Zimbabwean territory, the AU had passed a resolution expressing concern that the internal violence would spread throughout the sub-region.⁹⁹ The situation was also described by the deputy Secretary-General as the ‘single greatest challenge to regional stability in southern Africa.’¹⁰⁰ Furthermore, the UNSC has in previous cases, most notably Somalia,¹⁰¹ allowed for economic sanctions to be adopted for the purpose of rectifying a domestic situation based on the premise that the internal instability could ultimately spread beyond the borders of the state. In fact, it has been asserted that the UNSC is increasingly circumventing the provisions of Article 2(7) by determining that extreme internal violence, as existed in this instance, constitutes a threat to the peace in accordance with the provisions in Chapter VII of the UN Charter.¹⁰² It was therefore open to the UNSC to treat Zimbabwe similarly and adopt economic sanctions.

Secondly, the situation in Zimbabwe was sufficiently seriously to warrant economic sanctions being taken. The government of Zimbabwe had, in May 2005, started a slum-clearance program. Zimbabwe had, in some areas, experienced an increase in informal trading and the construction of unauthorised housing for people previously displaced and the purported aim of the slum-clearance program was to enforce by-laws in relation to, *inter alia*, illegal structures.¹⁰³ What transpired was the systematic destruction of property, including not only residential dwellings, but stalls and markets, a Catholic refuge for Aids orphans, a secondary school, a World Bank-funded public lavatory and a Sunni Mosque, without sufficient warning to inhabitants or the provision of suitable alternative accommodation.¹⁰⁴ Despite the creation of a follow-up programme, Operation Restore Order, it was estimated that 700,000 people had been left homeless, unemployed or both and that a further 2.4 million were affected in varying degrees with respect to access to food and water, education and healthcare.¹⁰⁵ Allegations of deaths caused by demolition were also made in relation to Operation

⁹⁸ Record of the 5933rd Meeting of the UNSC (n 95).

⁹⁹ African Union Summit Resolution on Zimbabwe, Adopted at the Ordinary Session of the African Union Assembly, 1 July 2008, Sharm El Sheikh, Egypt.

¹⁰⁰ ‘Africa Urged to Act on Zimbabwe’ *BBC News Online* (30 June 2008) (available at: <http://news.bbc.co.uk/2/hi/africa/7480584.stm> [last accessed 9 June 2010]).

¹⁰¹ UNSC Res 733 (23 January 1992) UN Doc S/RES/733.

¹⁰² Nigel D White, *The Law of International Organisations* (Manchester University Press 1996) 94.

¹⁰³ Zimbabwe Human Rights NGO Forum, ‘Order out of Chaos, or Chaos out of Order? A Preliminary Report on Operation “Murambatsvina”’ June 2005 (‘Report of the Zimbabwe Human Rights NGO Forum’).

¹⁰⁴ *ibid.*

¹⁰⁵ Anna Kajumulo Tibaijuka, UN Special Envoy on Human Settlements Issues in Zimbabwe, ‘Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina’ 18 July 2005.

Restore Shelter.¹⁰⁶ These occurrences breach both domestic law¹⁰⁷ and international human rights norms and were caused by negligent government policies. Zimbabwe was in any case experiencing extreme humanitarian difficulties, with hyperinflation and an estimated unemployment rate of 60 per cent causing food shortages amongst the general population, which were attributed to mismanagement by the Mugabe government.¹⁰⁸ Furthermore the elections of March 2008 had seen violence directed against supporters of the opposition political party¹⁰⁹ and detention of opposition leaders.¹¹⁰

These reasons would, in light of earlier sanctions, seem sufficient for sanctions to be legally invoked in this case. Additionally given criticism in previous cases such as FRY and Sierra Leone that sanctions had not been taken early enough with resulting mass humanitarian suffering it would not be unreasonable for sanctions to be taken in this case.

There were valid reasons why the UN did not impose economic sanctions against Zimbabwe. Firstly, as noted, there was a belief that the situation did not qualify as threatening international peace and security. Talks, chaired by the government of South Africa, were ongoing between the various parties in Zimbabwe at that point¹¹¹ and there was concern that a resort to sanctions might damage the progression of those talks.

Secondly, there was a legitimate fear that Mugabe would react badly to economic sanctions being imposed. Sanctions were criticized as an 'expression of imperialist conquest' during the UNSC debates on sanctions against Zimbabwe¹¹² and an African diplomatic source was quoted as saying that Mugabe blames limited western sanctions for Zimbabwe's economic crisis and '[i]f he feels the talks are not going his way, he could well use the economy as an excuse for a state of emergency and try and cling on a little longer.'¹¹³

Thirdly, there may have been concern that targeted economic sanctions would have an indirect impact on the already precarious humanitarian situation in Zimbabwe.

¹⁰⁶ Amnesty International, 'Zimbabwe: More deaths mass evictions continue unabated' 30 June 2005.

¹⁰⁷ Press Statement by the Law Society of Zimbabwe on Operation Restore Order, June 2005

¹⁰⁸ Report of the Zimbabwe Human Rights NGO Forum (n 103).

¹⁰⁹ Neil MacFarquhar and Celia W Dugger, 'Security Council Urges Zimbabwe to Halt Violence' *The New York Times* (New York 24 June 2008).

¹¹⁰ Peta Thornycroft, 'Zimbabwe police detain MDC leader Morgan Tsvangirai for second time in three days' *Telegraph* (London 6 June 2008).

¹¹¹ Mr. Kumalo (South Africa), Record of the 5933rd Meeting of the UNSC (n 95).

¹¹² *ibid.*

¹¹³ Jonathan Clayton, 'Zimbabwe slashes ten zeros off its currency' *Times Online*, 30 July 2008. Available at: <http://www.timesonline.co.uk/tol/news/world/article4428615.ece> [last accessed: 8 June 2010].

Despite this reasoning, however, the refusal to take economic sanctions against Zimbabwe must still be viewed as being inconsistent with the previous practice of the UNSC.¹¹⁴ As such, previous examples of economic sanctions will not be a good indication of the situations in which economic sanctions will be taken by the UNSC.

1.5 Characteristics of UN economic sanctions

Although it is difficult to delineate the precise situations in which economic sanctions may be adopted by the UNSC, economic sanctions taken by that body have certain characteristics, which will be discussed in this section.

1.5.1 Binding and Supreme

The most significant feature of UN economic sanctions is that, when they are taken by the UNSC under Chapter VII of the UN Charter, they are binding on Member States and are considered to take precedence over any other obligations of a state.

Their binding nature comes from the UN Charter. The wording of Article 41 does not itself place a clear obligation on Member States to implement UN economic sanctions.¹¹⁵ It provides that the UNSC ‘may call upon’ Member States to implement measures, including economic sanctions, which it has decided upon. However, Article 25 states that Member States ‘agree to accept and carry out the decisions of the Security Council in accordance with the [UN] Charter’. When the two articles are read together it is clear that Member States were intended, in seeking membership of the UN and signing up to the Charter, to concede to follow the decisions of the UNSC, which would therefore make those decisions binding on Member States.¹¹⁶ The binding quality of UNSC measures taken under Chapter VII has been borne out by UN practice,¹¹⁷ statements of courts¹¹⁸ and state practice.¹¹⁹

¹¹⁴ For example, see the case of economic sanctions taken against Southern Rhodesia and Haiti, put in place as a result of political action taken by factions that did not represent the majority of citizens, which would justify sanctions taken on the basis of the March 2008 elections. See also sanctions taken against Angola as a result of internal violence and the unwillingness of the UNITA to adhere to the election result.

¹¹⁵ Frowein and Krisch (n 92), 739.

¹¹⁶ James A Nafziger and Edward M Wise, ‘Section IV: The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations’ (1998) 46 American Journal of Comparative Law 421.

¹¹⁷ In UNSC Resolution 232, the first binding sanctions put in place against Southern Rhodesia, the UNSC at article 3 reminded states that they were obliged under article 25 of the charter to implement the measures. Furthermore, UNSC Res 670 (25 September 1990) UN Doc S/RES/670 (‘UNSC Resolution 670’) and UNSC Res 1306 (5 July 2000) UN Doc S/RES/1306 (‘UNSC Resolution 1306’) remind Member States of their “obligations” under previous resolutions.

¹¹⁸ See: *Prosecutor v Tadic* (Jurisdiction) (1996) 3 Intl Human Rights Rep 578 (‘*Tadic Case*’); *A. K. M v HM Treasury (No 1)* (n 26); *Case Concerning Questions of Interpretation and Application of the 1971 Montreal*

Despite these provisions, in practice not all UNSC resolutions are considered binding. The language used in the particular resolution as well as its context are considered indicative as to whether a resolution places obligations on Member States to undertake certain action or merely requests that they do so.¹²⁰ Higgins suggests that adopting a resolution under Chapter VII or using the phraseology of Article 39 (that is to say stating that the measure is taken as a result of a state breaching or threatening the peace or committing an act of aggression) is not determinative of the binding nature of that resolution.¹²¹ However, this has not proven to be the case with respect to economic sanctions where the only non-binding sanctions resolutions were those taken against Southern Rhodesia and South Africa, which were not stated to be taken under Chapter VII and which clearly indicated that states were requested (rather than obliged) to take the measures contained within them.¹²² Subsequent resolutions have explicitly stated that they are being taken under Chapter VII and have, therefore, been binding on Member States.¹²³

Although the binding nature of some of its resolutions is accepted, whether the UNSC is constrained in any way by international law when adopting resolutions, and if so to what extent, has been the subject of extensive legal commentary¹²⁴ and is discussed later in this thesis.¹²⁵ However, the question as to whether the UNSC can be bound by any legal norm in taking action should not be used to imply that Member States are not bound by UNSC resolutions in circumstances where the resolutions were intended to be binding. There is no provision for Member States to refuse to implement binding UNSC resolutions, even where the UNSC has acted beyond its powers, nor is there any provision for a review of such measures to ensure that the UNSC has acted within its powers.¹²⁶ Therefore, whether Member States are or are not bound by UN economic sanctions is left in the hands

Convention Raising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Request for the Indication of Provisional Measures: Order) [1992] ICJ Rep 114 at 126 para 42 ('*The Lockerbie Case*').

¹¹⁹ See Geneviève Burdeau and Brigitte Stern, 'France' in Vera Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions A Comparative Study* (Martinus Nijhoff Publishers 2004) 197.

¹²⁰ *The Namibia Case* (n 36); Rosalyn Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Article 25 of the Charter?' (1972) 21 ICLQ 270.

¹²¹ Higgins, 281.

¹²² UNSC Resolution 181 (n 77); UNSC Resolution 217 (n 43).

¹²³ See for example UNSC Res 232 (16 December 1966) UN Doc S/RES/232, which was the first case of binding economic sanctions against Southern Rhodesia ('UNSC Resolution 232').

¹²⁴ See for example: Elias Davidsson, 'Legal Boundaries to UN Sanctions' (2002) 7 International Journal of Human Rights 1; Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 229-232; Erika de Wet, 'Holding the United Nations Security Council accountable for human rights violations through domestic courts: A case of 'be careful what you wish for'?' in Jeremy Farrall and Kim Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press 2009) 143; Matheson, *Council Unbound* (n 71) 34-37.

¹²⁵ See section 5.2.3.1.

¹²⁶ Matheson, *Council Unbound* (n 71) 37.

of the UNSC itself and they are obligated to implement resolutions that contain binding economic sanctions.

As well as binding Member States, UNSC economic sanctions also take precedence over their other obligations. Article 103 of the UN Charter states that '[i]n the event of 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.'¹²⁷ It is clear therefore that UN obligations supersede the obligations of states under other 'international agreements' and the ICJ has accepted this position.¹²⁸

Cameron, however, calls the supremacy of UN obligations into question.¹²⁹ He argues that 'it is not possible for states to *avoid* constitutional/international human rights obligations by creating an international body and delegating to it the power to do something they are unable to do by themselves'.¹³⁰ However, he does not support this argument convincingly. His thesis is that, whilst states can accept the supremacy of some international norms over their own domestic norms, as EU Member States have with respect to EC law, 'when public international law purports to force a state to do something against its own fundamental constitutional principles, then a state's acceptance of the reasonableness of the international claim is put sorely to the test.'¹³¹ He further states 'it is an open question, when push comes to shove, which will be preferred.'¹³² To bolster his argument he uses the example of the UNSC ordering a state to detain indefinitely a person suspected of preparing a terrorist attack or to commit such a person to death. A recent House of Lords decision has indicated that a state faced with the former example would be obliged to detain the suspect, irrespective of whether such detention would be permissible in domestic law.¹³³ Even if the latter example was to be considered, and it is difficult to imagine such a situation arising in light of international sentiment with respect to the death penalty, surely Cameron cannot be suggesting that Member States need only consider their UN obligations as supreme so long as they are also compatible with their other obligations. The purpose of article 103, to which states have agreed to adhere to by taking membership of the UN, is that in cases

¹²⁷ Article 103, UN Charter.

¹²⁸ *The Lockerbie Case* (n 118), 126 para 42.

¹²⁹ Iain Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (2003) 72 *Nordic Journal of International Law* 159 at 179 ('Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights').

¹³⁰ *ibid.*

¹³¹ *ibid.* 179-180.

¹³² *ibid.* 180.

¹³³ *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58.

of conflict states are obliged to comply with their UN obligations. It is completely contrary to any logic to suggest that article 103 ceases to apply in circumstances where there is a real conflict between domestic and UN obligations. Cameron himself seems to recognise this when he states that it may be possible to develop a system of legal safeguards to reconcile human rights norms with targeted sanctions norms because such a system would not be necessary if his argument that states could simply refuse to implement economic sanctions on grounds that they violate human rights was accurate.

In contrast with Cameron's position, some commentators submit that article 103's remit is in fact not limited to 'international agreements.' Bernhardt indicates in Simma's text that the application of article 103 means that obligations on Member States that emanate from binding UNSC resolutions take precedence over any other commitment that Member States have¹³⁴ and further states that 'it would not be correct to assume that obligations under the Charter do not prevail in relation to [other] obligations.'¹³⁵ Boyle and Chinkin note that this supremacy 'cannot be over-estimated' and suggest that it may mean that economic sanctions take precedent over even *jus cogens* norms¹³⁶

Rain Liivoja in her thoughtful piece on the scope of article 103 seeks to counter this suggestion.¹³⁷ She looks to the preparatory materials relating to the UN Charter in order to support her contention that article 103 is limited to international agreements. She notes that the Advisory Committee suggested a supremacy clause 'which expressed the superiority of Charter-based obligations over 'any other international obligations to which [the Members of the UN] are subject'.¹³⁸ However, this formulation proved contentious and was therefore replaced by article 103 limiting supremacy to 'international agreements'. This she contends proves that the supremacy clause was not intended to extend beyond international agreements.

However, as will be discussed in chapter 5 with respect to whether the UNSC is obliged to take human rights into account in adopting resolutions, the UN Charter is a living instrument. Liivoja accepts this and attempts to further bolster her view by looking at the practice of the UNSC and UNGA, which she argues show no support for the contention that article 103 stretches beyond international agreements.¹³⁹ In considering the practice of the UNSC and the UNGA she focuses solely on statements that they have made, for example she comments on the 1980 Friendly Relations

¹³⁴ Rudolph Bernhardt, 'Article 103' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, Oxford University Press 2002) 1295.

¹³⁵ *ibid.* 1298-1299.

¹³⁶ Boyle and Chinkin (n 124), 233.

¹³⁷ Rain Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 ICLQ 583.

¹³⁸ *ibid.* 604.

¹³⁹ *ibid.* 607.

Declaration adopted by the UNGA which she notes states that ‘where obligations arising *under international agreements* are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.’¹⁴⁰ She also states that UNSC resolutions have not made a clear connection between customary international law and Article 103.¹⁴¹ Liivoja does not, however, actually consider the practice, as opposed to writing, of the UNSC and of UN Member States, which makes clear that article 103 obligations extend beyond international agreements.

In practice, it is clear that in some instances the implementation of economic sanctions has breached customary international law in some cases and yet the UNSC has proceeded on the basis that states were obliged to implement economic sanctions despite this conflict. For example, sanctions against Iraq have been charged with causing the death of some of the civilian population, thus breaching the right to life.¹⁴² Equally, when sanctions were in place against FRY it was stated that they resulted in maintenance of the *status quo*, limiting the possibility of self-defence and thus caused more deaths.¹⁴³ The UNSC has also adopted targeted economic sanctions that have authorised internment.¹⁴⁴ By putting in place binding economic sanctions that breach customary international law the UNSC is indicating that states are required to fulfil their obligations under the UN Charter not only in cases of conflict with international agreements but also in cases of conflict with customary international law. Furthermore, despite these breaches of customary international law states have applied these sanctions. Yes, in some cases, humanitarian exemptions have been authorised but even where they have proven inadequate states have continued to apply sanctions. Thus, the practice of both the UNSC and states prove that article 103 applies not only to international agreements but also to other obligations on UN Member States.

There have been recent judicial decisions, however, discussed in chapter 6, which have called into question the supremacy of UN economic sanctions.

¹⁴⁰ *ibid*, 606.

¹⁴¹ *ibid*, 607.

¹⁴² See section 3.5.2.

¹⁴³ Shale Horowitz, *From Ethnic Conflict to Stillborn Reform The Former Soviet Union and Yugoslavia* (Texas A&M University Press 2005) 197.

¹⁴⁴ UNSC Res 1546 (8 June 2004) UN Doc S/RES/1546 (‘UNSC Resolution 1546’).

1.5.2 Political

UNSC economic sanctions are, because of the way in which they are adopted, political instruments. The UNSC has five permanent members and ten non-permanent members that rotate every two years. Its decisions are inherently political because they are taken by a small number of states. A good example of the political nature UNSC decisions can be seen in China's veto of a peacekeeping mission to Guatemala in 1997. Speaking about the use of its veto, the Chinese government spokesman, Shen Guofang, said that whilst China did not object in principle to the provision of UN peacekeepers to Guatemala it was forced to use its veto powers because of Guatemala's stance on Taiwan.¹⁴⁵ Guatemala has long recognised Taiwan and Mr Shen stated that it could not expect 'on the one hand to do something that harms the sovereignty and territorial integrity of China while on the other hand requesting China to cooperate in peacekeeping'. The most contentious issue with respect to the political nature of UN economic sanctions is the veto powers of the UNSC mentioned above.¹⁴⁶

Because resolutions on non-procedural matters, which include economic sanctions resolutions, can only be adopted by the UNSC if they are not vetoed by any P-5 member, the P-5 have the power to block the adoption of economic sanctions. These veto powers arose because of the belief of the great powers that they were somehow superior to the other states and that, as they would have the responsibility for enforcing the UN Charter, they should have the ultimate decision as to when intervention in a given situation should take place.¹⁴⁷ In the initial stages the USSR insisted that the veto should cover all of the work of the UN whether relating to international peace or security or otherwise. The US pushed for a veto on substantive political issues, for example membership questions, determining threats to the peace and enforcement actions.¹⁴⁸ This could have proved to be the breaking point for the UN. At Dumbarton Oaks the issue was once more addressed with Stalin expressing concern that the more limited US-proposed veto would allow for the USSR, as had been the case in the League of Nations, to be ousted from the organisation.¹⁴⁹ Once reassured that that would not be possible the USSR conceded to the US position on the matter.¹⁵⁰ The voting structure that ultimately ensued allows for the P-5 to veto any question put to the UNSC that does not relate to purely

¹⁴⁵ Patrick E Tyler, 'China Asserts Taiwan's Ties to Guatemala Led to Veto' *The New York Times* (New York 12 January 1997).

¹⁴⁶ See final paragraph section 1.2.

¹⁴⁷ Stephen Schlesinger, *Act of Creation The Founding of the United Nations* (Westview 2003) 55.

¹⁴⁸ *ibid.* 55.

¹⁴⁹ *ibid.* 58.

¹⁵⁰ *ibid.* 59.

procedural matters. As mentioned, the UNSC has also in practice declined to treat an abstention from voting as a vote against a proposal.

At the time that the UN was founded, in light of the failure of the League of Nations, an organisation that had not been supported by all of the major powers, there was awareness amongst states that in order for this new organisation to succeed the great powers would have to remain within its framework.¹⁵¹ If getting the great powers to support an organisation that was being charged with averting any further world wars depended on allowing those states a veto the other states were willing to concede to this. However, the fact that the veto powers of the US and the Soviet Union paralysed the UNSC during the cold war called into question the practicality of the veto. And there remains concern to date that the veto is too frequently imposed by the UNSC for political rather than substantive reasons in situations where UN action is necessary and that its use may make the UN 'appear wavering or passive'.¹⁵²

Furthermore, in the current geo-political situation where the P-5 is no longer wholly representative of the strongest global military and economic powers, there are significant difficulties with the veto remaining in place. Firstly, it obviously gives those states more power than other Member States as they are involved in, and have the possibility of unilaterally quashing, all UNSC resolutions that deal with materially important issues. This has been criticised recently in light of the perceived links between Russia and China and regimes that are involved in the sponsoring of terrorism and the illegal proliferation of WMDs.¹⁵³ Secondly, the veto completely protects the P-5 from being subjected to the same rules as other Member States because each P-5 member can veto any proposed sanctions against itself. As noted when discussing the mooted sanctions against Zimbabwe, this opens the P-5 and the UNSC generally to criticism that it is imposing the will of some states, and the ideological beliefs of those states, on others.¹⁵⁴

¹⁵¹ Inis L. Claude, *Swords into Plowshares The Problems and Progress of International Organization* (4th edn, Random House 1984) 147.

¹⁵² Inocencio Aria, 'Shumanitarian Intervention: Could the Security Council Kill the United Nations?' (2002) 23 Fordham International Law Journal 1005.

¹⁵³ Alexander Benard and Paul J Leaf, 'Modern Threats and the United Nations Security Council: No Time for Complacency (A Response to Professor Allen Weiner)' (2010) 62 Stanford Law Review 1395.

¹⁵⁴ Katherine Hughes, 'Note: Operation "Drive Out the Trash": The Case for Imposing Targeted United Nations Sanctions Against Zimbabwean Officials' (2007) 76 Fordham Law Review 323.

1.5.3 Media-driven

Over the last 50 years media and communications technology has changed considerably. Former UN Secretary-General Boutros Boutros-Ghali has said that 'television has changed the way the world reacts to crises.'¹⁵⁵ Whereas before the main sources of news were newspapers or radio broadcasts, today news images are available immediately not only on television but also 24 hours a day via the Internet. This increase in reporting has impacted on the use of economic sanctions.

Broadly two trends can be seen in economic sanctions as a result of increased media attention and capability. Firstly, there is an increase in symbolic economic sanctions. When the situation in FRY reached crisis point the UN was already committed in both Iraq and Somalia. News reports of FRY showed 'images of atrocities and refugees and media reports of rape, detention camps, and ethnic cleansing.'¹⁵⁶ These images led to calls from the citizens of states that their government do something to ameliorate the situation. As the UN was already committed to action in other states economic sanctions were invoked out of a desire to be seen to be attempting to resolve the crisis.

Secondly, media attention on a given situation can result in action being taken in an attempt to resolve the situation. For example, sanctions taken against Somalia as opposed to Sudan, have, in circumstances where the two states were experiencing similar difficulties, been attributed to the varying levels of information available with respect to the two situations.¹⁵⁷

Media attention not only has an impact on economic sanctions but economic sanctions also have an impact on media output, as seen in FRY. As sanctions took hold it became almost prohibitively expensive to produce newsprint and other forms of media communication. The independent media outlets remaining, that spoke out in opposition to the conflict, became easier to silence.¹⁵⁸ Additionally, those who fled Yugoslavia tended to be the educated, middle classes, who would be expected to have supported human rights and antiwar causes being espoused by the remaining independent media.¹⁵⁹

It is inevitable that when a state is in crisis there will be some impact on its media. It should, however, be noted that there has also been criticism of the level of influence and control that states, particularly the US, exercise over media outlets on their territory, particularly in times of conflict.¹⁶⁰

¹⁵⁵ Paul Kennedy (n 75), 233.

¹⁵⁶ Julia Devin and Jaleh Dashti-Gibson, 'Sanctions in the Former Yugoslavia: Convolved Goals and Complicated Consequences' in Thomas G Weiss, David Cortright, George A Lopez and Larry Minear (eds), *Political Gain and Civilian Pain Humanitarian Impacts of Economic Sanctions* (Rowman & Littlefield 1997) 155.

¹⁵⁷ Paul Kennedy (n 75), 233.

¹⁵⁸ Cortright and Lopez, *The Sanctions Decade* (n 72), 75.

¹⁵⁹ *ibid.*

¹⁶⁰ Murrey Marder, 'Operation Washington Shield' *Neiman Reports* (22 December 1999).

This may mean that public perception, and therefore the public influence over what states are sanctioned, is misfocused as it relies on inaccurate information. It has been stated that during Operation Desert Shield major news organisations complained that the press was virtually totally controlled by the Pentagon and that from its outset the White House, Defence Department, State Department and other government agencies used numerous techniques to ‘manipulate the substance, flow and timing of non-military as well as military information to protect and support the Administration’s policy.’¹⁶¹

Furthermore, the censoring of media output aside, newspaper reporting is not always accurate. In 2004 USA Today journalist Jack Kelley was found to have fabricated substantial parts of some of his stories.¹⁶² Yassin Abdullah Kadi, who was sanctioned by the EU as a result of UNSC measures, has argued that he was sanctioned at the request of the US, which relied on allegations made in a number of articles including one written by Mr Kelley.¹⁶³

1.6 Methodology

The focus of this thesis is on the development of economic sanctions within the UN framework. Of key importance is the interesting relationship between the UN as an institution, which creates obligations for its members, and its Member States. For that reason research for this thesis has been undertaken on a doctrinal and, to some extent, multidisciplinary basis. Case studies are used throughout the thesis to illustrate key aspects of UN economic sanctions and to demonstrate how economic sanctions developed.

It is clear that a predominantly legal positivist approach underpins this thesis because of some of the key assumptions and arguments that underline the analysis throughout it. Firstly, as has been established in this chapter, Member States are bound by UN economic sanctions, irrespective of their merit, because they have agreed to be so bound under Articles 25 and 41 of the UN Charter. Secondly, it is submitted that, following the text of the UN Charter, economic sanctions are supreme over all other legal obligations of Member States. This is the case even where applying economic sanctions causes an outcome (such as for example significant humanitarian difficulties) that is not perceived to satisfy the ideals of justice or democracy or protect fundamental rights. Finally, this thesis does discuss how UN economic sanctions may be made more effective and cause less collateral damage but it does

¹⁶¹ *ibid.*

¹⁶² Blake Morrison, ‘Ex-USA Today reporter faked major stories’ *USA Today* (19 March 2004).

¹⁶³ Case T-85/09 *Yassin Abdullah Kadi v European Commission* (judgment of 30 September 2010), para 78 (‘*Kadi* (Decision of the GC)’)

not argue that these concerns impact on the fundamental power of the UNSC to take economic sanctions. It is suggested that in order for such measures to be improved the UNSC has to concede to this improvement because they are entitled, in any event, to adopt economic sanctions.

However, there are elements of critical legal theory in the thesis too and it is accepted that states may be reluctant to implement economic sanctions if they perceive them as somehow being illegitimate. What distinguishes this from being a purely critical legal analysis is that, whilst it is recommended that the difficulties that cause states reluctance to apply UN economic sanctions be addressed, it is not accepted that states are entitled to refuse to implement sanctions so nor that by doing so they undermine the legality of such measures.

The key source of primary law used has been the UNSC resolutions themselves. UN economic sanctions regimes are established through the use of UNSC resolutions. The resolutions outline the measures being put in place in a particular sanctions regime, state the reasons for such measures and indicate their purpose. By looking at various sanctions resolutions comparatively it is possible to trace how UNSC economic sanctions have developed over time. Material surrounding the adoption of these UNSC resolutions, which include the verbatim reports of UNSC meetings, statements of regional organisations and the reports of other UN entities, has also been analysed where necessary. The other frequently cited primary source has been the UN Charter from which the UNSC's powers to adopt economic sanctions and the obligations on Member States with respect to economic sanctions emanate.

Underpinning consideration of economic sanctions themselves is consideration of how the UN functions and how it interacts with its members. These issues were considered by reference to the UN Charter, reports of states and decisions of the ICJ. In order to consider how economic sanctions function in practice, analysis of the reports of UN entities charged with monitoring sanctions, the reports of NGOs and other organisations outside of the UN and the reports of states have been collated and examined in order to ascertain to what extent economic sanctions were being implemented, the difficulties surrounding their implementation and the causes of such difficulties. With respect to targeted economic sanctions the key judicial decisions, of both regional and domestic courts, that deal with economic sanctions, have also been analysed for the purpose of ascertaining legal challenges to economic sanctions.

Secondary sources were also used extensively throughout the thesis. Secondary legal material is used to bolster legal argument. The use of case studies highlights the importance of context in the UN economic sanctions framework. The case studies in this thesis identify difficulties with economic sanctions and demonstrate how sanctions regimes have developed whilst in place. However, it is important that those issues are correctly attributable to the sanctions measures themselves and not to the historical, political or economic context in which they are being implemented. Context is also important with respect to states' obligations to implement UN economic sanctions as the political and economic context will impact on the capacity and willingness of states to implement UN economic sanctions. For these reasons, as well as secondary legal material, material from other disciplines including history, politics, economics and philosophy have been considered. Newspaper reports are also used for context and to outline key political events.

The law and materials used in this thesis are up to date as of 31 January 2011.

1.7 Structure of the Thesis

The remainder of the thesis looks at how the use of economic sanctions by the UNSC has unfolded and how each episode of sanctions has impacted on subsequent regimes.

The next chapter considers the first case of UNSC economic sanctions, which were those taken against Southern Rhodesia. It discusses the history of Southern Rhodesia. It analyses why economic sanctions were taken in that case and the arguments made by states for and against such measures. It considers the sanctions regime that was put in place and the difficulties that arose with economic sanctions in that case.

The third chapter focuses on the second case of UNSC economic sanctions, sanctions against Iraq, which became the most comprehensive UNSC economic sanctions regime to date. It looks at the background to the invocation of economic sanctions before discussing how the sanctions regime developed. It considers the efficacy of economic sanctions against Iraq. Finally it examines the humanitarian problems that arose in the Iraqi context and the attempts made to resolve the crisis.

The fourth chapter concentrates on the development of UN targeted economic sanctions. It outlines the different types of targeted economic sanctions. It considers potential modifications to UNSC targeted economic sanctions with a particular emphasis on the European Conferences.

The fifth chapter looks at the two predominant systems of UNSC targeted economic sanctions, those created under UNSC Resolution 1267 and those created under UNSC Resolution 1373.¹⁶⁴ It considers how those sanctions regimes developed and the changes that they brought to economic sanctions within the UN. It also discusses the problems that became prevalent in UN targeted economic sanctions as they progressed.

The sixth chapter explores jurisprudential challenges to UN targeted economic sanctions. It outlines two key cases and considers the consequences of those decisions and why those decisions were actually handed down. Finally, it proposes the development of a new institution to prevent such decisions from reoccurring and from stifling the UNSC in its use of economic sanctions going forward.

The final chapter concludes the thesis by outlining the major features of UN economic sanctions that can be distilled from the analysis and by discussing how economic sanctions need to develop in order to retain their usefulness in the UN framework.

¹⁶⁴ UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267 ('UNSC Resolution 1267') and UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 ('UNSC Resolution 1373').

Southern Rhodesia – The First Case of UN Economic Sanctions

Although economic sanctions were clearly provided for in the UN Charter,¹⁶⁵ they were not invoked by the UNSC until almost two decades after its inception when they were taken against Southern Rhodesia. Consideration of this episode of economic sanctions will therefore provide an insight as to how states initially perceived the UNSC's power to adopt sanctions.¹⁶⁶

In order to discover the initial opinions of states towards the idea of economic sanctions as a legal power of the UNSC, this chapter will undertake a case study of Southern Rhodesia under international economic sanctions stretching from 1966¹⁶⁷ until 1979.¹⁶⁸ Initially, the chapter will explain why Southern Rhodesia has been selected as a starting point for discussing UN economic sanctions practice. The second part of the chapter will briefly outline the history of Southern Rhodesia. The third section will consider the various arguments put forward by states as to why sanctions were or were not permissible in the case of Southern Rhodesia. Finally, it will outline the resolutions that implemented economic sanctions against Southern Rhodesia and discuss the initial difficulties therein.

2.1 Why Southern Rhodesia?

Southern Rhodesia has been chosen as the first case study in this thesis for three reasons. Firstly, it was the first UN example of economic sanctions. Secondly, it provides a closed system of sanctions. Thirdly, there is the perception that Southern Rhodesia was the 'perfect state' to be paralysed by economic sanctions and thus forced to amend its behaviour.

¹⁶⁵ See Articles 39, 41 and 42 UN Charter.

¹⁶⁶ Please note that throughout this chapter the native Southern Rhodesian population is described variously as the black population, the native population and African and the European settler population is described as the white population, the settlers and European. This reflects the terminology used in commentary in relation to economic sanctions against Southern Rhodesia.

¹⁶⁷ The first binding economic sanctions were contained in UNSC Resolution 232 (n 123) although non-binding sanctions had been instigated a full year earlier in UNSC Resolution 217 (n 43).

¹⁶⁸ UNSC Res 448 (30 April 1979) UN Doc S/RES/448 ('UNSC Resolution 448').

2.1.1 The First UN Example

The primary reason for selecting Southern Rhodesia is that it was the first case of UN economic sanctions. Whilst, as previously outlined in chapter 1,¹⁶⁹ economic sanctions were not a creation of the UN Charter, their use by the UNSC has differed from previous sanctions regimes in three key manners. Firstly, they require a previously unprecedented level of international cooperation.¹⁷⁰ Secondly, the P-5 alone has the power to veto economic sanctions.¹⁷¹ Thirdly, economic sanctions are binding on UN Member States.¹⁷² These changes have shaped the development of international economic sanctions, and, as such, sanctions prior to 1948 are of limited use in analysing the current conception of international economic sanctions. The result is that the case of Southern Rhodesia, as the first UNSC sanctions regime, is the most appropriate starting point for this thesis.

Of further interest in relation to Southern Rhodesia's status as the first target of UN economic sanctions is the UNSC's reluctance to invoke economic sanctions prior to that time. As outlined in chapter 1, the Cold War impacted on the UNSC's use of economic sanctions¹⁷³ but other factors may have also contributed to this initial reluctance. The UNSC may have been of the opinion that no other state had demonstrated the type of behaviour that should provoke the invocation of economic sanctions until Southern Rhodesia. Alternatively, the initial hesitation in taking economic sanctions may have simply related to the fact that the UN Charter was a new instrument and as a result there was uncertainty as to its application. What is clear, however, is that the political situation in Southern Rhodesia and the reasons given by states for supporting economic sanctions in this case are extremely important indicators of how states viewed economic sanctions at that point in time.

2.1.2 A Closed System of Sanctions

Southern Rhodesia is not only no longer subject to economic sanctions - it no longer exists. This has two main advantages for the purpose of this thesis. Firstly, it allows the case of Southern Rhodesia to act as an effective base line as the situation, both in terms of the sanctions themselves and in terms of the conditions that prevail whilst a state is subject to sanctions, is no longer in flux. One of the difficulties with obtaining material relating to sanctions regimes is that the situations in which

¹⁶⁹ Section 1.1.

¹⁷⁰ In order for economic sanctions to be properly enforced all states must implement them.

¹⁷¹ See section 1.5.1.

¹⁷² See section 1.5.1.

¹⁷³ Section 1.4.1.

economic sanctions are taken tend not to create favourable conditions for the transmission of accurate and comprehensive economic data to sources outside of the state where they would be properly archived. This is compounded in situations like that of Southern Rhodesia where following the end of sanctions the state became Zimbabwe, which resulted in new institutions being set up that may or may not have had access to material previously held by Southern Rhodesian institutions. Nor is it always ideal for the organisations that generally monitor the economy of a state to do so, when, quite aside from the sanctions themselves, there is a difficult political situation that necessitated the invocation of economic sanctions. Information, relating to the impact of economic sanctions on a state subjected to them is often more readily available following the cessation of the sanctions when the state targeted is in a better position to share information with the relevant analysts.

Secondly, economic sanctions against Southern Rhodesia were only ended, by Resolution 460, when their stated aim was achieved and the sanctioned regime had made a commitment to change leading to majority rule.¹⁷⁴ Of course, economic sanctions themselves may not have been wholly responsible for the regime change in Southern Rhodesia and, in fact, given the period of time over which sanctions extended, it seems likely that there may have been many factors that ultimately contributed to the change. This does not, however, diminish the fact that economic sanctions stretched the length of the crisis in Southern Rhodesia and may have contributed its solution.

Whilst some commentators favour the assertion that economic sanctions can be most accurately assessed following their cessation, with Geiss even going as far as to indicate that any comprehensive assessment of sanctions should include consideration of their long-term effects, it is not a universally accepted approach.¹⁷⁵ Eland has suggested that '[o]ne, two, or ten years from the initiation of the episode [of economic sanctions], it is easy to overlook the complexity of the environment surrounding the imposition of the measures'.¹⁷⁶ This reflects the discussion in the previous chapter about the purposes of economic sanctions and Elliot's view that they may have many goals beyond the rectification of undesirable behaviour of the targeted state.¹⁷⁷

However, it is submitted that the use of a system of economic sanctions that has come to an end allows for a thorough examination of the strengths and weaknesses of that particular system of

¹⁷⁴ UNSC Res 460 (21 December 1979) UN Doc S/RES/460 ('UNSC Resolution 460').

¹⁷⁵ Robin Geiss, 'Humanitarian Safeguards in Economic Sanctions Regimes – A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-Up Assessment of Long-Term Effects', (2005) 18 *Harvard Human Rights Journal* 167.

¹⁷⁶ Eland (n 57), 29-48.

¹⁷⁷ Elliot (n 67), 51.

sanctions. It also ensures that comprehensive material on the economic sanctions regime is available, both primary and secondary material produced at the time of the sanctions and analysis produced at a later date. Southern Rhodesia is a good example of such a system.

2.1.3 The 'Perfect Target'?

The final reason that Southern Rhodesia has been chosen is the suggestion, as mooted by Anglin, that it was the ideal target for economic sanctions.¹⁷⁸ This concept of the 'perfect target' relates not to the legal thresholds that need to be met before sanctions may be imposed but to other factors such as geographical, economic and social factors. As an initial point it is worth considering what exactly a 'perfect target' is. The mythical 'perfect target' would be a state that, if UN sanctions were imposed against it, would find its economy paralysed to the extent that it would have no choice but to immediately comply with the wishes of the UN in order to survive. It is difficult to even offer a coherent outline of the characteristics of such a state as some factors would seem simultaneously to make a state both a good and a poor target for economic sanctions. For example, an island state subjected to economic sanctions might find it relatively easy to continue to import and export goods due to the difficulty and cost involved in policing a long coastline. This might imply that an island state generally would not make a good target state and yet, on the other hand, the fact that all imports and exports have to be transported by sea or by air may make breaching sanctions more difficult, which would imply that an island state would be a good target for economic sanctions.

There are of course some factors that are less likely to be capable of flexible interpretation. A state that relies heavily on importing and exporting goods rather than being largely self-sufficient is more likely to feel the impact of sanctions. Equally if a state receives a lot of international aid, the cessation of such aid due to economic sanctions could make it more likely to comply with the desires of the UN. However, not only is it unlikely that a state would have all of the criteria that would make it a 'perfect target', it is equally unlikely that even if a state did fulfil those criteria that sanctions would act completely as predicted in paralysing the economy of such a state.

The reasons given by Anglin as to why Southern Rhodesia constituted an ideal target for economic sanctions were that Southern Rhodesia was a small, landlocked country, which was particularly vulnerable to external pressure. As such, its geographical situation would make it more

¹⁷⁸ Douglas G Anglin, 'UN Economic Sanctions Against South Africa and Rhodesia' in David Leyton-Brown (ed), *The Utility of Economic Sanctions* (St. Martins Press 1987) 23-56.

amenable to the potential effect of economic sanctions. He stated that 'the theory of sanctions postulates a dual linkage between external trade and economic deprivation, and between economic deprivation and political change.'¹⁷⁹ In the case of Southern Rhodesia, his argument suggested, the target was heavily reliant on a small number of trading partners, who, with the exception of Zambia, were not equally reliant on it for trade. Furthermore, Southern Rhodesia's exports focused on a small number of products. Those two factors combined to leave Southern Rhodesia, at least on paper, particularly susceptible to having its economy paralysed by economic sanctions. Anglin's suggestion raises two potential questions which will be dealt with briefly here. Firstly, was Southern Rhodesia the perfect target, and secondly, why, in any case, is that important?

It is difficult to say with absolutely certainty that Southern Rhodesia was the perfect target for economic sanctions. What commentators have said is that Southern Rhodesia 'should have been, in theory, extremely vulnerable to the application of sanctions'.¹⁸⁰ Strack bases this statement on Southern Rhodesia's adherence to Galtung's description of the ideal target for economic sanctions.¹⁸¹ Galtung sets out eight criteria that would make a state susceptible to economic sanctions: (i) imports are necessary for key sectors of the economy of the sanctioned state; (ii) there is no internal substitute for those imports; (iii) a large percentage of the imports come from the sanctioning state(s); (iv) there is no external substitute for the imports which the sanctioned state can switch to; (v) the imports are either only a very small percentage of the sanctioning states exports or can be exported to another state; (vi) exports from the sanctioned state are mainly sent to the sanctioning state(s); (vii) exports from the sanctioned state can be obtained elsewhere therefore causing little economic damage to the sanctioning state or in the alternative cannot be obtained elsewhere and this information is used by the sanctioning state to prove that it is willing to be deprived of the product rather than engage in economic interaction with the sanctioned state; and (viii) trade relations are visible and could potentially even be controlled (examples given are of an island state, a state surrounded by impenetrable terrain or bordered by nations that uphold the sanctions).¹⁸²

Strack argues that Southern Rhodesia came within these criteria. He states, with respect to exports from Southern Rhodesia, that 33 per cent were of one product (tobacco) and 40.5 per cent were of two (tobacco and asbestos) and that 25.3 per cent were exported to one state (Zambia) and 47.2 per

¹⁷⁹ *ibid.*, 33.

¹⁸⁰ Harry R Strack, *Sanctions The Case of Southern Rhodesia* (Syracuse University Press 1978) 15.

¹⁸¹ Galtung (n 63), 384.

¹⁸² *ibid.*

cent were exported to two states (Zambia and the UK).¹⁸³ Imports present equally persuasive evidence with 32 per cent focused in one area (machinery and transport equipment) and with 30.4 per cent imported from one trading partner (the UK) and 53.3 per cent from two partners (the UK and South Africa).¹⁸⁴ These limited trading partners could have paralysed the economy of Southern Rhodesia had they adhered properly to economic sanctions and in the absence of either adequate substitutes being available or there being time to develop such substitutes.

Leys has argued that this reliance on a small number of products and the effects of that reliance had already been seen in the impact on the former Federation of Central Africa¹⁸⁵ of the collapse of copper prices (1956-8) and beginnings of recession in the US (1957-8).¹⁸⁶ Additionally, Strack indicates that a high percentage of Southern Rhodesia's national income came from exports (38 per cent) and was spent on imports (34 per cent).¹⁸⁷ Furthermore, the fact that Southern Rhodesia was land-locked meant that exports could theoretically be prevented with ease, as they had to enter the port of another state and traverse that state's territory before ever reaching Southern Rhodesia.

An additional point that should be made at this stage, in relation to Southern Rhodesia's suitability as a target for sanctions, is that the black majority in Southern Rhodesia were stated to have been in favour of sanctions.¹⁸⁸ This support not only lent credibility to the perception of economic sanctions as a valuable tool in dealing with the situation in Southern Rhodesia it also increased the likelihood of their success as the vast majority of the population was in favour of them and thus were, at least theoretically, less likely to make attempts to breach them.

With these points in mind it could be said that whilst Southern Rhodesia might not be described as 'the perfect' target for economic sanctions it could certainly be regarded as a state that should have been very responsive to sanctions. However, as will be discussed later, there were difficulties with economic sanctions against Southern Rhodesia such that they ultimately remained in place for more than a decade. Why then is this important? Put simply, if Southern Rhodesia was a susceptible target of economic sanctions and yet issues arose with respect to Southern Rhodesia those issues or problems must be attributable to the sanctions themselves rather than any difficulties that arose with Southern Rhodesia as a target.

¹⁸³ Strack (n 180), 15.

¹⁸⁴ *ibid.*

¹⁸⁵ The word Federation here refers to the Federation of Central Africa (1953-1964) comprising Southern Rhodesia, Northern Rhodesia (now Zambia) and Nyasaland (now Malawi).

¹⁸⁶ Colin Leys, *European Politics in Southern Rhodesia* (Clarendon Press 1959) 24.

¹⁸⁷ Strack (n 180), 16.

¹⁸⁸ *ibid.* 30.

2.2 The History of Southern Rhodesia

This section gives the historical context of sanctions against Southern Rhodesia. It firstly outlines the history of Southern Rhodesia until the Federation was created in 1953. The Federation itself is discussed in section two, whilst the section thereafter discusses the issue of white oppression. The final section examines the UDI.

2.2.1 A Brief History of Southern Rhodesia to 1953

Southern Rhodesia was, prior to its colonisation, inhabited predominantly by two tribes, the Mashona and the Matabele.¹⁸⁹ Towards the end of the nineteenth century Britain, whilst still eager to extend its territory, became increasingly reluctant to commit to the occupation of new territories and, therefore, allowed private companies to undertake occupation on its behalf. On 29 October 1889 a Royal Charter was granted to the BSAC to enable it to exploit the Rudd Concession.¹⁹⁰ This concession, granted by Lobengula, King of the Ndebele to CJ Rhodes in 1888, gave Rhodes the mineral rights to lands interpreted as extending over what became known as Southern Rhodesia in return for a monthly payment and military equipment.¹⁹¹ It has been described as 'one of the very few cases in Africa of acquisition by undisguised conquest'.¹⁹²

There was conflict from the outset. While the Royal Charter empowered the BSAC to settle and administer the area, the Rudd Concession contained no such rights. Occupation therefore took place by military force.¹⁹³ In 1890 the first European settlement took place at Salisbury (Mashonaland). Within three years there were 3,000 settlers and in 1893 a force was raised which drove Lobengula from Matabeleland and brought the whole territory under BSAC control although there remained periods of unrest.¹⁹⁴ The original focus of the settlers had been on the belief that Southern Rhodesia was rich in gold. When this failed to materialise the focus shifted to the use of land for farming.¹⁹⁵ This

¹⁸⁹ Leonard T Kapungu, *Rhodesia: The Struggle for Freedom* (Orbis Books 1974) ('Kapungu, *The Struggle for Freedom*').

¹⁹⁰ Alfred J Wills, *An Introduction to the History of Central Africa, Zambia, Malawi and Zimbabwe* (4th edn, Oxford University Press 1985) 41.

¹⁹¹ *ibid.*, 135-136.

¹⁹² Reginald Austin, *Racism and apartheid in southern Africa, Rhodesia, A book of data* (The Unesco Press 1975) 22.

¹⁹³ Leys (n 186), 5.

¹⁹⁴ Wills (n 190), 151.

¹⁹⁵ *ibid.*, 196.

resulted in native Africans being pushed from their land and used as labourers for the European settlers.¹⁹⁶

In 1918 the Judicial Committee of the Privy Council held that the land did not belong to the BSAC but to the Crown¹⁹⁷ and by 1922 a settlement was reached whereby the BSAC relinquished control of the territory and the settlers got to decide the future fate of Southern Rhodesia.¹⁹⁸ Faced with a choice of either joining in union with South Africa or becoming a self governing colony, the settlers opted for the latter,¹⁹⁹ with 5,989 people voting for union with South Africa and 8,744 for becoming a self governing colony.²⁰⁰ In 1923 the UK annexed Southern Rhodesia.²⁰¹ The settler government set about establishing and consolidating white supremacy by legislation, which will be discussed later.

2.2.2 Federation

The idea of a federation of Nyasaland, Northern and Southern Rhodesia had been suggested but not pursued for a number of years. In 1952 this suggestion solidified. The Federation of Central Africa was created by the UK in 1953. It comprised Southern Rhodesia (now Zimbabwe), Northern Rhodesia (now Zambia) and Nyasaland (now Malawi). Once created, the Federation exercised much of the power previously exercised at state level, however, the power of advancement over the African population remained within the ambit of each of the territories.²⁰²

It was during this period that the African population in Southern Rhodesia began to search for its voice. A number of political parties were formed, for example: 1957 – the African National Congress, banned in 1959; 1960 – the National Democratic Party, banned in 1961; 1961 – the Zimbabwe African People's Union, banned in 1962. 1961 also saw a referendum for a new constitution, which further entrenched racial inequalities. Those Africans entitled to vote largely boycotted the referendum but began to strike and riot. This brought the situation in Southern Rhodesia to the attention of the UK.²⁰³

¹⁹⁶ Kapungu, *The Struggle for Freedom* (n 189) 5.

¹⁹⁷ Special Reference as to the Ownership of the Unalienated Land in Southern Rhodesia, Report of the Lords of the Judicial Committee of the Privy Council, delivered the 29th July 1918.

¹⁹⁸ *ibid.*, 13.

¹⁹⁹ Robert Tredgold, *The Rhodesia that was my life* (George Allen & Unwin 1968) 190.

²⁰⁰ Leys (n 186), 13.

²⁰¹ Myers S McDougal and W Michael Reisman, 'Rhodesia and the UN: The Lawfulness of International Concern', (1968) 62 AJIL 1.

²⁰² For example there was a Federal Constitution, Government and Court.

²⁰³ Jericho Nkala, *The UN, International Law, and the Rhodesia Independence Crisis* (Clarendon Press 1985).

The proposed dissolution of the Federation could be seen as the issue that forced Southern Rhodesia on to the agenda of the UN. Upon the dissolution certain powers that had been exercised by the Federation fell once more to the states. It had been agreed that the former Federal armed forces would be split between the three territories²⁰⁴ and that Southern Rhodesia would gain control of the Federal Air Force.²⁰⁵ The African states raised their concern that once the white elite gained military power through the dissolution of the Federation they would use that power to attempt to promulgate their racist policies throughout Africa, which would ultimately lead to conflict in the region, at a meeting of the UNSC.²⁰⁶ The seminal issue was what the military power would be used for. In the view of Mr Quaison-Sackey of Ghana,²⁰⁷ the strongest air force on the African Continent was to be put in the hands of the white minority government of Southern Rhodesia. This, in his opinion, could then be used either to attack the civilian population or to mount external attacks.²⁰⁸ The UNSC also saw the discussions at this stage as the opportunity for the UK to change the regime in Southern Rhodesia thus mitigating any need for sanctions. The draft resolution tabled at the 1068th Meeting of the UN dealt primarily with the transfer of powers following the break-up of the Federation.²⁰⁹ The first paragraph invited the UK to refrain from transferring to the colony of Southern Rhodesia any attributes of sovereignty until the government was fully representative of all of the inhabitants of the territory and the second invited the UK not to transfer to it what was previously the armed forces and aircraft of the Federation. It is clear, therefore, that initially the African states sought to prevent the devolution of power from the Federation to Southern Rhodesia.²¹⁰

Despite initial intentions that the Federation was to be a long-term union it was ultimately dissolved on 1 January 1964. Both Northern Rhodesia and Nyasaland were given independence but the UK refused to give Southern Rhodesia the same due to its racist franchise policies.²¹¹

²⁰⁴ Claire Palley, *The Constitutional History and Law of Southern Rhodesia 1888-1965 with Special Reference to Imperial Control* (Clarendon Press 1966) 731.

²⁰⁵ Harold Wilson, *The Labour Government 1964-1970, A Personal Record* (Weidenfeld and Nicolson and Michael Joseph 1971) 21.

²⁰⁶ UNSC Verbatim Record (9 September 1963) UN Doc S/PV/1064, 73 ('Record of the 1064th Meeting of the UNSC').

²⁰⁷ *ibid.*, 22.

²⁰⁸ *ibid.*, 24.

²⁰⁹ UNSC Verbatim Record (12 September 1963) UN Doc S/PV/1068 ('Record of the 1068th Meeting of the UNSC').

²¹⁰ *ibid.*, 4.

²¹¹ Wilson (n 205), 22.

2.2.3 Repression Through Racist Policies

That Southern Rhodesia was, like many colonies and former colonies, very much rooted in the enrichment of the white settler population by the repression of the black native community is unsurprising. Cecil Rhodes, the person to whom the initial colonisation of Southern Rhodesia is attributed, has been quoted as saying of the English: 'We are the finest race in the world and the more of the world we inhabit the better it is for the human race'.²¹² Sir Robert Tregold, the Chief Justice of the Federation, illustrated the initial attitude of settlers when he stated: 'It may or may not have been misguided and arrogant, but it was certainly sincere. We were deeply convinced that the Empire had a part to play in a great purpose for the world and that, in furthering this purpose we were doing a right and worthy thing'.²¹³ However, he also acknowledged that the white paternalistic attitude towards the black population continued despite changing conditions.²¹⁴

Commentators agree white people were never significantly more than 5 per cent of the total population in Southern Rhodesia. Despite this, by 1926 the black population had only 45,000 acres of alienable land compared with 31,000,000 acres that had been acquired by Europeans.²¹⁵ Additionally, most senior positions in public service were reserved for whites, healthcare, education and social services were heavily weighted towards whites and the property and educational qualifications for voting ensured that until 1979 whites had 95 per cent of the votes in national elections.²¹⁶

Repressive legislation was enacted which had adverse effects on the rights of the native population. The Native Affairs Act restricted movement by indigenous people who were required to carry a pass and left the authorities free to arbitrarily arrest any African charged with criticising the regime. The Land Apportionment Act forbade Africans from entering zones exclusively reserved for the white population. The Public Order Act forbade nationalist movements and any political activities on the part of the indigenous people. The Preventive Detention Act allowed the authorities to imprison any suspect for ninety days without trial. The Law and Order (Maintenance) Act empowered the Minister for Internal Affairs to proceed to the arrest of anyone and to detain him for five years without possibility of appeal.²¹⁷

²¹² Kapungu, *The Struggle for Freedom* (n 189) 9.

²¹³ Tregold (n 199), 52.

²¹⁴ *ibid.*, 55.

²¹⁵ Wills (n 190), 255.

²¹⁶ Austin (n 192), 43-51, 90-70.

²¹⁷ These references are taken from UNSC Verbatim Record (20 April 1965) UN Doc S/PV/1194 56 ('Record of the 1194th Meeting of the UNSC').

A combination of factors in the mid-twentieth century resulted in this disparity being considered less acceptable than it had been previously and led ultimately to the invocation of sanctions by the UN against Southern Rhodesia. The process of decolonisation had begun in other states and Southern Rhodesia was anxious to gain its independence.²¹⁸ Simultaneously there was increased recognition of human rights and equality for all amongst the international community.²¹⁹ The concept of civilised settlers battling against, and then ruling over, an uncivilised native population was no longer acceptable.

Mr Doudou Thiam of Senegal, in offering the opinion of the OAU with regard to the situation in Southern Rhodesia, effectively summarised the racial inequality that was being perpetuated there.²²⁰ He stated:

‘A so-called “self-government” is granted to a handful of settlers and then we are told that the provisions of Chapter XI of the Charter are not applicable to Southern Rhodesia because it is a “self-governing” colony. A constitution is granted to that same minority, enabling it to oppress and dominate the majority of the population of that country, in defiance of the United Nations Charter and the resolutions condemning the 1961 Constitution, and then we are told that the administering Power can no longer convene a constitutional conference and that the Africans should have accepted the 1961 Constitution which would have enabled them to influence political life in Rhodesia’²²¹

2.2.4 UDI

Even when Southern Rhodesia, as a direct result of its racist policies, was not granted independence following the break up of the Federation, the Southern Rhodesian electorate, almost wholly composed of members of the white settler population, continued to support racist policies.²²² In 1962 the Rhodesia Front was voted into power. Its manifesto at that time was that it would lead Southern Rhodesia into

²¹⁸ Ian Smith, *Bitter Harvest: The Great Betrayal and the Dreadful Aftermath* (Blake 2001) 50.

²¹⁹ A number of human rights treaties were signed between the end of World War II and the period when economic sanctions against Southern Rhodesia took place. These include: Universal Declaration of Human Rights (1948) UNGA Res 217A (III); Convention Relating to the Status of Refugees (1951) 189 UNTS 137; Convention Relating to the Status of Stateless People (1954) 360 UNTS 117; International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3; and International Covenant on Civil and Political Rights (1966) 999 UNTS 171. The International Convention on the Suppression and Punishment of the Crime of Apartheid UNGA Res 3068 (XXVIII) (30 November 1973) was also proposed in 1973 but was not signed or ratified by any Western state.

²²⁰ Record of the 1194th Meeting of the UNSC (n 217).

²²¹ *ibid.* 22.

²²² Wilson (n 205), 22.

independence under white rule by whatever means were necessary.²²³ In 1964 Ian Smith, leader of the Rhodesian Front, became Prime Minister of Southern Rhodesia. The same year Smith held a referendum, which asked the people of Southern Rhodesia: 'Are you in favour of independence based on the 1961 constitution?' According to Smith, 89 per cent voted in the affirmative.²²⁴ This referendum, however, only measured the European settlers' support for Smith's proposition because with regard to the native African population, Smith argued that, due to high levels of illiteracy, a referendum would be an unsuitable means of assessing their opinion. Therefore, he held an Indaba²²⁵ for 5 days commencing on 22 October 1964, which brought together 622 Chiefs and Headmen who professed unanimous support for Smith's proposal.²²⁶

In actuality, the majority of black nationalists in Southern Rhodesia were not in favour of a declaration of independence. As mentioned previously, the early 1960s had seen the rise of nationalist movements in Southern Rhodesia and despite the prohibition of various incarnations of these organisations they continued to grow throughout the decade. The two main national liberation movements at the time of the UDI were ZANU, formed in 1963, and ZAPU, which had been formed in 1961 and, although banned the following year, remained active.²²⁷ Despite his protestations that he had black African support, it is incontrovertible that these organisations did not support Smith. Kapungu states that the 'Rhodesian regime had ascertained, before effecting the UDI, that African nationalist movements had been suppressed and that the African population had been intimidated to such an extent that the organization of internal sanctions was made impossible.'²²⁸ Shanuyarira further states that 'Smith... [n]ever managed to show that consultation had broadened beyond the... chiefs and headmen who were collected for the Indaba.'²²⁹ This implies that the opinions of the chiefs were insufficient as representations of the African opinion on a declaration of independence. He also discusses how the white settlers were perceived by the native population:

'What do the Africans think of [the white settler population]? After all many of our people nursed some of these men as children. Smith grew up among Africans in Selukwe. His father was well liked; several Seluwke Africans cried openly at his funeral. The children and the

²²³ Kapungu, *The Struggle for Freedom* (n 189) 51.

²²⁴ Smith (n 218), 82.

²²⁵ Indaba is a word of Xhosa and Zulu origin meaning a discussion or conference (Oxford English Dictionary).

²²⁶ Smith (n 218), 79-82

²²⁷ Austin (n 192), 16-17.

²²⁸ Leonard T Kapungu, *The United Nations and Economic Sanctions Against Rhodesia* (Lexington Books 1973) 130.

²²⁹ Nathan M Shamuyarira, *Crisis in Rhodesia*, (Deutsch 1965) 225.

farms of the Duke and other post-war arrivals are being tendered by our people. At the beginning of the struggle for freedom, we were surprised that these same Europeans we had known for so many years had become so aggressive. But few can doubt now that the European ruler is first to be distrusted, second to be disliked, and third to be fought against whenever possible. Every African, without exception, has been pushed by events into one of these three categories, although he may not show it at first sight.'²³⁰

It must be stated that the fact that the nationalists were not in favour of a declaration of independence is further confirmed by their behaviour during the period that Southern Rhodesia was under sanctions. In 1974, the leaders of Southern Rhodesia's national parties, by that stage, with the addition of the Front for the Liberation of Zimbabwe and the African National Congress, numbering four, came together and entered into negotiations with Smith. These negotiations were unsuccessful, however, as agreement could not be reached on the issue of majority rule.²³¹

At the 2033rd meeting of the UNSC an invitation to speak was extended to Mr. Joshua Nkomo of the Patriotic Front of Zimbabwe (which had been formed of ZANU and ZAPU in 1976).²³² He spoke of the 'supreme sacrifice' made by nationalists in Southern Rhodesia because the Smith regime had denied their right to self-determination and identified the parties to the conflict in Southern Rhodesia as the forces of the Patriotic Front in opposition to the British settler forces.²³³ It should be noted that his participation at a meeting of the UNSC also illustrates the recognition that was being given to the Southern Rhodesian nationalists by this stage.

In 1965, Britain stated the five principles on the basis of which it would be prepared to grant Southern Rhodesia independence. They were: (i) unimpeded progress to majority rule; (ii) guarantees against retrogressive amendment of the constitution; (iii) an immediate improvement in the political status of the African population; (iv) progress towards ending racial discrimination; and (v) Britain's need to be satisfied that any basis proposed for independence was acceptable to the people of Rhodesia as a whole.²³⁴ The minority government protested that the system then in place allowed for majority rule and continued to push for independence. Ian Smith dissolved the government in March 1965 and held an election in May of that year in which his party won all 50 seats. The election was almost totally

²³⁰ *ibid.*

²³¹ Nkala (n 203), 20.

²³² UNSC Verbatim Record (28 September 1977) UN Doc S/PV/2033.

²³³ *ibid.*

²³⁴ Wilson (n 205), 143.

boycotted by the black population.²³⁵ Following intense negotiations between Southern Rhodesia and the UK, the latter remained unconvinced that the five principles had been met.²³⁶

Finally on 11 November 1965 Smith asked his cabinet whether Southern Rhodesia should declare its independence. It was decided unanimously to do so.²³⁷

2.3 Discussion of Sanctions prior to Adoption against Southern Rhodesia

As the first case of UN economic sanctions, and given the long delay between the establishment of the UN and the adoption of economic sanctions, the information available in relation to economic sanctions against Southern Rhodesia is particularly telling as to the opinions of states at that time in relation to economic sanctions. This section considers the reasoning offered by states both in favour of and against the sanctioning of Southern Rhodesia, analyses that reasoning and concludes with a brief discussion as to whether economic sanctions were in this case permissible under the UN Charter.

2.3.1 Reasons for the Initial Reluctance to Invoke Sanctions

This section is dealt with in two parts. Firstly, the UK position is considered. The UK is dealt with separately here because it was arguably still the administering power of Southern Rhodesia when economic sanctions were invoked²³⁸ and because it was under pressure from the outset of sanctions to resolve the situation in Southern Rhodesia.²³⁹ As such, it would have had a particular interest in seeing a solution to the problems in Southern Rhodesia.

Secondly, the four predominant reasons why other states were initially reluctant to adopt economic sanctions against Southern Rhodesia are considered: the threat to the peace; the international aspect of the situation in Southern Rhodesia; self-determination; and the fear of further economic sanctions regimes.

²³⁵ Austin (n 192), 17.

²³⁶ Palley (n 204), 747.

²³⁷ Smith (n 218), 102.

²³⁸ See John W Halderman, 'Some Aspects of Sanctions in the Rhodesian Case' (1968) 17 ICLQ 672 for a discussion on the status of Southern Rhodesia at that time.

²³⁹ UNSC Resolution 232 (n 123), 3.

2.3.1.1 UK Reasons

The UK initially considered economic sanctions against Southern Rhodesia in 1963 and was, at that point, unwilling to take them.²⁴⁰ The first argument against economic sanctions mooted by Sir Patrick Dean, the representative of the UK, was that the situation in Southern Rhodesia was one that came within its domestic jurisdiction and therefore, under Article 2(7) of the UN Charter,²⁴¹ the UNSC had no authorisation to interfere with it.²⁴² Dean also stated that the UK government did not consider there to be a situation in Southern Rhodesia, in any case, which would warrant intervention by the UNSC on grounds of maintaining international peace and security.²⁴³

These reasons were largely motivated by the desire of the UK to protect its own reputation. As the administering power, the UK, whilst seeking to exclude UNSC interference into Southern Rhodesia, did not exclude its own involvement in Southern Rhodesia. This was initially supported by the French delegation, which indicated that France would not support the draft resolution because, France, it was stated, had always been of the opinion that the UN had no power to decide whether or not a state is autonomous and thus whether it was subject to Chapter XI of the Charter.²⁴⁴ Initially, the UK was anxious to regain control of the territory in order to protect British settlers rather than move automatically to self-determination. The UK only changed its stance following the UDI when it had become clear that Southern Rhodesia could not be brought back under British control.

2.3.1.2 General Arguments made by States against Sanctions

The main arguments that economic sanctions against Southern Rhodesia were illegal are discussed below.

2.3.1.2.1 The Threat to the Peace

The predominant argument against economic sanctions in the case of Southern Rhodesia was that there was no threat to the peace. This sentiment is most accurately captured by US Senator Harry F Byrd, Jr

²⁴⁰ Record of the 1064th Meeting of the UNSC (n 206).

²⁴¹ Charter of the UN, Article 2(7): 'Nothing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'

²⁴² Record of the 1064th Meeting of the UNSC (n 206), Adoption of the agenda, 6.

²⁴³ *ibid.* Adoption of the agenda, 7.

²⁴⁴ Record of the 1068th Meeting of the UNSC (n 209) 83. Chapter XI relates to non-self-governing territories.

of Virginia during the hearing on the Rhodesian Chrome Statute²⁴⁵ who stated: 'Whom has Rhodesia threatened? What nation has reason to fear an assault by this small African nation? The answer of course, is that no one actually believes that Rhodesia threatens the peace'.²⁴⁶ It was also raised in the UNSC by the representative of the UK, Sir Patrick Dean, who stated 'more generally, my Government does not consider that there is any genuine question of a situation existing in Southern Rhodesia which the UNSC should deal with in discharge of its responsibility to the maintenance of international peace and security'.²⁴⁷

Under Article 39 of the UN Charter the UNSC must determine that there is a 'threat to the peace, breach of the peace, or act of aggression' before taking action under Article 41 and Article 42. A preliminary flaw in the contention that the situation in Southern Rhodesia did not rise to the level of being a threat to the peace²⁴⁸ is that there is no precise definition of any of those terms. Shaw simply states that whether a given situation comes within these terms depends on each particular case and the political situation in the UNSC at the particular point in time.²⁴⁹ He indicates that 'threat to the peace' is the most difficult term to define and that since the Cold War the situations that have come within its ambit have vastly increased.²⁵⁰ These terms were purposely left undefined at the time of the drafting of the UN Charter in order to give the UNSC flexibility as to the use of Article 41 or Article 42.²⁵¹ Ultimately the situation in Southern Rhodesia could be said to comply with Article 39 once the UNSC voted that it did so.

As to the fact that there was no act of aggression prior to the initiation of sanctions, one was not necessary once either a breach of the peace or a threat to the peace was found. McDougal and Reisman suggest that, in any case, if an act of aggression was considered a necessity in order for Chapter VII action to be taken that burden could be met by the seizure of property the rest of the world believed to be British and by the racist policies of the Smith regime.²⁵²

The next issue is whether the actions of the white elite were in fact consistent with international law. An internationally wrongful act is not, as discussed in chapter 1, a prerequisite for

²⁴⁵ Act of November 17 1971, Pub. L. No. 92-156.

²⁴⁶ 'The Rhodesian Chrome Statute: The Congressional Response to UN Economic Sanctions Against Southern Rhodesia', (1972) 58 Virginia Law Review 511, 524.

²⁴⁷ UNSC Verbatim Record (9 September 1963) UN Doc S/PV/4385.

²⁴⁸ 'The Rhodesian Chrome Statute: The Congressional Response to UN Economic Sanctions Against Southern Rhodesia' (n 246).

²⁴⁹ Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008), 1236-1241.

²⁵⁰ *ibid.*, 1237.

²⁵¹ *ibid.*

²⁵² McDougal and Reisman (n 201), 10-11.

the adoption of UN economic sanctions.²⁵³ However, a breach of international law might add support to the decision to take sanctions. In this case the white government had breached the right to self-determination of the majority by virtue of their UDI.²⁵⁴

2.3.1.2.2 The International Aspect of the Situation in Southern Rhodesia

Whether the situation in Southern Rhodesia was international in nature is important for two reasons. Firstly, under Article 39 the stated aim of Chapter VII action is to 'maintain or restore *international* peace and security. Secondly, the UN is precluded by virtue of Article 2(7) from intervening in situations that come within the domestic jurisdiction of a state. It has been suggested that this domestic jurisdiction discussion may be discarded as 'Article 2(7) refers to "the domestic jurisdiction of any state" and Southern Rhodesia is not a state'.²⁵⁵ That fails to address whether, even if Southern Rhodesia was not a state, if as part of the UK the term domestic jurisdiction in this case should mean the domestic jurisdiction of the UK.

Clearly, in this case however, the African states did feel threatened, as, during the initial discussions at the UNSC, they argued that leaving military power with Southern Rhodesia, following the dissolution of the Federation, left them vulnerable to attack.²⁵⁶ It was stated that 'the question of Southern Rhodesia raises particular and urgent issues which, on the information at present available, appear to all African States to constitute a serious threat to the peace and security of the African Continent'.²⁵⁷ As such, the situation in Southern Rhodesia did in fact constitute a threat that went beyond its borders.

If it is accepted that the situation in Southern Rhodesia did not have an international aspect it may have been reasonable to assume that economic sanctions could not have been taken.²⁵⁸ However, South Africa's practices of apartheid, which could be considered as akin to Southern Rhodesia's racist policies had already warranted non-binding declarations by the UNSC, which were not considered to have breached Article 2(7).²⁵⁹ Furthermore, in subsequent economic sanctions regimes it has been established that the behaviour being sanctioned need not go beyond the territory of the state targeted.

²⁵³ Section 1.1.

²⁵⁴ Self-determination is protected in Article 1(2) of the Charter of the UN.

²⁵⁵ 'The Rhodesian Chrome Statute: The Congressional Response to UN Economic Sanctions Against Southern Rhodesia' (n 246), 524

²⁵⁶ Record of the 1064th Meeting of the UNSC (n 206), Mr. Quaison-Sackey (Ghana), 22.

²⁵⁷ *ibid*, 21.

²⁵⁸ See Halderman (n 238) for a contemporaneous discussion on the absence of an international aspect to the situation in Southern Rhodesia.

²⁵⁹ UNSC Res 182 (4 December 1963) UN Doc S/RES/182, UNSC Res 190 (9 June 1964) UN Doc S/RES/190.

For example, economic sanctions have been put in place where mass breaches of international human rights or humanitarian law were occurring within a territory.²⁶⁰

2.3.1.2.3 Self-Determination

Self-determination is established as a purpose of the UN in Article 1(2) of the UN Charter.²⁶¹ The term self-determination is not easily defined. Cassese suggests that it is 'a democratic principle calling for the consent of the governed in any sovereign State: the people should always have the right freely to choose their own rulers' and '[f]urthermore, people and nations were entitled to be free from any external oppression, chiefly in the form of colonial rule'.²⁶² He also states that '[s]elf-determination appears firmly entrenched in the corpus of international law in only three areas: as an anti-colonialist standard; as a ban on foreign military occupation; and as a requirement that all racial groups be given full access to government'.²⁶³

Just five years prior to UDI the UNGA had passed the Declaration on the Granting of Independence to Colonial Countries and Peoples, which was concerned with bringing about the end of colonialism.²⁶⁴ It provided that: colonialism is contrary to human rights and an impediment to world peace; all people have the right to self-determination; independence should never be delayed on the grounds of inadequacy of political, economic, social or educational readiness; people should be allowed to peacefully exercise their right to independence; and that immediate steps should be taken in Trust and Non-Self-Governing Territories and all other non-independent territories to transfer all power unconditionally to the people of those territories.²⁶⁵

Following this declaration by the UNGA, the white minority government perceived the UDI as an exercise of self-determination against a colonialist power. This idea was strengthened by the fact that after the Federation the other two constituent parts were given independence. Certainly Smith's declaration of independence accords with this idea.²⁶⁶ Smith and the Rhodesian Front argued that they had black support for the UDI and that it was therefore an act of self-determination by the entirety of

²⁶⁰ UNSC Res 794 (3 December 1992) UN Doc S/RES/794 (Somalia), UNSC Resolution 841 (n 42) (Haiti).

²⁶¹ Charter of the UN, Article 1: '[t]he purposes of the UN are... 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace...'

²⁶² Cassese (n 82), 105.

²⁶³ *ibid.* 106.

²⁶⁴ Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 Dec 1960).

²⁶⁵ *ibid.* 1-5.

²⁶⁶ Smith (n 218), 104-106.

the Southern Rhodesian population. However, this belief that there was black support for the UDI was founded on the fact that the African Chiefs of Southern Rhodesia had supported this declaration rather than on the basis that fair and open elections had been held and it is now clear that the African chiefs did not speak for the African population who were opposed to what they perceived to be the white elite protecting their power.²⁶⁷ In fact almost all of the Chiefs were ‘servants of the government’.²⁶⁸

This undermines any suggestion that the UDI was an act of self-determination. The UDI was in fact in direct opposition to the ‘requirement that all racial groups be given full access to government’ and as Crawford has stated: ‘the minority government’s declaration of independence was and remained internationally a nullity, as a violation of the principle of self-determination’.²⁶⁹ Rather than being an argument against sanctions, self-determination became the justification for the legality of economic sanctions and the UNSC called for ‘immediate measures in order to allow the people of Southern Rhodesia to determine their own future consistent with the objectives of General Assembly resolution 1514 (XV)’.²⁷⁰

2.3.1.2.4 Fear of Further Implementation

Certain states, most notably South Africa, would, at the time of sanctions against Southern Rhodesia, have been aware that their own behaviour could have made them susceptible to being subjected to economic sanctions. This, whilst not a legal argument, would have made states reluctant to sanction Southern Rhodesia for fear that they too would be ultimately sanctioned.

This section has established that economic sanctions against Southern Rhodesia were legally justifiable. They complied with the relevant provisions of the UN Charter and none of the criticisms made by various states could be sustained. The next section looks at the reasons why states decided to support economic sanctions in relation to the situation in Southern Rhodesia.

2.3.1.3 The Appeal of Sanctions

This section first looks at the symbolic value of economic sanctions, then at the fact that they were a compromise between the African position and that of the UK and finally at economic sanctions as a measure short of force.

²⁶⁷ Kapungu, *The Struggle for Freedom* (n 189) 73.

²⁶⁸ Philip Ziegler, *Wilson: The Authorised Life*, (Weidenfold & Nicolson 1993), 230.

²⁶⁹ James Crawford, *The Creation of States* (2nd edn, Oxford University Press 2006) 129

²⁷⁰ UNSC Resolution 217 (n 43), 7.

2.3.1.3.1 Symbolic Value

The actions of the UK in relation to Southern Rhodesia offer a good illustration of the symbolic value of UN economic sanctions. As discussed in detail already, the UK initially showed considerable reluctance to adopt economic sanctions against Southern Rhodesia. One of the reasons for this was that in the initial stages much of the blame for the situation in Southern Rhodesia was being laid at the feet of the UK²⁷¹ and, as a result, it likely was reluctant to agree to action simply because it would be seen as conceding that it was responsible, a view widely held amongst African States, which the UK denied. Clearly, however, no state can remain immune to criticism from other states indefinitely, this is especially true when the state in question holds itself to be an example for other members of the international community. A particularly provocative criticism of British policy was offered by Mr Coulibaly of Mali²⁷² who drew an analogy with the Second World War. He asked, if Britain had not been successful and instead had the Nazis invaded the UK and held a referendum amongst their own people for the purpose of changing the status of the UK, would the British have considered the referendum to be valid? Yet, he argued, in 1922 the British had organised a referendum amongst white settlers in Southern Rhodesia which resulted in them being granted powers of self-government. The government of the UK were faced with a situation where they had to be seen to be taking some kind of action. In November 1965, the UK had ceased providing aid to Southern Rhodesia, frozen its sterling assets in London and excluded it from the sterling area and from Commonwealth preferences.²⁷³ Non-binding UN sanctions followed later that month.²⁷⁴

Even then the African states remained dissatisfied as they felt that an oil embargo should have been included in the sanctions and, as a response, when Wilson rose to speak to the UNGA Assembly on 15 December 1965 in the region of one hundred African delegates left in protest.²⁷⁵ As a result, and in order to be seen as taking action, the UK ultimately gave an invitation to the UNSC to create under Chapter VII what became UNSC Resolution 232.²⁷⁶

²⁷¹ See for example: Record of the 1064th Meeting of the UNSC (n 206) 32, 42; UNSC Verbatim Record (9 September 1965) UN Doc S/PV/1065, 21, 23 ('Record of the 1065th Meeting of the UNSC').

²⁷² Record of the 1065th Meeting of the UNSC, 26.

²⁷³ Robin Renwick, *Economic Sanctions*, (Harvard Center for International Studies, 1981) 27.

²⁷⁴ UNSC Resolution 217 (n 43).

²⁷⁵ Martin Bailey, *Oilgate. The Sanctions Scandal* (Coronet 1979), 24

²⁷⁶ Austin (n 192), 95.

2.3.1.3.2 Compromise

Whilst, as mentioned, the UK displayed reluctance in the initial stages to take any action against Southern Rhodesia, the African states were from the outset committed to taking action given their concerns over the transfer of military power to Southern Rhodesia.²⁷⁷ In the initial stages the African states requested non-military action by the UK and the UNSC. Mr Coulibaly (Mali) stated the objective of the African states in coming to the UNSC as being: ‘to ask the Council to take preventive steps to avoid further outbreaks of violence which might cause casualties among men who have no other ambition than to live in peace in the land of their forebears and in respect for their human dignity’.²⁷⁸ He requested that: the UNSC invite the UK to refrain from transferring, to the settler government, powers which could cause disputes and threaten peace in the region; the UNSC take preventative measures for the purpose of preserving international peace and security; and that the UK not provide weapons that might be used against the African population in Southern Rhodesia.²⁷⁹

By the time of the UDI, pressure from African states had intensified and some were now demanding military intervention. The UNSC met to consider the situation in Southern Rhodesia on 30 April 1965.²⁸⁰ Mr. Doudou Thiam of Senegal, having been invited to participate without vote, spoke as a representative of the Organisation of African Unity. He criticised the British response. He noted an article had been published in the Manchester Guardian Weekly, which indicated that white Rhodesians believed that the British would not go as far as to ban tobacco sales let alone take military action²⁸¹ and quoted a statement of Mrs Barbara Castle, the UK Minister for Overseas Development, made on 22 April 1965 that: “[t]he UK would meet with a set-back if it tried to use force to settle the Rhodesian question”.²⁸² The British Prime Minister had threatened that there would be an economic and diplomatic embargo on Southern Rhodesia if there was a UDI,²⁸³ which Mr. Thaim argued was unlikely to be effective.²⁸⁴ He questioned whether earlier sanctions had given any indication that such measures would work and instead sought proposals from the UK of specific measures and positive action in advance of any UDI.²⁸⁵

²⁷⁷ Record of the 1064th Meeting of the UNSC (n 206) 22, 24-25.

²⁷⁸ Record of the 1065th Meeting of the UNSC (n 271), 5.

²⁷⁹ *ibid.*, 19.

²⁸⁰ Record of the 1194th Meeting of the UNSC (n 217).

²⁸¹ *ibid.*, 24.

²⁸² *ibid.*, 25.

²⁸³ Harold Wilson Statement of 27 October 1964 in Bailey (n 275), 122.

²⁸⁴ Record of the 1194th Meeting of the UNSC (n 217), 38.

²⁸⁵ *ibid.*, 38.

One of the strongest arguments put forth by Mr. Thaim was his pre-emption of Britain's argument of non-intervention where he stated that the UK had previously intervened in other states and that as Southern Rhodesia remained its colony it could legally use force should the territory rebel against the Crown.²⁸⁶ The examples given were of the suppression of the Mau Mau in Kenya, and police operations in Oman and Southern Arabia. The first example might be the most useful comparator to the situation in Southern Rhodesia as it too was a colony where one racial faction rose against the other.²⁸⁷ In that case the native African community rose up by force and the UK intervened to protect its white citizens.²⁸⁸

This opened the UK government to criticism during the situation in Southern Rhodesia that it would only intervene to protect its own white citizens and not the native citizens of its colonies. The issue of previous intervention by the UK was one that had an emotional value for the citizens of both the UK and the African states. It emphasised the underlying current beneath the push for action by the UK, namely that the UK was ignoring the African people in Southern Rhodesia and, more broadly, that it was ignoring the African states when they were suffering despite being in a position to go to their aid.

By this time, not only had the UK established that it had to take some action to resolve an issue, which was increasingly outside of its control, but it was also faced with pressure to apply military sanctions. Arguments as to the legality of such action aside, it is extremely unlikely that there would have been support within the UK for military sanctions against Southern Rhodesia. Wilson, then UK Prime Minister, was aware that the public viewed the white minority in Southern Rhodesia as 'kith and kin' who had fought on their behalf in World War II with the result that there was support in the UK for Smith and to an extent UDI.²⁸⁹ As such, a reasonable compromise between the African push towards military sanctions and the UK's initial reluctance to take action was the invocation of economic sanctions.

²⁸⁶ *ibid.*, 39.

²⁸⁷ Martin Meredith, *The State of Africa. A History of Fifty Years of Independence* (Free Press 2006), 83-87.

²⁸⁸ Caroline Elkins, *Britain's Gulag. The Brutal End of Empire in Kenya* (Pimlico 2005).

²⁸⁹ Ziegler (n 268), 230.

2.3.1.3.3 Measures Short of Force

Whilst the UNSC determined that the situation in Southern Rhodesia constituted a threat to international peace and security,²⁹⁰ it did not establish that it had risen to the level where Article 42, allowing the use of military sanctions, could be invoked. As such, action was restricted to lower level responses including those contained in Article 41. Other forms of action had already been exhausted both at state level, by governments condemning the regime and by the UNGA in the form of non-binding declarations.²⁹¹ The only option left open was, therefore, to instigate a system of economic sanctions, which would usually be considered as the last resort before authorisation of the use of armed force.²⁹²

The other point to reiterate in this regard is that even if armed force was legally permissible, in this case it may have been a politically unpopular decision. Winston Field had made a commitment that Britain would not react to the situation in Southern Rhodesia with military action.²⁹³ However, it must be noted that force would eventually be authorised to empower the UK to stop oil destined for Southern Rhodesia arriving at Beira.²⁹⁴ The Royal Navy continued to patrol the port of Beira throughout the sanctions against Southern Rhodesia at an estimated cost in excess of £100m.²⁹⁵

2.4 Implementation of Sanctions Against Southern Rhodesia

The first part of this section outlines the action taken by the UNSC in relation to economic sanctions against Southern Rhodesia. The second part discusses the main issues that arose with economic sanctions against Southern Rhodesia.

2.4.1 Measures taken by the UNSC

The UNSC Resolutions dealing with Southern Rhodesia are considered under a number of headings: merely condemnatory or reaffirming resolutions; those resolutions containing economic sanctions; resolutions criticising breaches; and those dealing with third state issues.

²⁹⁰ UNSC Resolution 217 (n 43).

²⁹¹ For example UNGA Res 1747 (XVI) (27 June 1962), UNGA Res 1755 (XVII) (12 October 1962) and UNGA Res 1760 (XVII) (31 October 1962).

²⁹² James C Ngobi, 'The UN Experience with Sanctions' in David Cortright and George A Lopez (eds), *Economic Sanctions Panacea or Peacebuilding in a Post-Cold War World* (Westview Press 1995) 17-27.

²⁹³ Kapungu, *The Struggle for Freedom* (n 189) 62.

²⁹⁴ UNSC Res 221 (9 April 1966) UN Doc S/RES/221, 5 ('UNSC Resolution 221').

²⁹⁵ Bailey (n 275), 16.

2.4.1.1 Condemnatory or Reaffirming Resolutions

The first UNSC resolution taken in relation to the situation in Southern Rhodesia was actually taken in 1965, prior to the UDI, and did not contain or recommend any sanctions.²⁹⁶ It was submitted by the Ivory Coast, Jordan and Malaysia and its purpose was to exert pressure on the UK to take action in Southern Rhodesia, where it was considered to be the administering power,²⁹⁷ and to ask that should there be a UDI, that Member States would not support it.²⁹⁸

The next resolution to be taken in relation to Southern Rhodesia was taken following the UDI in November 1965.²⁹⁹ It condemned the UDI and requested that all states not recognise it.³⁰⁰

UNSC Resolution 288³⁰¹ and UNSC Resolution 314³⁰² simply reinforced earlier resolutions with the latter highlighting that chrome ore came within the ambit of UNSC Resolution 253.³⁰³ They were followed by UNSC Resolution 318,³⁰⁴ which approved recommendations and suggestions made by the Committee established in pursuance of UNSC Resolution 253.³⁰⁵

2.4.1.2 Economic Sanctions

The first UNSC resolution invoking economic sanctions was taken following the UDI and was not binding.³⁰⁶ It condemned the UDI³⁰⁷ and requested that the UK take some action to 'put an end' to the situation in Southern Rhodesia.³⁰⁸ It then asked states not to recognise the UDI and to 'refrain from any action which would assist and encourage the illegal regime and, in particular, to desist from providing it with arms, equipment and military material, and to do their utmost in order to break all economic relations with Southern Rhodesia, including an embargo on oil and petroleum products'.³⁰⁹

The first binding economic sanctions against Southern Rhodesia were taken just over a year after the first economic sanctions.³¹⁰ The UNSC decided that all Member States should prevent the importation into their territory of asbestos, iron ore, chrome, pig-iron, sugar, tobacco, copper, meat,

²⁹⁶ UNSC Res 202 (6 May 1965) UN Doc S/RES/202.

²⁹⁷ *ibid.* 4-6.

²⁹⁸ *ibid.* 3.

²⁹⁹ UNSC Res 216 (12 November 1965) UN Doc S/RES/216.

³⁰⁰ *ibid.* 1-2.

³⁰¹ UNSC Res 288 (17 November 1970) UN Doc S/RES/288.

³⁰² UNSC Res 314 (28 February 1972) UN Doc S/RES/314.

³⁰³ *ibid.* 3.

³⁰⁴ UNSC Res 318 (28 July 1972) UN Doc S/RES/318.

³⁰⁵ *ibid.* 4.

³⁰⁶ UNSC Resolution 217 (n 43).

³⁰⁷ *ibid.* 3.

³⁰⁸ *ibid.* 4.

³⁰⁹ *ibid.* 6.8.

³¹⁰ UNSC Resolution 232 (n 123).

meat products, hides, skins and leathers originating in Southern Rhodesia, activities either by their nationals or in their territories which would encourage such importation especially the transfer of money to Southern Rhodesia for that purpose and transportation by vehicles of their registration of those products.³¹¹ They were also required to prohibit activities by their citizens, or in their territories, that encouraged the sale or shipment of arms, ammunition, military equipment, military vehicles and the material for the manufacture of those products to Southern Rhodesia, activities that encouraged the supply to, or manufacture in, Southern Rhodesia of any type of vehicle and the supply of oil or oil products to Southern Rhodesia.³¹² The UNSC called on states not to give financial or other economic aid to Southern Rhodesia.³¹³

When UNSC Resolution 232 was not implemented by all states, the UNSC responded eighteen months later with further binding sanctions.³¹⁴ It decided that states should prevent: the importation of all goods originating in Southern Rhodesia; activities by their citizens or in their territories that would encourage the same, especially the transfer of funds to Southern Rhodesia; the use of their vehicles for the transportation of goods to Southern Rhodesia; the sale or supply of goods to Southern Rhodesia (with some humanitarian exemptions); and the transportation of such goods.³¹⁵ With certain humanitarian exemptions,³¹⁶ Member States were not to make available to Southern Rhodesia, or any commercial entity therein, financial or economic resources and were to ensure that their citizens did likewise.³¹⁷ The UNSC prohibited Member States from allowing entry to their territory of any person on the basis of a Southern Rhodesian passport or a passport issued under the UDI and requested that they take all possible measures to prevent entry by those ordinarily resident in Southern Rhodesia.³¹⁸ Member States were to prohibit airlines or aircraft, registered in their territory or under charter to their nationals, operating to or from Southern Rhodesia.³¹⁹ Member States were called upon to take all measures to prevent encouragement, promotion or assistance to emigrate to Southern

³¹¹ *ibid.* 2(a)-2(c).

³¹² *ibid.* 2(d)-2(f).

³¹³ *ibid.* 5.

³¹⁴ UNSC Res 253 (29 May 1968) UN Doc S/RES/253 ('UNSC Resolution 253').

³¹⁵ *ibid.* 3.

³¹⁶ The exhaustive list of exemptions granted was those for pensions, medical, humanitarian and educational purposes, news materials and in certain circumstances food.

³¹⁷ UNSC Resolution 253 (n 314), 4.

³¹⁸ *ibid.* 5.

³¹⁹ *ibid.* 6.

Rhodesia.³²⁰ The UNSC emphasised the need for the withdrawal of all trade and consular representation to Southern Rhodesia.³²¹

Two years later, when Southern Rhodesia proclaimed the status of a republic, the UNSC took further binding economic sanctions.³²² The UNSC decided that Member States should refrain from recognizing the illegal regime and called on them to ensure that acts performed by officials of the regime would not be given any recognition by the competent authorities of their states.³²³ In accordance with Article 41 of the UN Charter, it was decided that Member States should sever all diplomatic, consular, trade, military and other relations they had with the illegal regime, terminate any representation they had in that area and stop any means of transport to and from Southern Rhodesia.³²⁴ The UNSC called on Member States to take measures to suspend membership of the illegal regime in specialized agencies of the UN and urged Member States of international and regional organisations to refuse membership to, and suspend membership of, Southern Rhodesia.³²⁵ Agencies and international organisations were requested, in consultation with the OAU, to give assistance to refugees from Southern Rhodesia.³²⁶

Economic sanctions under Chapter VII were extended further in 1976.³²⁷ The UNSC decided that Member States should take measures to ensure that nationals or persons in their territories did not insure commodities that were, or that they had reason to believe were, exported from or imported to Southern Rhodesia or any commodity, product or property in Southern Rhodesia.³²⁸ It also decided that Member States should not grant any commercial, industrial or public entity in Southern Rhodesia the right to use any trade name nor should they enter into any franchising agreement involving the use of such a trade name.³²⁹

Binding economic sanctions were extended once more in 1977.³³⁰ The UNSC decided that all Member States should prohibit the use or transfer of any funds in their territories by the illegal regime in Southern Rhodesia including any office or agent thereof or by persons within Southern Rhodesia for

³²⁰ *ibid.* 8.

³²¹ *ibid.* 10.

³²² UNSC Res 277 (18 March 1970) UN Doc S/RES/277 ('UNSC Resolution 277').

³²³ *ibid.* 2-3.

³²⁴ *ibid.* 9.

³²⁵ *ibid.* 12, 14.

³²⁶ *ibid.* 15.

³²⁷ UNSC Res 388 (6 April 1976) UN Doc S/RES/388 ('UNSC Resolution 388').

³²⁸ *ibid.* 1.

³²⁹ *ibid.* 2.

³³⁰ UNSC Res 409 (27 May 1977) UN Doc S/RES/409 ('UNSC Resolution 409').

the purposes of office or agency of the illegal regime established within their territories other than for pension purposes.³³¹

2.4.1.3 Condemnation of Breaches

Not long after the first economic sanctions were invoked, the UNSC heard reports that a large shipment of oil destined for Southern Rhodesia had arrived at Beira and that Portuguese authorities might allow it to pass.³³² It called upon Portugal not to allow the oil to be pumped to Southern Rhodesia nor to receive oil at Beira destined for Southern Rhodesia³³³ and upon all other states to divert oil from Beira that they believed to be destined for Southern Rhodesia.³³⁴ It also empowered the UK to use force, if necessary, to stop oil destined for Southern Rhodesia arriving at Beira.³³⁵

The actions of South Africa and Portugal, in refusing to observe sanctions against Southern Rhodesia, and the US, in authorising the importation of chrome ore and other minerals from Southern Rhodesia, were condemned in UNSC Resolution 320.³³⁶ South Africa was once more condemned for its refusal to adhere to sanctions against Southern Rhodesia in 1973.³³⁷

The US breached sanctions against Southern Rhodesia on one further occasion in 1978 when it allowed Ian Smith and some other members of the illegal regime entry into the US. This was noted by the UNSC.³³⁸

2.4.1.4 Sanctions Relating to Third States

It was clear from the initial stages of economic sanctions that, by complying with economic sanctions against Southern Rhodesia, Zambia, due to its location and economic reliance on Southern Rhodesia, could have experienced severe economic difficulties. For this reason, the UNSC requested states to give aid to Zambia because of the special economic problems it may have suffered as a result of the sanctions.³³⁹ A task force was later sent out to assess the needs of Zambia in light of its decision to sever all trade and communication links with Southern Rhodesia.³⁴⁰ In early 1973, South Africa

³³¹ *ibid.*, 1.

³³² UNSC Resolution 221 (n 294).

³³³ *ibid.*, 2-33.

³³⁴ *ibid.*, 4.

³³⁵ *ibid.*, 5.

³³⁶ UNSC Res 320 (29 September 1972) UN Doc S/RES/320 ('UNSC Resolution 320').

³³⁷ UNSC Res 328 (10 March 1973) UN Doc S/RES/328 ('UNSC Resolution 328').

³³⁸ UNSC Res 437 (10 October 1978) UN Doc S/RES/437 ('UNSC Resolution 437').

³³⁹ UNSC Resolution 253 (n 314), 15.

³⁴⁰ UNSC Res 327 (2 February 1973) UN Doc S/RES/327 ('UNSC Resolution 327').

militarily intervened in Southern Rhodesia and also deployed forces on the border with Zambia. The regime in Southern Rhodesia also committed acts of provocation against Zambia. The UNSC condemned this action.³⁴¹ Further appeals were made to states to give aid to Zambia in light of the difficulties it faced as a result of it diverting trade from Southern Rhodesia.³⁴² The UNSC threatened action under Chapter VII in light of Southern Rhodesia's continued hostile acts in UNSC Resolution 424.³⁴³ Finally the UNSC called for compensation to be paid to Zambia for damage to life and property.³⁴⁴

In early 1976, Southern Rhodesia began to commit aggressive acts against the People's Republic of Mozambique, which had gained its independence from Portugal on 25 June 1975.³⁴⁵ The UNSC condemned those acts and requested other states and the relevant UN organisations and programmes to give assistance to Mozambique.³⁴⁶ The situation did not improve and the UNSC demanded that it cease and reiterated its request for aid in 1977.³⁴⁷ Botswana was also subjected to hostile acts by Southern Rhodesia.³⁴⁸ The UNSC demanded the cessation of those acts and requested that states give assistance to Botswana.³⁴⁹ This was reiterated in UNSC Resolution 406.³⁵⁰ In 1979 Southern Rhodesia undertook armed invasions in to Angola, Mozambique and Zambia.³⁵¹ The UNSC condemned those acts and requested aid for frontline states.³⁵²

2.4.1.5 Other Resolutions

In September 1977, the UNSC requested that the Secretary-General appoint a representative to enter into discussions with the British Resident Commissioner designate and all parties, concerning military and associated arrangements necessary to effect the transition to majority rule in Southern Rhodesia and to report on these discussions.³⁵³ It also called on all parties to co-operate with the representative.³⁵⁴ This was followed by a related resolution on 14 March 1978 whereby the UNSC

³⁴¹ UNSC Res 326 (2 February 1973) UN Doc S/RES/326 ('UNSC Resolution 326').

³⁴² UNSC Res 329 (10 March 1973) UN Doc S/RES/329 ('UNSC Resolution 329').

³⁴³ UNSC Res 424 (17 March 1978) UN Doc S/RES/424 ('UNSC Resolution 424').

³⁴⁴ UNSC Res 455 (23 November 1979) UN Doc S/RES/455.

³⁴⁵ UNSC Res 386 (17 March 1976) UN Doc S/RES/386.

³⁴⁶ *ibid.* 2, 4-5.

³⁴⁷ UNSC Res 411 (30 June 1977) UN Doc S/RES/411, 7 and 13.

³⁴⁸ UNSC Res 403 (14 January 1977) UN Doc S/RES/403.

³⁴⁹ *ibid.* 4.8.

³⁵⁰ UNSC Res 406 (25 May 1977) UN Doc S/RES/406.

³⁵¹ UNSC Res 445 (8 March 1979) UN Doc S/RES/445 ('UNSC Resolution 445').

³⁵² *ibid.* 1.3.

³⁵³ UNSC Res 415 (29 September 1977) UN S/RES/415, 1-2.

³⁵⁴ *ibid.* 3.

declared any internal settlement concluded under the illegal regime would be both illegal and unacceptable and requested states not to recognise any such settlement.³⁵⁵ It stated that the first prerequisite for the restoration of legality in Southern Rhodesia was the termination of the illegal regime and replacement of police and military forces so that there might be a transition to genuine majority rule and independence in 1978, which would include the holding of free and fair elections under UN supervision.³⁵⁶ It considered that the UK, with the assistance of the Secretary-General, should enter into consultations with the parties concerned.³⁵⁷

The illegal regime in Southern Rhodesia had announced that there would be elections in April 1979, which it was clear had the aim of extending minority rule.³⁵⁸ The UNSC condemned the elections, declared any such elections and their results null and void and stated that no state would recognise them.³⁵⁹ It also urged states not to send observers to observe the elections.³⁶⁰ Those elections were ultimately held and the UNSC then reaffirmed resolution 445.³⁶¹

Economic sanctions against Southern Rhodesia were finally lifted on 21 December 1979 when a constitution for a free and independent Zimbabwe had been agreed upon and the UK had committed to the decolonisation of Southern Rhodesia on the basis of free and fair elections.³⁶²

2.4.2 Initial Difficulties with Sanctions

Economic sanctions against Southern Rhodesia were in place for more than a decade, which indicates that at minimum they did not paralyse the economy of Southern Rhodesia and could have been more effective. The two main difficulties seen with economic sanctions against Southern Rhodesia related to enforcement and to the extent to which Southern Rhodesia's economy was able to modify itself to avoid the worst effects of economic sanctions. This section discusses how these difficulties may have impacted on the effectiveness of sanctions.

³⁵⁵ UNSC Res 423 (14 March 1978) UN Doc S/RES/423, 2.

³⁵⁶ *ibid.* 3-4.

³⁵⁷ *ibid.* 6.

³⁵⁸ UNSC Resolution 445 (n 351).

³⁵⁹ *ibid.* 5-6.

³⁶⁰ *ibid.* 7.

³⁶¹ UNSC Resolution 448 (n 168).

³⁶² UNSC Resolution 460 (n 174).

2.4.2.1 Enforcement

From the very outset of economic sanctions against Southern Rhodesia their enforcement was an issue. There were constant breaches of sanctions by various states and no repercussions when sanctions were breached. This section discusses breaches by South Africa and Portugal, the UK and the US, and Zambia. These states have been grouped together based on their reasoning for breaches of the sanctions regime. This section also looks at the role of the Committee established pursuant to UNSC Resolution 253³⁶³ and discusses the various breaches before discussing why these breaches resulted in enforcement problems for sanctions against Southern Rhodesia.

2.4.2.1.1 South Africa and Portugal – Breaches for Political Reasons

South Africa and Portugal consistently breached sanctions against Southern Rhodesia and, in fact, UNSC Resolution 320 expresses concern at their 'refusal... to co-operate with the United Nations in the observance and implementation of sanctions against Southern Rhodesia'.³⁶⁴ Both states had considerable strategic interests in the outcome of the Southern Rhodesian case. Not only were both states geographically close to Southern Rhodesia,³⁶⁵ with the resulting economic ties that come with that proximity, they also shared a common ideology at that time. McKinnell in 1969 stated that 'relations between Southern Rhodesia and her allies, South Africa and Portugal, have grown ever closer' and as a result the continent of Africa was being divided into two, the black dominated north and the white colonialist south.³⁶⁶

It is not surprising that South Africa and Portugal wanted sanctions against Southern Rhodesia to fail due to fear that they would be subjected to economic sanctions themselves if they were seen to be effective against Southern Rhodesia. Both states were criticised by the UNSC for failing to implement the sanctions³⁶⁷ and it is likely that their failure to adhere to sanctions impacted on the length of time it took for sanctions to take effect. One of the clearest examples of this can be seen in the fact that when the overt supply of petroleum to Southern Rhodesia was cut off it began to use alternative sources routed through Mozambique and South Africa.³⁶⁸ This is particularly relevant

³⁶³ UNSC Resolution 253 (n 314).

³⁶⁴ UNSC Resolution 320 (n 336).

³⁶⁵ Portugal through its, then, colony Mozambique.

³⁶⁶ Robert McKinnell, 'Sanctions and the Rhodesia Economy'. (1969) 7 *Journal of Modern African Studies* 559.

³⁶⁷ UNSC Resolution 320 (n 336) and UNSC Resolution 328 (n 337).

³⁶⁸ Jorge Jardim, *Sanctions Double Cross: Oil to Rhodesia* (Books of Rhodesia Publishing Company Limited 1978) 87-99.

because petroleum was a commodity without access to which Southern Rhodesia would have been completely paralysed and it is the one commodity that if completely boycotted could lead to total paralysis of a state's economy given its importance for both manufacturing and transportation.

In 1974, the Portuguese colonial regime finally collapsed and Mozambique gained its independence in 1975. As such, the Mozambique-Rhodesia border was closed in 1976 and in August and September 1976 South Africa briefly imposed economic and military sanctions on Southern Rhodesia to compel acceptance of the Kissinger formula for transition to majority rule.³⁶⁹ Anglin has identified these as occasions when both states adhered to the UNSC resolutions and has stated that the impact of South African and Portuguese breaches can be seen in the fact that sanctions had a much tighter grip on Southern Rhodesia during this period.³⁷⁰

2.4.2.1.2 UK and US – Breaches for Economic Reasons

The fact that the UK and the US were breaching sanctions is of far more concern than any of the other breaches. Both states are members of the P-5 and so could simply have decided to veto sanctions. Whilst the UK had the highest number of prosecutions of individuals and organisations for breach of sanctions, for fear of upsetting its precarious economy it did not force British-based companies to shut down subsidiaries in Southern Rhodesia and was willing to largely ignore the breaches by other states.³⁷¹

Whereas Portugal and South Africa were allowing for the transportation of oil over their territories, the UK was responsible for much of the oil itself. Given that Southern Rhodesia had no oil reserves and little oil stockpiled prior to sanctions, sanctions had to be breached continuously in order to ensure that Southern Rhodesia had sufficient oil.³⁷² At that time, there were five major oil companies in Southern Rhodesia.³⁷³ Jardim states that these oil companies exported similar quantities of oil during economic sanctions as they did prior to their imposition and that generally each maintained its market share in Southern Rhodesia during that period.³⁷⁴ Two of those companies, namely Shell and BP, had at least 40 per cent of their shares owned by UK shareholders. In 1973 it was suggested that British-

³⁶⁹ The Kissinger formula included a simultaneous ending of sanctions and the war, a transition period during which the white population would retain control of law and order before a move to majority rule in two years, see Wills (n 190), 436.

³⁷⁰ Anglin (n 178), 39.

³⁷¹ *ibid.*, 41.

³⁷² Bailey (n 275), 20-21.

³⁷³ *ibid.*, 24.

³⁷⁴ Jardim (n 368), 102.

owned companies were providing 56 per cent of the oil transported by rail from Mozambique to Southern Rhodesia.³⁷⁵ Whilst breaches in the UK could be considered to have been covert and committed largely by individuals or organisations rather than by the state itself, it has been argued that the UK was aware of potential breaches having been warned that oil was being exported to Southern Rhodesia by British companies and that, despite these warnings, the state failed to investigate any breaches of sanctions until 11 years after UDI and the resulting sanctions breaches commenced.³⁷⁶

The US on the other hand simply implemented legislation circumventing the sanctions. The Military Procurement Act of 1971 was amended by what became known as the 'Rhodesian Chrome Statute'.³⁷⁷ It allowed for the importation of 'material determined to be strategic and critical'. Although neither Southern Rhodesia nor chrome is mentioned it was enacted to allow for the importation of Southern Rhodesian chrome.³⁷⁸ Additionally it allowed Ian Smith and other members of the regime entry into the US when they were subject to travel bans.³⁷⁹ Obviously this gave legitimacy to the breach of sanctions both by the US and by other states.

2.4.2.1.3 Zambia – Breaches for the Purpose of Self-Preservation

Zambia (formerly Northern Rhodesia) relied heavily in economic terms on Southern Rhodesia and breached sanctions in an attempt not to sink into economic crisis itself. Prior to the imposition of economic sanctions on Southern Rhodesia, Zambia provided a market for more than 25 per cent of exports from Southern Rhodesia and was itself reliant on Southern Rhodesian railways to transport 65 per cent of its imports and 95 per cent of its exports.³⁸⁰ Southern Rhodesia also supplied all of its oil and coal and 69 per cent of its electricity.³⁸¹ As McKinnell commented, it simply could not cut such strong economic ties overnight.³⁸²

However, despite the difficulties it faced, Zambia remained committed to economic sanctions throughout their duration. It refused Smith's offer to spare Zambia if it did not enforce sanctions and slowly tightened its enforcement until Southern Rhodesia closed its northern borders in 1973. The

³⁷⁵ Bailey (n 275), 59.

³⁷⁶ *ibid.*, 69.

³⁷⁷ Pub. L. No. 92-156 (Nov 17, 1971).

³⁷⁸ Further discussion of the justifications given for the Rhodesian Chrome Statute are available in: 'Notes: The Rhodesian Chrome Statute: The Congressional Response to UN Economic Sanctions Against Southern Rhodesia' (n 246).

³⁷⁹ UNSC Resolution 437 (n 338).

³⁸⁰ Anglin (n 178), 29.

³⁸¹ *ibid.*

³⁸² McKinnell (n 366), 559-581.

borders remained closed until Zambia, under threat of starvation, reopened them in 1978 by which time it is estimated this action had cost Zambia \$800 million.³⁸³ Zambia clearly needed economic support from the international community and although it made no official application under Article 50³⁸⁴ of the UN Charter both Zambia itself and the UNSC made repeated calls for assistance.³⁸⁵ Despite these requests, support was slow and inadequate.³⁸⁶

2.4.2.1.4 The 253 Committee³⁸⁷

A committee of the UNSC was established under UNSC Resolution 253 ('the 253 Committee') with a limited mandate to examine reports on the implementation of the resolution as had been submitted by the Secretary-General and to seek from Member States or specialised agencies information on trade or any other activity by states that might constitute breach of the sanctions.³⁸⁸ This mandate was expanded slightly in UNSC Resolution 277 to include the examination of reports submitted under that resolution, the study of methods that could improve the implementation of UNSC decisions regarding sanctions against Southern Rhodesia and to make recommendations to the UNSC.³⁸⁹ This section will offer a brief overview of some of the work undertaken by the 253 Committee.

During its existence the 253 Committee released a number of reports on compliance with resolution 253.³⁹⁰ Three issues arise with these reports. Firstly, the 253 Committee did not undertake any of the initial investigations itself but instead simply collected information from states, which was

³⁸³ Anglin (n 178), 40.

³⁸⁴ Article 50 states: 'If preventive or enforcement measures against any state are taken by the UNSC, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the UNSC with regard to a solution of those problems', as such it would have provided Zambia with an official means of seeking assistance from other states.

³⁸⁵ The difficulties experienced by Zambia and calls for assistance to relieve Zambia were the subject of UNSC Resolution 253 (n 314), UNSC Resolution 327 (n 340), UNSC Resolution 329 (n 342) and UNSC Resolution 424 (n 341).

³⁸⁶ Anglin (n 178), page 40.

³⁸⁷ UNSC Resolution 253 (n 314),

³⁸⁸ *ibid.*, 20(a)-20(b).

³⁸⁹ *ibid.*, 21(a), 21(c).

³⁹⁰ Report of the Committee established in pursuance of UNSC resolution 253 of 29 May 1968 (30 December 1968), UN Doc S/8954 ('Report of the 253 Committee'); Second Report of the Committee established in pursuance of UNSC resolution 253 of 29 May 1968 (12 June 1969), UN Doc S/9252 and Add. 1 ('Second Report of the 253 Committee'); Third Report of the Committee established in pursuance of UNSC resolution 253 of 29 May 1968 (15 June 1970), UN Doc S/9844 and Add. 1, 2, 3 ('Third Report of the 253 Committee'); Fourth Report of the Committee established in pursuance of UNSC resolution 253 of 29 May 1968 (16 June 1971), UN Doc S/10228 and Add. 1, 2; Fifth Report of the Committee established in pursuance of UNSC resolution 253 of 29 May 1968 (June 1972), UN Doc S/10852; Special Report of the UNSC Committee established in pursuance of resolution 253 (1968) concerning the question of Southern Rhodesia on the expansion of sanctions against Southern Rhodesia (15 December 1975), UN Doc S/11913; Second Special Report of the UNSC Committee established in pursuance of resolution 253 (1968) concerning the question of Southern Rhodesia on the expansion of sanctions against Southern Rhodesia (31 December 1976), UN Doc S/12296.

then used to compile statistical data.³⁹¹ Under this system there is no mechanism in place to check the accuracy of the information being relied upon and that states were not under-reporting their trade with Southern Rhodesia. Additionally, the 253 Committee used trade figures provided by Southern Rhodesia, which had reason to over-estimate its trade. This was highlighted in the 253 Committee's third report where it acknowledged that there was a large discrepancy between the figures provided by Southern Rhodesia and those provided by other states as to the trade between them.³⁹²

Secondly, states were reporting on an inconsistent basis. From the outset some states failed to report.³⁹³ By the time of the second report, 33 states, of which 29 were UN Member States, had not responded.³⁹⁴ The third report showed that 31 states had yet to report.³⁹⁵ Those states that did report appear in some cases to have made different assumptions about what compliance with the reporting requirements entailed. Initially states failed to separate specific figures for Southern Rhodesia from their exports and imports.³⁹⁶ In 1970, in the 253 Committee's second report, some states suggested that they were adhering to sanctions but saw no need to take specific measures to ensure compliance, others responded with detailed outlines of measures taken and a minority of states were not in compliance with sanctions at all.³⁹⁷

Thirdly, whilst the 253 Committee did investigate some of the information provided by states, which prompted it for example to redistribute some reported exports by states, which had been reported as exports to neighbouring countries but which the 253 Committee felt on examination were in fact destined for Southern Rhodesia,³⁹⁸ it is unclear how these investigations were conducted. However, given that it commented in relation to the investigation of suspected breaches of economic sanctions that it had received 'no further information on case No. 4... on case No. 10... reply was received from Switzerland', it seems that even where information on suspected violations was provided by states heavy reliance was once more placed on state reporting.³⁹⁹

The 253 Committee did provide some useful services to states. It acted as a point of contact where states could report suspected violations in the knowledge that at a minimum they would be published and thus brought to the attention of other states. It also provided information to states both

³⁹¹ Report of the 253 Committee (n 390), 5, 10.

³⁹² Third Report of the 253 Committee (n 390), 19.

³⁹³ Second Report of the 253 Committee (n 390), 5.

³⁹⁴ Second Report of the 253 Committee (n 390), 14.

³⁹⁵ Third Report of the 253 Committee (n 390), 14.

³⁹⁶ Report of the 253 Committee (n 390), 18.

³⁹⁷ Second Report of the 253 Committee (n 390), 10.

³⁹⁸ Third Report of the 253 Committee (n 390), 23.

³⁹⁹ *ibid.* 66.

through its published reports and directly to states via the Secretary General. However it failed to reach its full potential as an effective monitoring body as it failed to take an active role in the investigation of suspected violations instead relying on information provided by states, which limited its utility. This failure as an effective monitoring body means that it was also unlikely to encourage states to comply with sanctions. In addition it failed to suggest suitable methods of enforcing the sanctions thus negating any possible enforcement benefit they might have had.

2.4.2.1.5 Breaches of Economic Sanctions

It must be stated at this juncture that some breaches of sanctions are inevitable. There will always be an individual or corporate entity willing to breach sanctions for personal gain. The salient point with respect to the case of Southern Rhodesia and its 'leaky sanctions policy'⁴⁰⁰ is that the breaches were either being committed by states or with the acquiescence of states. The fundamental problem that linked breaches of economic sanctions to a lack of enforcement was that there was no attempt made by the UNSC to punish those who breached economic sanctions, this goes to a lack of accountability with respect to the implementation of UNSC economic sanctions.

It was suggested in UNSC Resolution 320, that sanctions might be imposed on those who breached economic sanctions against Southern Rhodesia in order to force compliance with the UNSC's previous resolutions.⁴⁰¹ However, that suggestion did not ultimately come to fruition. As there were no repercussions for breaches at any level, comprehensive enforcement of economic sanctions against Southern Rhodesia became impossible and Southern Rhodesia and South Africa were given confidence to commit acts of aggression against neighbouring states.

2.4.2.2 Economy Modification

The second major factor that impacted on the effectiveness of economic sanctions against Southern Rhodesia was the extent to which the economy was modified in order to protect itself following the invocation of economic sanctions. The Southern Rhodesian economy shifted its production so that sanctions did not cause as much damage as they might otherwise have done. A good example can be seen in relation to tobacco, which was at the time a major export of Southern Rhodesia. Initially the government bought and stockpiled tobacco before imposing quotas on the amount to be grown and

⁴⁰⁰ McKinnell (n 366), 572.

⁴⁰¹ UNSC Resolution 320 (n 336), 4.

ultimately compelling farmers to switch to other crops that were no longer being imported.⁴⁰² Essentially this made Southern Rhodesia far more self-sufficient than would have previously seemed possible given its heavy reliance on imports and exports.⁴⁰³ There are three reasons why this modification was possible: the response of the white elite, the speed at which sanctions were imposed and the cessation of debt repayments. Each will be considered in turn.

2.4.2.2.1 The Response of the White Elite

An unexpected consequence of sanctions was their role in uniting the white settler community. Two accounts quoted by Galtung are worth stating in full:

‘Q. How do you manage with so little petrol?

A. Oh, that is easy enough. You know, if a family has two cars and receives some petrol for both, to put one car in the garage is not very much of a sacrifice. Besides, some of us who live in the countryside and have offices in Salisbury join our rations and form a car pool and go in together. It is strange to see how much better friends one becomes with one’s neighbours in such situations – we really did not know them before. And if even this should not work, this may be the great impetus that forces the city to develop adequate collective transportation, and if even that does not work, doctors are almost unanimous that walking is good for you...

Q. But what about all kinds of luxury goods, or household appliances?

A. You must remember that very many families here are quite well off. They have a refrigerator, maybe even two. They work. If refrigerators cannot be bought, well, some will be without and others will not have the latest models. But most will have refrigerators, and they will last – our technicians are not so bad that they cannot improvise some spare parts. And as to luxury goods – we have been without them during two world wars when we helped Britain, the same Britain that attacks us today, and we can do without them again. Besides, one family has some and another family will borrow from it. That was also the pattern during the war’.⁴⁰⁴

Galtung describes this as a ‘rally-around-the flag effect’. McKinnell also highlights the behaviour of the white population and attributes some of the economic modification to their willingness to increase their savings, which made it easier for the regime to raise loans and allowed commercial banks to make

⁴⁰² McKinnell (n 366), 564.

⁴⁰³ See: TRC Curtain, ‘Rhodesian Economic Development Under Sanctions and ‘The Long Haul’ (1968) 267 African Affairs 100-110 for discussion on Southern Rhodesia’s economy; Galtung (n 63), 393.

⁴⁰⁴ Galtung (n 63), 378-416.

short-term loans to the government.⁴⁰⁵ Put simply, the white population of Southern Rhodesia was prepared to sacrifice as a reaction to what it perceived as the unjust sanctions being imposed on it. This was exacerbated by the fact that Southern Rhodesia had provided troops to the allies during the two world wars and thus saw the actions of the UK as a betrayal. They had helped the UK when they were needed and now they felt they were being abandoned in their hour of need.

2.4.2.2.2 The Slow Speed at Which Sanctions were Imposed

What is striking in reading the resolutions themselves and the various commentaries offered is the general acceptance that economic sanctions were invoked in stages rather than comprehensively. Economic sanctions against Southern Rhodesia expanded gradually as initial action failed to have the desired effect. Sanctions commenced in 1965,⁴⁰⁶ were not compulsory until 1966⁴⁰⁷ and even then were not comprehensive.

UNSC Resolution 232 prohibited the importation and exportation of certain key commodities, the importation of military equipment and prohibited states from giving financial or economic aid to Southern Rhodesia. Two years later this was expanded to all goods, trade and consular representation, recognition of passports and other travel restrictions and a prohibition on the transfer of economic resources to Southern Rhodesia or commercial entities therein.⁴⁰⁸ UNSC Resolution 277 prohibited all diplomatic, consular, military, trade and other relations with Southern Rhodesia. 1976 saw the invocation of sanctions prohibiting the insurance of commodities within Southern Rhodesia.⁴⁰⁹ Finally in 1977 the use or transfer within a state of funds by the illegal regime in Southern Rhodesia was prohibited.⁴¹⁰

In light of the time that Southern Rhodesia had as a result of the slow implementation of sanctions to switch its production and stockpile certain commodities it is unsurprising that it was able to modify its economy. As Anglin states: 'piecemeal implementation of sanctions... provided the country with a valuable breathing space during which to adapt economically and psychologically to its new circumstances'.⁴¹¹

⁴⁰⁵ McKinnell (n 366), 559-581.

⁴⁰⁶ UNSC Resolution 217 (n 43).

⁴⁰⁷ UNSC Resolution 232 (n 123).

⁴⁰⁸ *ibid.*

⁴⁰⁹ UNSC Resolution 388 (n 327).

⁴¹⁰ UNSC Resolution 409 (n 330).

⁴¹¹ Anglin (n 178), 88.

2.4.2.2.3 The Cessation of Debt Repayment

The third factor that allowed the Southern Rhodesian economy to adjust to sanctions was that it stopped repaying its debts. Southern Rhodesia had considerable external debt owed to the UK, the World Bank and other creditors and by not repaying those debts it made considerable financial resources available to prop up the economy. McKinnell takes an expansive view of the effect this had when he states: “[t]he interruption of external payments from Britain was more than offset by the repudiation of all liability to service external debt”.⁴¹² This reflects the statistics of Hawkins who indicated that by refusing to service its debts Southern Rhodesia saved £8.8 million in 1966, whereas in the same year the ‘blocking and freezing of dividends, profits and interest payable to Rhodesians by Britain and Zambia reduced Rhodesia’s income by £5.1 million’.⁴¹³ Bond indicates that the non-repayment of debt facilitated what he terms ‘dramatic economic restructuring’ by making the money that would have been spent on debt repayments available for other uses.⁴¹⁴

2.5 The Legacy of Economic Sanctions Against Southern Rhodesia

The sanctions regime put in place against Southern Rhodesia was the UNSC’s first attempt at using the sanctions provisions in Article 41. It is therefore unsurprising that some difficulties were experienced with sanctions in this instance. The key issues were: the slow move to comprehensive sanctions, which resulted in the modification of the country’s economy; the breaches of sanctions by states; and the ineffectiveness of the 253 Committee. However, teething problems were to be expected in the initial case of economic sanctions in order for economic sanctions to be more effective going forward these difficulties should have been addressed in the next episode of economic sanctions. That next episode of binding UN economic sanctions was taken against Iraq, which is discussed in the next chapter.

⁴¹² McKinnell (n 366), 564.

⁴¹³ Antony Hawkins, ‘The Rhodesian Economy under Sanctions’ (1967) 1 *The Rhodesian Economic Journal* 58.

⁴¹⁴ Patrick Bond, *Against Global Apartheid: South Africa meets the World Bank, IMF and International Finance* (2nd edn. UCT Press 2003) 252.

Iraq – A Humanitarian Crisis

The case of Iraq has been described as the ‘single most important issue’ the UN Security Council dealt with in the 1990s.⁴¹⁵ This chapter examines economic sanctions against Iraq, which stretched from 1990 until December 2010.⁴¹⁶ It considers the developments to the UN economic sanctions regime that took place during this time and establishes that, regardless of the ultimate suitability of such measures, the regime was reactive to the situation as it developed. It also argues that the use of economic sanctions against Iraq constituted a turning point for UN economic sanctions in that they paved the way for the move towards targeted economic sanctions. The chapter begins with an overview of why Iraq has been selected as one of the case studies for the purpose of this thesis before briefly outlining the historical and political background of Iraq. It then considers the various resolutions that were taken by the UNSC and whether such resolutions were effective. The humanitarian impact of economic sanctions on the Iraqi population and attempts to rectify that impact are examined. Finally, the impact of economic sanctions against Iraq on targeted sanctions is explored.

3.1 Why Iraq?

The 1990’s has been termed the ‘sanctions decade’⁴¹⁷ as it heralded a new era for the development of economic sanctions within the UN framework. In the 1990’s the UN instigated twelve economic sanctions regimes⁴¹⁸ compared with only two cases⁴¹⁹ prior to 1990.⁴²⁰ As a result of the increase in the number of cases of economic sanctions, UN practices, in relation to such sanctions, became refined. Iraq was to become, and still remains, the most comprehensive system of sanctions invoked by the UNSC. Economic sanctions against Iraq, as they developed, reflected how the UN was dealing with economic sanctions. There are two reasons why Iraq has been selected. Firstly, the humanitarian problems and attempts at rectification of those problems. Secondly, the combination of military and

⁴¹⁵ Bardo Fassbender, ‘Uncertain Steps into a Post-Cold War World: The Role and Functioning of the UN Security Council after a Decade of Measures against Iraq’ (2002) 13 EJIL 273.

⁴¹⁶ They were lifted in 2010 by: UN Res 1956 (15 December 2010) UN DOC S/RES/1956; UN Res 1957 (15 December 2010) UN DOC S/RES/1957; and UN Res 1958 (15 December 2010) UN DOC S/RES/1958

⁴¹⁷ Cortright and Lopez, *The Sanctions Decade* (n 72).

⁴¹⁸ Iraq, the former Yugoslavia, Libya, Liberia, Somalia, Cambodia, Haiti, Angola, Rwanda, Sudan, Sierra Leone and Afghanistan.

⁴¹⁹ Southern Rhodesia, South Africa.

⁴²⁰ Cortright and Lopez, *The Sanctions Decade* (n 72) 1-2.

economic sanctions. The case of Iraq is also used as a contrast with the first case study in this thesis, that of Southern Rhodesia. The development of UN economic sanctions is shown by contrasting the two regimes. By comparing the two regimes the consistent elements of UN economic sanctions during the period are also shown.

3.1.1 The Humanitarian Difficulties

UNSC economic sanctions against Iraq commenced on 6 August 1990.⁴²¹ Since then, they have had a devastating impact on the Iraqi population. In March 1991, less than a year after their inception, Mr Martti Ahtisaari, UN Under-Secretary-General for Administration and Management who led a UN mission into the humanitarian needs of the Iraqi population, stated that, as a result of the combined effect of military action and economic sanctions, 'Iraq has, for some time to come, been relegated to a pre-industrial age, but with all the disabilities of post-industrial dependency on an intensive use of energy and technology.'⁴²² It has, in fact, been argued that economic sanctions against Iraq have caused more civilian deaths than were caused during the Gulf Conflict of 1990 to 1991.⁴²³ The full humanitarian impact of economic sanctions on Iraq will be discussed further in the latter stages of this chapter but suffice it to say at this juncture that commentators have attributed deaths in the civilian population of Iraq to economic sanctions.⁴²⁴

The humanitarian situation makes Iraq a suitable case study for the purpose of this thesis for three reasons. Firstly, neither Southern Rhodesia nor South Africa had experienced the sort of significant humanitarian problems that were experienced in Iraq. There was no indication in either of those cases that the civilian population was starving or dying as a result of economic sanctions. As indicated in chapter 2, Southern Rhodesia continued largely unscathed by sanctions for a decade and in many respects the main impact of economic sanctions in that case was their symbolic force, that is to say how other states viewed Southern Rhodesia as a result of the fact that it was subjected to economic

⁴²¹ UNSC Resolution 661 (n 44).

⁴²² Martti Ahtisaari, 'The Impact of War on Iraq', Report to the Secretary General on humanitarian needs in Iraq in the immediate post-crisis environment by a mission to the area led by Mr Martti Ahtisaari, Under-Secretary-General for Administration and Management, United Nations, New York, 20 March 1991, contained in Letter from the Secretary-General addressed to the President of the Security Council, 20 March 1991 UN Doc S/22366 ('Ahtisaari Report').

⁴²³ Geoff Simons, *The Scourging of Iraq: Sanctions, Law and Natural Justice* (2nd edn, MacMillan Press Ltd 1998) xviii ('Simons, *The Scourging of Iraq*').

⁴²⁴ Cassandra LaRae-Perez, 'Economic Sanctions as a Use of Force: Re-evaluating the Legality of Economic Sanctions from an Effects-Based Perspective' 20 Boston University International Law Journal 161; John Pilger, 'Collateral Damage' in Anthony Arnove (ed) *Iraq Under Siege The Deadly Impact of Sanctions and War* (2nd edn, South End Press 2002) 77; GR Popal, 'Impact of sanctions on the population of Iraq' (2000) 4 Eastern Mediterranean Health Journal 791.

sanctions, which forced Smith to remain in negotiations. As such, the fact that economic sanctions had a humanitarian impact in the case of Iraq makes an exploration of that case both novel and of particular importance. It calls into question how the necessity or desirability of taking economic sanctions should be balanced against the wellbeing of citizens, which did not arise in previous cases.

Secondly, economic sanctions were not the only UN action taken against Iraq, there was also a period of military intervention. Two issues arise as a result of this two-faceted action. Firstly, it has been argued that economic sanctions in this case compounded the effects of the hostilities.⁴²⁵ This suggests that economic sanctions may not be a suitable tool for use if military force has already been used. Secondly, it raises the question as to what type of sanctions should be used in a given case. In the first stage of the sanctions taken against Iraq economic sanctions were used,⁴²⁶ then, in the second phase, military force was invoked,⁴²⁷ before, in the third stage, economic sanctions were used again.⁴²⁸ Neither economic nor military force should be used in a given case without full consideration of the implications of whichever form of sanctions is selected.

The third reason why the humanitarian situation in Iraq justifies its inclusion as a case study is that it forced the UNSC to be more reactive in its treatment of economic sanctions. When Southern Rhodesia was under consideration it was noted that economic sanctions were extremely slow to respond whenever flaws in the system of economic sanctions, such as breaches by states, arose.⁴²⁹ This was not true in the case of Iraq and it led to such innovations as the Oil-for-Food Programme.

3.1.2 The Combination of Economic and Military Sanctions

Sanctions against Iraq were taken in three phases, firstly, economic sanctions (from 6 August 1990), then military sanctions (from 16 January 1991)⁴³⁰ and finally further economic sanctions (from 3 April 1991). The use of military sanctions distinguishes the case of Southern Rhodesia from that of Iraq. In the case of Southern Rhodesia, full-scale military sanctions were never seriously contemplated, although permission for the use of limited force to stop oil arriving at Beira was given to the UK.⁴³¹ However, given that it annexed another state, it is of little surprise that military sanctions were

⁴²⁵ Simons, *The Scourging of Iraq* (n 423) xviii.

⁴²⁶ From 6 August 1990.

⁴²⁷ From 16 January 1991.

⁴²⁸ From 3 April 1991.

⁴²⁹ See section 2.4.2.1.5.

⁴³⁰ It should be noted that during military sanctions the first phase of economic sanctions continued to run (UNSC Res 686 (2 March 1991) UN Doc S/RES/686).

⁴³¹ UNSC Resolution 221 (n 294), 5. Section 2.3.1.3.3.

considered against Iraq.⁴³² The most controversial aspect of the move toward military sanctions was the speed at which the transition occurred.⁴³³ Having been in place for less than six months, economic sanctions were given very little time to work before the commencement of military force. This contention is made on two grounds. Firstly, economic sanctions against Southern Rhodesia and South Africa had been in place for considerably longer than six months before they forced the respective governments to fully amend their behaviour so it would seem unlikely that economic sanctions could rectify the situation in Iraq in a much shorter period of time. Secondly, Iraq had some stocks of food available to it in the initial stages of sanctions estimated to be sufficient for between three and six months⁴³⁴ and the true effect of economic sanctions would not have been felt until those supplies were extinguished.

The three broad types of UNSC sanctions can be seen as hierarchical with mere condemnations of action as the lowest level of sanction, economic sanctions somewhere in the middle and military sanctions as the highest. This follows the schemata of the UN Charter, which does not require a threat or breach of the peace or act of aggression to have occurred for an action to be condemned, and requires that the UNSC decide that measures short of force provided for under Article 41 could be considered inadequate before force is invoked.⁴³⁵ As such, it would be logical to progress from economic sanctions, if they did not work, to military sanctions, if the UNSC assesses that they might be more suitable, and indeed Chapter VII allows for that situation. However, questions must be raised about maintaining economic sanctions after military sanctions – the most serious action available to the UNSC – have achieved their aims and been dropped as occurred in this case. Military sanctions cause destruction to a state. Economic sanctions cut off a state's access to the economic resources necessary to rebuild following such destruction thus retarding re-development and compounding the destruction caused by military sanctions. Equally, military sanctions, by destroying key resources, compound the effect of economic sanctions. For that reason, it is not desirable to have the mixture of economic and military sanctions of the type that occurred in Iraq.

⁴³² See for example statement of Mr Wilenski of Australia in the Security Council: 'The Security Council was compelled to authorize the use of military force by the action of the Government of Iraq. Hostilities began not on 16 January, as some seem to suggest, but on 2 August last year, when Iraq invaded Kuwait, later purporting to annex it.' UNSC Verbatim Record (15 February 1991) S/PV/2977.

⁴³³ Economic sanctions were first taken under UNSC Resolution 661 (n 44) and military action began in January of 1991.

⁴³⁴ John Simpson, *From the House of War* (Hutchinson 1991) 180 ('Simpson, *From the House of War*'); Peter Passell, 'Confrontation in the Gulf: How Vulnerable is Iraq?' *New York Times* (New York 20 August 1990).

⁴³⁵ Articles 39 – 42, UN Charter.

3.2 The Historical and Political Background to Economic Sanctions

This section outlines how the political situation that ultimately prompted the invocation of economic sanctions against Iraq developed. It will be divided into two sections: the rise to power of Saddam Hussein and the invasion of Kuwait.

3.2.1 The Rise to Power of Saddam Hussein

From the end of World War I, when due to its decision to align with the Central Powers the territory now known as Iraq was under British control,⁴³⁶ until Saddam Hussein's rise to power there was considerable political instability in Iraq.

Initially, following World War I the mandate over territory now known as Iraq was granted to the UK.⁴³⁷ The intention was that it, like other mandated territories, would eventually become independent self-governing nations but that it would only do so under the tutelage of the UK.⁴³⁸ In order to minimise its costs in the region the UK created a monarchy and arranged for an ally of the British, Hashemite Amir Feisal, to be crowned king on 23 August 1921.⁴³⁹ Once Feisal was made king he pushed for independence from the UK and Iraq was responsible for its own defence by 1928⁴⁴⁰ and became a member of the League of Nations independently in 1932.⁴⁴¹ Following independence the monarchy suffered a number of attempted military coups until it was overturned by a group known as the Free Officers' Movement on 14 July 1958.⁴⁴²

The Free Officers Movement remained in power until on 17 July 1968, in a bloodless coup, a coalition of the Baathist Party and non-Baathist commanders seized Broadcasting House, the Ministry of Defence and the headquarters of the Republican Guard and the leadership of Iraq.⁴⁴³ On 30 July of that year the Baath party expelled all others from the coalition and assumed full control of Iraq.⁴⁴⁴ Saddam Hussein initially played a minor role in the new government having been made deputy secretary of the party, vice-president of the RCC, the highest government authority, and responsible for

⁴³⁶ Charles Tripp, *A History of Iraq* (3rd edn, Cambridge University Press 2007) 31.

⁴³⁷ Margaret MacMillan, *Peacemakers Six Months that Changed the World* (John Murray (Publishers) 2001), 416.

⁴³⁸ Tripp (n 436), 40.

⁴³⁹ MacMillan (n 437), 419.

⁴⁴⁰ Tripp (n 436), 60.

⁴⁴¹ MacMillan (n 437), 420.

⁴⁴² Thabit Abdullah AJ, *A Short History of Iraq* (Pearson Education Limited 2003), 153.

⁴⁴³ Tripp (n 436), 184.

⁴⁴⁴ *ibid.* 185.

establishing an internal security apparatus⁴⁴⁵ whilst General Hassan al-Bakr acted as president, prime minister, secretary-general of the Baath Party and president of the RCC.⁴⁴⁶

From the outset, however, Saddam Hussein set about achieving power. His most strategic decision in seeking power was his involvement in the oil situation. Prior to his involvement, oil production had been controlled by the British dominated IPC, which shared revenues with Iraq. Saddam Hussein realised that in order for Iraq to get the most benefit from its oil it needed to control production and, as a result, in June 1972 Iraq nationalised the IPC.⁴⁴⁷ In September 1977 Saddam Hussein took control of all aspects of Iraq's oil thus giving him control over Iraq's key asset.⁴⁴⁸ It has been said that he was president in all but name⁴⁴⁹ and in July 1979, citing ill-health, al-Bakr resigned naming Saddam Hussein his successor.⁴⁵⁰ Within hours Saddam Hussein was sworn in as president of Iraq.⁴⁵¹

As Saddam Hussein was taking control of Iraq, a new Islamic regime was taking control of Iran. Saddam Hussein viewed the new Iranian regime with suspicion and felt that a limited war with it would be an opportunity to exert Iraq's power in the region.⁴⁵² It seemed that Iraq could have been swiftly successful in hostilities with Iran at that point. Iran had purged its officer classes and the regime was being subjected to challenge by its citizens.⁴⁵³ The US had also cut off its supply of weapons to Iran.⁴⁵⁴ In contrast Iraq had invested heavily in its military since the mid-1970s and had more international support than Iran.⁴⁵⁵ On 17 September 1980, in front of the National Assembly, Saddam Hussein abrogated the agreement,⁴⁵⁶ reached five years earlier, between Iraq and Iran with respect to their disputes at OPEC over borders, water and navigation rights.⁴⁵⁷ This was followed by pre-emptive attacks on Iran's military airfields on 22 September and by the invasion of some of Iran's territory.⁴⁵⁸ Unfortunately for Iraq it did not have the advantage over Iran that it had estimated. Iraq ended the war with a debt of between \$100 and \$120 billion, having entered it with a reserve of \$35 billion and facing

⁴⁴⁵ Abdullah (n 442), 169.

⁴⁴⁶ William Polk, *Understanding Iraq* (IB Tauris 2006) 118.

⁴⁴⁷ *ibid.*, 127.

⁴⁴⁸ Tripp (n 436), 209.

⁴⁴⁹ *ibid.*, 209.

⁴⁵⁰ Abdullah (n 442), 177.

⁴⁵¹ Tripp (n 436), 213.

⁴⁵² *ibid.*, 224.

⁴⁵³ Abdullah (n 442), 185.

⁴⁵⁴ Tripp (n 436), 223.

⁴⁵⁵ *ibid.*, 224, Polk (n 446), 129.

⁴⁵⁶ Algiers Accord (6 March 1975).

⁴⁵⁷ Tripp (n 436), 224.

⁴⁵⁸ *ibid.*

a reconstruction cost in excess of \$400 billion.⁴⁵⁹ An estimated 400,000 Iraqis were killed.⁴⁶⁰ The war ultimately ended both as a result of Iraq's use of chemical weapons,⁴⁶¹ and because the US made a policy decision to support Iraq.⁴⁶² In July 1988, Iran expressed its willingness to concede to a ceasefire.⁴⁶³

Despite being bolstered by American support, Iraq achieved nothing by going to war with the situation ultimately reverting to its previous status. In fact, the war brought about unfortunate consequences for Iraq. Firstly, it left Iraq financially devastated, which would be one of the triggers in Iraq's later hostilities with Kuwait. It also meant that Iraq was in a weak initial position when economic sanctions commenced, which would impact on the humanitarian situation. Secondly, US support gave Iraq a false confidence that such support would be forthcoming in other situations. It allowed Iraq to believe that should it get embroiled in further regional conflict it would have the support of the US and its allies. This undoubtedly hastened the Kuwait crisis that would follow.

3.2.2 The Invasion of Kuwait

As outlined previously, Iraq had suffered great financial losses during its war with Iran.⁴⁶⁴ Saddam Hussein believed that Kuwait and Saudi Arabia were in a position to help with Iraq's post-conflict refinancing. He sought three concessions: firstly, that they would restrain their production of oil thus ensuring the price remained high; secondly, that they would declare loans given to Iraq during the war with Iran as grants; and, finally, that they would offer money towards reconstruction.⁴⁶⁵ Such concessions were not forthcoming.

Even after the war, Iraq had emerged as the strongest military power in the region.⁴⁶⁶ That strength was combined with the misguided belief that other states would ultimately acquiesce should Saddam decide to invade Kuwait.⁴⁶⁷ During June and July 1990, Iraq complained to OPEC that Kuwait was violating its exportation quotas and driving down the price of oil.⁴⁶⁸ On 2 August 1990, Iraqi

⁴⁵⁹ Abdullah (n 442), 190.

⁴⁶⁰ *ibid.* 184.

⁴⁶¹ *ibid.* 187.

⁴⁶² Polk (n 446), 133.

⁴⁶³ Abdullah (n 442), 187.

⁴⁶⁴ *ibid.* 190.

⁴⁶⁵ Tripp (n 436), 242.

⁴⁶⁶ Abdullah (n 442), 192.

⁴⁶⁷ Polk (n 446), 139.

⁴⁶⁸ E Lauterpacht, CJ Greenwood, Marc Weller and Daniel Bethlehem (eds), *The Kuwait Crisis: Basic Documents*, Cambridge International Documents Series, Volume 1 (Grotius Publications Limited 1991) 71 (E Lauterpacht, CJ

troops invaded Kuwait.⁴⁶⁹ Within 24 hours Kuwait was under Iraqi control.⁴⁷⁰ This left Iraq in control of a significant proportion of the world's oil reserves.⁴⁷¹

Unlike the situation in Southern Rhodesia, which could be termed an internal conflict, the annexation of Kuwait by Iraq reflected more closely the interstate conflicts envisaged by the drafters of the UN Charter that drove the creation of Chapter VII of the Charter.⁴⁷² Within a matter of hours, the UNSC would condemn the invasion and within days economic sanctions would be in place. The next section of this chapter looks at the UNSC resolutions invoked against Iraq.

3.3 UNSC Resolutions Relating to Iraq (1990-1996)

The UNSC has released an unprecedented number of resolutions dealing with the situation in Iraq. It is not, therefore, intended that this section should go through each resolution in detail, rather it is intended that the key resolutions in relation to economic sanctions and the UNSC discussions surrounding their implementation will be outlined. This will exclude consideration of more recent UNSC sanctions resolutions dealing with Iraq as they post-date the issues under consideration here.

3.3.1 UNSC Resolutions Taken During the Iraqi Invasion of Kuwait

UNSC Resolution 661, taken 4 days after Iraq's invasion of Kuwait, was the first resolution to impose economic sanctions on Iraq.⁴⁷³ It was sponsored by a number of states⁴⁷⁴ but largely drafted by the US.⁴⁷⁵ It imposed comprehensive economic sanctions on Iraq from the outset, which can be contrasted with the piecemeal fashion in which economic sanctions against Southern Rhodesia were imposed.⁴⁷⁶ This demonstrates a willingness on the part of the UNSC to try to avoid the problems associated with the slowness at which the implementation of economic sanctions against Southern Rhodesia took place,

Greenwood, Marc Weller and Daniel Bethlehem (eds), *The Kuwait Crisis: Basic Documents*); Press Release by the Press Office of the Embassy of the Republic of Iraq, London, 12 September 1990.

⁴⁶⁹ UNSC Verbatim Record (2 August 1990) UN Doc S/PV/2932.

⁴⁷⁰ Polk (n 446), 142.

⁴⁷¹ In 1990 the total global proven oil reserves were 1003.2 thousand million barrels of oil. Iraq held 100 thousand million barrels and Kuwait held 97 thousand million barrels. By gaining control of Kuwait Iraq would have gone from a situation where it was in control of 10 per cent of the world's proven oil reserves to one where it was in control of almost 20 per cent. Statistics obtained from 'BP Statistical Review of World Energy Full Report', 2009 available at <http://www.bp.com/productlanding.do?categoryId=6929&contentId=7044622> [last accessed 20 August 2009].

⁴⁷² Schlesinger (n 147), 15-16.

⁴⁷³ UNSC Resolution 661 (n 44).

⁴⁷⁴ Canada, Colombia, Cote d'Ivoire, Ethiopia, Finland, France, Malaysia, UK, US and Zaire.

⁴⁷⁵ Marc Weller (ed), *Iraq and Kuwait: The Hostilities and their Aftermath*, Cambridge International Documents Series, Volume 3 (Grotius Publications Limited 1993) 102 ('Marc Weller (ed), *Iraq and Kuwait: The Hostilities and their Aftermath*').

⁴⁷⁶ See section 2.4.2.2.2.

leading *inter alia* to a change in the economy of Southern Rhodesia. It may also be reflective of how seriously the UNSC took the threat made to international peace and security by Iraq's invasion of Kuwait.

UNSC Resolution 661 prohibited the importation from or exportation to Iraq and Kuwait of all products, save for those products intended strictly for medical or humanitarian purposes.⁴⁷⁷ The resolution also prohibited the provision of economic resources.⁴⁷⁸ UNSC Resolution 661 established a committee ('the 661 Committee') comprising all members of the UNSC to examine reports and seek further information from states concerning the implementation of the resolution and report to the UNSC with its observations and recommendations.⁴⁷⁹ Two later resolutions developed the UN position in relation to humanitarian aid. UNSC Resolution 666 clarified what would constitute humanitarian or medical aid.⁴⁸⁰ Furthermore, in UNSC Resolution 669, the 661 Committee's ambit would later be expanded to include the examination of requests for humanitarian aid.⁴⁸¹

At the UNSC meeting, debating whether UNSC Resolution 661 should be adopted, Mr Al-Anbari, the representative of Iraq argued that Iraq had already begun withdrawing from Kuwait in accordance with UNSC Resolution 660.⁴⁸² This, he suggested, made the proposed resolution inconsistent with its aim, which was, he submitted, to ensure implementation of UNSC Resolution 660.⁴⁸³ Whilst it ultimately abstained from voting, Cuba criticised the mooted resolution on three grounds. Firstly, it accepted that Iraq had stated that it would withdraw troops from Kuwait and had in fact begun doing so.⁴⁸⁴ Secondly, it argued that the resolution was merely a means of getting the UNSC to approve and geographically expand 'specific sanctions that [had] already been imposed unilaterally by the principal developed Powers of the world.'⁴⁸⁵ Finally, it stated that the resolution was being justified on spurious grounds, in that it had purported to be a response to a failure to comply with UNSC Resolution 660 and, yet, since it had been circulated for the first time Iraq had made moves to comply with UNSC Resolution 660, which were not now being considered.⁴⁸⁶

⁴⁷⁷ UNSC Resolution 661 (n 44), 3, 4.

⁴⁷⁸ *ibid.*, 4.

⁴⁷⁹ *ibid.*, 6.

⁴⁸⁰ UNSC Res 666 (13 September 1990) UN Doc S/Res/666.

⁴⁸¹ UNSC Res 669 (24 September 1990) UN Doc S/RES/669.

⁴⁸² UNSC Verbatim Record (6 August 1990) UN Doc S/PV/2933 ('Record of the 2933rd Meeting of the UNSC').

⁴⁸³ Resolution 660 (UNSC Res (2 August 1990) UN Doc S/RES/660) had called for Iraq's withdrawal from Kuwait.

⁴⁸⁴ Record of the 2933rd Meeting of the UNSC (n 482).

⁴⁸⁵ *ibid.*

⁴⁸⁶ *ibid.*

Whilst generally other members of the UNSC⁴⁸⁷ voted in favour of the resolution,⁴⁸⁸ two points were noted by some of the participating states. Firstly, Malaysia and Canada acknowledged that such expansive sanctions would cause some humanitarian difficulties but suggested that the suffering was a necessary sacrifice in order to maintain international peace and security.⁴⁸⁹ Secondly, both Malaysia and the UK stated that the proposed resolution should not be seen as a prelude to military sanctions, rather economic sanctions were being taken so that military sanctions would not be necessary.⁴⁹⁰ It should, however, be noted that the US, as the main drafter of the resolution, concentrated largely on the motivation for economic sanctions and made no promise that military sanctions would not ultimately follow.⁴⁹¹

Despite the economic sanctions outlined in UNSC Resolution 661, and reiterated in later resolutions,⁴⁹² Iraq failed to comply with the demand to withdraw from Kuwait. This failure resulted in the creation of quasi-military sanctions in UNSC Resolution 665.⁴⁹³ It called on Member States deploying maritime forces in support of Kuwait to use such measures as were necessary to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and ensure strict implementation of UNSC Resolution 661.⁴⁹⁴ These sanctions were strengthened by the UNSC's confirmation that they applied to aircraft.⁴⁹⁵

UNSC Resolution 665 is indicative of the speed at which the UNSC was approaching sanctions against Iraq. Despite its previous assertion that UNSC Resolution 661 would not be used as a prelude to military sanctions, the UK was amongst those states that tabled the draft resolution.⁴⁹⁶ Its representative at the UNSC, Sir Crispin Tickell, argued that the force contemplated was minimal and would only be used if necessary.⁴⁹⁷ In opposition to the resolution, Yemen and Cuba argued that UNSC Resolution 661 had been given insufficient time to work prior to the invocation of further measures.⁴⁹⁸

⁴⁸⁷ Canada, China, Cote d'Ivoire, Colombia, Ethiopia, Finland, France, United Kingdom, Malaysia, Romania, USSR, United States and Democratic Republic of the Congo voted in favour of the resolution. Yemen joined Cuba in abstaining from voting on the grounds that it sought conciliation through negotiation.

⁴⁸⁸ For example the French representative, Mr Blanc, stated that the measures envisaged were justified 'because of the unacceptable nature of Iraq's military aggression, which is a major violation of international law and a serious threat to international peace and security.'

⁴⁸⁹ Record of the 2933rd Meeting of the UNSC (n 482).

⁴⁹⁰ *ibid.*

⁴⁹¹ *ibid.*

⁴⁹² UNSC Res 662 (9 August 1990) UN Doc S/RES/662, UNSC Res 664 (18 August 1990) UN Doc S/RES/664.

⁴⁹³ UNSC Res 665 (25 August 1990) UN Doc S/RES/665 ('UNSC Resolution 665').

⁴⁹⁴ *ibid.*, 1.

⁴⁹⁵ UNSC Resolution 670 (n 117).

⁴⁹⁶ E Lauterpacht, CJ Greenwood, Marc Weller and Daniel Bethlehem (eds), *The Kuwait Crisis: Basic Documents* (n 468) 116.

⁴⁹⁷ UNSC Verbatim Record (25 August 1990) UN Doc S/PV/2938 ('Record of the 2938th Meeting of the UNSC').

⁴⁹⁸ *ibid.*

Furthermore, Cuba argued that the proposed resolution was ambiguous as to its ambit as it did not specify exactly what states should provide troops nor offer any explicit limitation on what 'inward and outward maritime shipping' should be halted.⁴⁹⁹ The response to criticism that the resolution was ambiguous, offered by Mr Razali, the Malaysian representative was that: '[a]t this time no one can give any definitive assurance on the action contemplated in the resolution. The litmus test, therefore, will be its implementation.'⁵⁰⁰ France justified the invocation of the proposed resolution on the grounds that Iraq had been attempting to violate UNSC Resolution 661 and, as a result, further measures were needed in order to ensure compliance.⁵⁰¹ The resolution was adopted with thirteen votes in favour; Cuba and Yemen abstained.

It can be seen from the above that UN economic sanctions against Iraq were responsive from the outset in that the UNSC sought to rectify inadequacies in implementation such as Iraq's attempted breaches. This answered criticisms levelled against economic sanctions in relation to Southern Rhodesia that the UNSC acted slowly and failed to deal adequately with Southern Rhodesia's own breaches of the sanctions system.

However, if the UNSC failed to react when sanctions against Southern Rhodesia were in place it could be said that it reacted too quickly when sanctions against Iraq were enacted. Mr Penalosa, the representative of Colombia, vocalised this concern when he stated that 'the haste imposed on [the drafting of the proposed resolution] has deprived non-permanent members of adequate time and leisure to negotiate improvements in it.'⁵⁰² The ambiguity in relation to whom exactly the resolution would apply in terms of providing troops and in terms of what ships should be stopped was also a matter of concern in terms both of ensuring that it was properly implemented and ensuring that those states that voted to support it did so fully cognisant of its ramifications.

3.3.2 UNSC Resolutions Taken Following the Gulf Conflict

Despite the statements of the UK and Malaysia to the contrary,⁵⁰³ it is clear that from the very outset of economic sanctions that military sanctions were being contemplated,⁵⁰⁴ and shortly after the

⁴⁹⁹ *ibid.*

⁵⁰⁰ *ibid.*

⁵⁰¹ *ibid.*

⁵⁰² *ibid.*

⁵⁰³ Record of the 2933rd Meeting of the UNSC (n 482).

⁵⁰⁴ Sarah Graham-Brown, *Sanctioning Saddam The Politics of Intervention in Iraq* (IB Tauris 1999) 57.

implementation of UNSC Resolution 661 a military coalition of 34 countries began to form.⁵⁰⁵ The US very much drove the coalition and provided 75 per cent of the troops.⁵⁰⁶ The use of force was authorised by UNSC Resolution 678 in November 1990⁵⁰⁷ and the allied attack began on 16 January 1991 with an aerial bombardment which would continue for six weeks before a ground offensive.⁵⁰⁸ Once the ground offensive against Iraq commenced on 24 February, Kuwait was liberated within a matter of days and Iraq sought a cease-fire.⁵⁰⁹ Iraq had lost somewhere between 94,000 and 281,000 people,⁵¹⁰ whereas, the coalition had lost 126 troops.⁵¹¹ Iraq began withdrawing its troops from Kuwait on 27 February 1991⁵¹² and ultimately agreed to a ceasefire on 28 February 1991.⁵¹³ The terms of the ceasefire were set out in UNSC Resolution 687.⁵¹⁴

3.3.2.1 UNSC Resolution 687⁵¹⁵

Despite the ceasefire and withdrawal of Iraq from Kuwait, which meant that the aims of UNSC Resolution 661 had been achieved, UNSC Resolution 687 did not rescind any of the previous UNSC resolutions. Force could still be used under UNSC Resolution 678 because it authorised Member States to ‘use all necessary means to uphold and implement Security Council resolution 660 (1990) and all subsequent relevant resolutions.’⁵¹⁶ In fact both the UK⁵¹⁷ and the US⁵¹⁸ invoked UNSC Resolution 687 in justifying their military intervention into Iraq in 2003. Furthermore, the scope of UNSC Resolution 687 was not limited to the situation between Iraq and Kuwait but also referred to Iraq’s weapon policy and to the possibility of Iraq committing terrorist acts. It required Iraq to cease production or acquisition of and destroy previously produced or acquired chemical and biological weapons, nuclear weapons and ballistic missiles within 45 days.⁵¹⁹

⁵⁰⁵ Abdullah (n 442), 193.

⁵⁰⁶ *ibid.*, 193.

⁵⁰⁷ UNSC Res 678 (29 November 1990) UN Doc S/RES/678 (‘UNSC Resolution 678’).

⁵⁰⁸ Tripp (n 436), 245.

⁵⁰⁹ *ibid.*, 246.

⁵¹⁰ Abdullah (n 442), 194.

⁵¹¹ Simpson, *From the House of War* (n 434) xv.

⁵¹² Letter from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, 27 February 1991, S/22274.

⁵¹³ Christine Gray, ‘After the Ceasefire: Iraq, the Security Council and the Use of Force’ (1994) 65 BYIL 135.

⁵¹⁴ UNSC Res 687 (3 April 1991) UN Doc S/RES/687 (‘UNSC Resolution 687’).

⁵¹⁵ *ibid.*

⁵¹⁶ *ibid.*, 2.

⁵¹⁷ Letter dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (21 March 2003) UN Doc S/2003/350.

⁵¹⁸ Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (21 March 2003) S/2003/351.

⁵¹⁹ UNSC Resolution 687 (n 514), 8, 10, 12.

Under the resolution the UNSC held Iraq responsible for all damages caused as a result of its occupation of Kuwait.⁵²⁰ In light of those responsibilities the UNSC directed that the Secretary-General create a fund to pay compensation to the relevant parties ('the Compensation Fund').⁵²¹

UNSC Resolution 687 did advance the situation in relation to humanitarian exemptions. It provided, in paragraph 20, that the sanctions would not apply to food notified to the 661 Committee,⁵²² to materials and supplies notified for essential civilian needs under the 'no-objection' procedure to the 661 Committee or to any further findings of need by the 661 Committee.⁵²³ The paragraph 20 provisions were subject to review every sixty days.⁵²⁴ The 661 Committee could also allow exceptions to the ban on the importation of commodities and products originating in Iraq if such activity was needed to finance any action under paragraph 20.⁵²⁵ The economic sanctions would come to an end when the UNSC had approved the plan for a payment fund with respect to Iraq's debts and when Iraq had complied with the various weapons provisions.⁵²⁶

UNSC Resolution 687 was a punitive resolution. Ahtisaari had by the time the resolution was tabled produced a report on Iraq that indicated that the civilian population had been heavily impacted by both the hostilities and economic sanctions.⁵²⁷ At the UNSC meeting discussing the resolution, the representative of Iraq, Mr Al-Anbari, argued that civilians had suffered greatly during the hostilities, both as a result of directly being bombed and also through the destruction of key water, sewage and electricity facilities.⁵²⁸ He further criticised the proposed resolution on three grounds. Firstly, that it imposed reparations on Iraq whilst not awarding reparations for the damage that Iraq suffered. Secondly, that other states in the Middle East had weapons of the nature of those being prohibited in Iraq. Finally, that the maintenance of previous resolutions was unjustified in light of the progress Iraq had made on conforming to their requirements.⁵²⁹

Yemen reiterated many of Iraq's concerns in its own criticism of the resolution. Its main difficulties were that the prohibition on arms would merely create a 'military imbalance' in the region making Israel, a state which Yemen submitted challenged 'the Security Council and the international

⁵²⁰ *ibid.* 16.

⁵²¹ *ibid.* 18, 19.

⁵²² UNSC Resolution 661 (n 44), 6.

⁵²³ UNSC Resolution 687 (n 514), 20.

⁵²⁴ *ibid.* 21.

⁵²⁵ *ibid.* 23.

⁵²⁶ *ibid.* 22.

⁵²⁷ Ahtisaari Report (n 422).

⁵²⁸ UNSC Verbatim Record (3 April 1991) UN Doc S/PV/2981.

⁵²⁹ *ibid.*

community whenever it [felt] it had sufficient military power... to act without fear of competition from anyone else', more powerful. It also argued that the humanitarian crisis would be worsened by economic sanctions and that the resolution was being used to justify the behaviour of certain states.⁵³⁰ The representative of Cuba, Mr Alarcon de Quesda, accused the UNSC of selectivity in its approach to the proposed resolution stating that it was taking responsibility for the maintenance of boundaries, which went beyond its legal powers and it was banning Iraq from keeping, producing or acquiring weapons whilst aware that other states in the region had such weapons.⁵³¹ Cuba ultimately voted against the resolution.

Other states were willing to support the resolution, with Zimbabwe calling it a 'justified response to a unique situation' and Zaire stating that it addressed the humanitarian problems being seen in Iraq.⁵³² France, too, saw the resolution as materially changing the situation with regard to the importation of foodstuffs and other commodities, which it stated could be imported once notified to the 661 Committee.⁵³³ The UK justified the arms provisions by arguing that Iraq was far more advanced in terms of arms production than other states in the region and had in fact used them against its own population and against neighbouring states.⁵³⁴ It also stated that the resolution sought a balance between ensuring Kuwait received reparations for damage and not crippling the Iraqi economy because the resolution did not insist on excessive payments. India on the other hand attempted to adopt a reasonably moderate approach when it voted in favour of the resolution whilst also saying that it would seek for the commodities listed in the Martti report to be freely exportable to Iraq.⁵³⁵ The resolution was passed with twelve states in favour,⁵³⁶ one against,⁵³⁷ and two abstentions.⁵³⁸

UNSC Resolution 687 is flawed for four reasons. Firstly, it failed to offer any real consideration to the inroads that Iraq had made towards complying with earlier resolutions. There was therefore no incentive for Iraq to concede to future demands if it seemed that such concessions would bring with them little benefit. Secondly, it could, and in fact did, prove almost impossible to demonstrate that Iraq had divested itself of the listed weapons. Thirdly, the weapons requirements were only imposed on Iraq and not on other states that also possessed weapons. Finally, any increase in the

⁵³⁰ *ibid.*

⁵³¹ *ibid.*

⁵³² *ibid.*

⁵³³ *ibid.*

⁵³⁴ *ibid.*

⁵³⁵ *ibid.*

⁵³⁶ Austria, Belgium, China, France, Cote d'Ivoire, France, India, Romania, USSR, UK, US, Zaire and Zimbabwe.

⁵³⁷ Zaire.

⁵³⁸ Zimbabwe.

export of goods required for humanitarian purposes to Iraq was dependent on the opinion of the 661 Committee rather than on objective criteria, given that its permission had to be sought for such export.

3.3.2.2 UNSC Resolution 778⁵³⁹

Despite the humanitarian provisions in UNSC Resolution 687, when it was adopting UNSC Resolution 778 the UNSC noted that there were concerns about the nutrition and health of the civilian population of Iraq and that the humanitarian situation might worsen. The UNHCR had released a report the previous December indicating that by that date more than 700,000 Iraqis were internally displaced.⁵⁴⁰ In February 1992, the Special Rapporteur on Human Rights had reported that human rights violations were being committed in Iraq by both the Government of Iraq and by other parties and deemed the situation so grave as to warrant 'a response that would have to be considered as disproportionate in most other cases of human rights violations' with the presence of human rights monitors in Iraq until such time as the human rights situation improved.⁵⁴¹ By 30 July 1992, the UN Special Rapporteur stated that there was 'no reason to assume that the situation of human rights [had] improved' since the February report.⁵⁴²

Whilst Iraq may have had significant debts following the hostilities with Iran in the 1980's, as an oil producing state, it was in a position to raise money. The UNSC had attempted to formulate a means for Iraq to do this within the sanctions framework by creating resolutions allowing for an escrow account from which the various provisions of UNSC Resolution 687 would be financed.⁵⁴³ The funds for the account were provided for in UNSC Resolution 778.

The UNSC decided that all states that held Iraqi state funds, representing the proceeds of sale of Iraqi petroleum or petroleum products, paid on or after 6 August 1990, would transfer those funds to the escrow account.⁵⁴⁴ This transfer was subject to a limit of 200 million dollars or more than fifty per cent of the total funds transferred by all states.⁵⁴⁵ Furthermore, all states which were in possession of such petroleum products were to take 'all feasible steps' to purchase or arrange for the sale of such

⁵³⁹ UNSC Res 778 (3 October 1992) UN Doc S/RES/778 ('UNSC Resolution 778').

⁵⁴⁰ UNCHR Update on Operations Within the Regional Humanitarian Plan of Action, 5 December 1991, available in Marc Weller (ed), *Iraq and Kuwait: The Hostilities and their Aftermath* (n 475) 649.

⁵⁴¹ Max van der Stoep, Special Rapporteur of the Commission on Human Rights, 'Report on the situation of human rights in Iraq in accordance with Commission resolution 1991/74' (18 February 1992) E/CN.4/1992/31.

⁵⁴² Letter from the UN Special Rapporteur on the situation of human rights in Iraq to the President of the UN Security Council (30 July 1992).

⁵⁴³ UNSC Res 706 (15 August 1991) UN Doc S/RES/706, UNSC Res 712 (12 September 1991) UN Doc S/RES/712.

⁵⁴⁴ UNSC Resolution 778 (n 539), 1.

⁵⁴⁵ *ibid.* 1.

products at fair market price and transfer the proceeds as soon as possible to the escrow account.⁵⁴⁶ It also urged states to contribute funds from other sources to the escrow account.⁵⁴⁷ The Secretary-General was to monitor the whereabouts of petroleum products and the sale of same.⁵⁴⁸ He was also to ensure that the money from the escrow account went to the Compensation Fund and towards the costs of UN activities concerning the elimination of weapons of mass destruction, provision of humanitarian relief in Iraq and other UN operations.⁵⁴⁹

The UNSC was prepared to suspend the operative paragraphs of the resolution outlined above once oil exports took place pursuant to the system in UNSC Resolutions 706 and 712, or until the eventual lifting of sanctions pursuant to UNSC Resolution 687, and all proceeds of those oil exports would immediately be transferred to the escrow account.⁵⁵⁰ Iraq had, however, been unwilling to implement UNSC Resolutions 706 and 712 as it perceived them to be unreasonable encroachments on its sovereignty.⁵⁵¹ UNSC Resolution 778 was to have no effect on the debts owed by Iraq.⁵⁵² Foodstuff and essential materials and supplies were to be financed from the escrow account going forward.⁵⁵³

These measures raised \$101.5 million.⁵⁵⁴ They were, however, short-term measures, which would not be sustainable in the medium to long-term, as they relied on petroleum products already having reached third states. In order to provide adequate funds in the escrow account in the future, an agreement would have to be reached, acceptable to Iraq, whereby Iraq could export oil and the money received would be used to finance the escrow account.

3.3.2.3 UNSC Resolution 986⁵⁵⁵

By April 1995 the UNSC expressed concern that there was a serious nutritional and health situation in Iraq, which could worsen.⁵⁵⁶ In order that Iraq be given an opportunity to rectify the humanitarian situation itself, UNSC Resolution 986 established a system that became known as the Oil-for-Food Programme. The UNSC authorised the importation of petroleum and petroleum products from Iraq and

⁵⁴⁶ *ibid.*, 2.

⁵⁴⁷ *ibid.*, 3.

⁵⁴⁸ *ibid.*, 5(a).

⁵⁴⁹ *ibid.*, 5(c).

⁵⁵⁰ *ibid.*, 6.

⁵⁵¹ UNSC Verbatim Record (15 August 1991) UN Doc S/PV/3004; Tim Niblock, *"Pariah States" and Sanctions in the Middle East Iraq, Libya, Sudan* (Rienner 2002) 114.

⁵⁵² UNSC Resolution 778 (n 539), 7.

⁵⁵³ *ibid.*, 8.

⁵⁵⁴ Niblock (n 551), 114.

⁵⁵⁵ UNSC Res 986 (14 April 1995) UN Doc S/RES/986 ('UNSC Resolution 986').

⁵⁵⁶ *ibid.* introduction.

essential transactions relating to them, up to a total of one billion US dollars every 90 days, provided they received approval from the 661 Committee and paid the full amount of each purchase directly into the escrow account established by the Secretary-General for this purpose.⁵⁵⁷

The funds in the escrow account were to be used predominately for humanitarian purposes and the UNSC delineated a number of necessary actions. It requested the Secretary-General to use the funds deposited to finance the export to Iraq of medicine, health supplies, foodstuffs and materials and supplies for essential civilian needs.⁵⁵⁸ There were some criteria that needed to be met before this could take place.⁵⁵⁹ Each export had to be requested by the Government of Iraq, which also had to guarantee their equitable distribution on the basis of a plan approved by the Secretary-General.⁵⁶⁰ He had to receive confirmation that the exported goods concerned had arrived in Iraq and ensure that the Government of Iraq distributed relief equitably by providing between 130 and 150 million US dollars every 90 days to the UN Inter-Agency Humanitarian Programme operating within the sovereign territory of Iraq or a proportionate amount if less than one billion US dollars worth of petroleum or petroleum products was sold during any 90 day period.⁵⁶¹ Furthermore, a percentage of the funds had to be transferred to the Compensation Fund.⁵⁶² The money in the escrow account would also be used for administrative purposes, to meet the costs of the UN associated with implementation of the resolution, the current operating costs of the Special Commission and any reasonable expense determined by the 661 Committee to be directly related to the export by Iraq of petroleum and petroleum based products as permitted.⁵⁶³ Finally the sum of up to 10 million US dollars had to be made available every 90 days for the payments to states envisaged under paragraph 6 of UNSC Resolution 778.⁵⁶⁴

UNSC Resolution 986 was in one respect a significant improvement upon previous resolutions in that it allowed Iraq's oil reserves to be used to improve the humanitarian situation in Iraq. More extensive consideration will be given to the implementation of the Oil-for-Food Programme later in this chapter, however three problems on the face of the resolution should be mentioned here.

⁵⁵⁷ *ibid.* 1, 7.

⁵⁵⁸ *ibid.* 8.

⁵⁵⁹ *ibid.* 8(a).

⁵⁶⁰ *ibid.* 8(a)(i), 8(a)(ii).

⁵⁶¹ *ibid.* 8(a)(iii), 8(b).

⁵⁶² *ibid.* 8(c).

⁵⁶³ *ibid.* 8(d)-8(f).

⁵⁶⁴ *ibid.* 8(g).

Firstly, the importation from Iraq was only allowed for a thirty-day period. This was a short period of time given that the system could not function beyond that date without a further mandate. Whilst it ensured the system was constantly under review, a longer period of permitted importation, which had a review period at thirty days but could function beyond that, would have been more efficient in that it would have allowed for implementation problems to be seen and rectified without there being a risk that the exportation of oil would be forced to stop.

Secondly, the money in the escrow account was being spread too thinly. The primary aim of the escrow account and of the resolution was to resolve the humanitarian crisis in Iraq. All of the money raised should have been placed in an escrow account and used by Iraq, albeit under supervision, for humanitarian aid, which would be a strong response to any potential criticism by Iraq that such resolutions impacted on its sovereignty. Other issues such as compensation and administrative costs should have been treated as subsidiary. The former costs could have been frozen until a point at which Iraq could sustain itself and there was a stable humanitarian situation and the latter could, with the agreement of the UNGA, have been serviced from the general UN budget.

The second issue was compounded by the third – that there were no provisions to allow other states to fund humanitarian programmes if oil exportation failed to raise sufficient funds to resolve the humanitarian situation. The assumption of the UNSC seems to have been that Iraq would be able to wholly finance itself once oil exportation recommenced. If this did not prove to be case, as it ultimately did not, there was no suggestion that other states might donate funds for humanitarian purposes. This was a significant flaw in UNSC Resolution 986.

A process to monitor exports and imports was later established under UNSC Resolution 1051, which required notification by states to a joint unit comprised of a Special Commission and the Director of the IAEA.⁵⁶⁵ States were required to notify exports and potential breaches of economic sanctions.

3.3.3 Further Resolutions

The resolutions outlined in detail in this chapter do not cover all of the resolutions that Iraq was subjected to between 1990 and 1996. Iraq's denial on occasion to allow weapons inspectors access, or

⁵⁶⁵ UNSC Res 1051 (27 March 1996) UN Doc S/RES/1051.

to refuse to export petroleum, prompted further UNSC resolutions.⁵⁶⁶ The humanitarian situation also remained unsatisfactory and regular reviews of it and of the Oil-for-Food Programme took place. The resolutions outlined here, however, form the basis of the next sections of this chapter. They are relevant because they outline the policies that had the greatest impact on the Iraqi situation as time progressed.

3.4 Were Economic Sanctions Taken Against Iraq Effective?

There are two aspects to the question of effectiveness that may be important in considering a system of sanctions. In Southern Rhodesia, we saw the first of them – the actions taken by the UNSC that influence the effectiveness of sanctions, for example the move to more targeted economic sanctions as time went on.

The second aspect of effectiveness is raised in Iraq. What impact does the effectiveness of economic sanctions have on the state against which they are implemented? For example, does the effectiveness of a sanctions regime increase compliance sufficiently that any deficiencies within that regime may be disregarded? These two aspects of effectiveness remain important because they give guidance as to how economic sanctions should develop. They offer an indication as to the UNSC policies that have and have not worked and the impact of those policies on the community on which they have been implemented.

This section offers a brief analysis of the effectiveness of economic sanctions in achieving their intended goals in Iraq. It discusses the notion of effectiveness in the Iraqi context. It questions whether the situation in Iraq was such that Iraq was a good target for economic sanctions, that is to say were there indications that economic sanctions should have been effective. Finally it examines whether economic sanctions were in fact effective.

3.4.1 How to Define Effectiveness in the Iraqi Context

The decision as to whether a system of economic sanctions has or has not been effective is based upon the degree to which a given system of economic sanctions achieves the goals for which it was established. Many systems of economic sanctions have multiple goals as each state will have its own interest in mind when voting to implement sanctions. Iraq presents a difficult analysis because as

⁵⁶⁶ UNSC Res 1060 (12 June 1996) UN Doc S/RES/1060, UNSC Res 1115 (21 June 1997) UN Doc S/RES/1115, UNSC Res 1129 (12 September 1997) UN Doc S/RES/1129.

economic sanctions progressed the goals of economic sanctions expressed on the face of the UNSC resolutions expanded.

The initial goal of UN economic sanctions against Iraq was the withdrawal of Iraq from Kuwait.⁵⁶⁷ However once that goal was reached, albeit through the use of military sanctions, the parameters of economic sanctions were shifted to include commitments in relation to weapons and the prevention of terrorism.⁵⁶⁸ This section will look at two issues in order to ascertain the difficulties in measuring the effectiveness of economic sanctions against Iraq – selection of sanction-type and the issue of multiple goals before concluding with a summary of what economic sanctions would need to achieve in order to be considered effective in the Iraqi context.

3.4.1.1 Selection of Economic Sanctions

Save for the limited British naval actions,⁵⁶⁹ military sanctions were never seriously considered against Southern Rhodesia. Iraq presented a very different situation than had been at issue in Southern Rhodesia in that annexation of another territory had occurred. States were quick to suggest the use of force.⁵⁷⁰ This use of both economic and military sanctions is important when considering the effectiveness of economic sanctions in two respects.

Firstly, the speed at which the UNSC moved from economic sanctions to military sanctions may be seen by states as proof that the UNSC sees economic sanctions as insufficient in their own right to force change. This may have impacted on the effectiveness with respect to both Iraq itself and other states. Iraq may have believed that it could outlast economic sanctions because it began to perceive economic sanctions as a weak tool, which would diminish their effectiveness in practice. Other states may have been willing to breach economic sanctions in the belief that this would have little impact on whether the overall aim of economic sanctions was or was not achieved as economic sanctions would not in any case be effective.

Secondly the use of both military and economic sanctions may make any assessment of sanctions difficult. This manifests itself in two ways in the case of Iraq. Firstly, following Iraq's invasion of Kuwait, economic sanctions were taken by the UN with the aim of coercing Iraq to

⁵⁶⁷ UNSC Resolution 661 (n 44).

⁵⁶⁸ UNSC Resolution 687 (n 514).

⁵⁶⁹ UNSC Resolution 221 (n 294), 5(f).

⁵⁷⁰ Christopher Greenwood, 'New World Order or Old? The Invasion of Kuwait and the Rule of Law' (1992) 55 *Modern Law Review* 161; Simons, *The Scourging of Iraq* (n 423) 41; Record of the 2938th Meeting of the UNSC (n 497).

withdraw from Kuwait, but before an assessment had been made as to whether economic sanctions had worked, military force was taken as a result of which Iraq withdrew from Kuwait. Based on this fact pattern it would be very difficult to assess whether or not economic sanctions were in any way effective because it is unclear to what extent they, as opposed to the military sanctions that followed, could be considered responsible for Iraq's withdrawal from Kuwait.

The second phase of economic sanctions also serves to illustrate the difficulties in assessing economic sanctions when military sanctions are also in use. In that phase economic sanctions followed military sanctions. The military sanctions against Iraq had caused damage to it. Most significantly, material damage had been caused to its key resources such as the water and electrical supply.⁵⁷¹ As it was subject to economic sanctions Iraq was not in a position to rebuild those resources. In that situation it is very difficult to separate the damage caused by economic sanctions from that arising as a result of military sanctions. As such, it is possible that subsequent economic sanctions could be assessed as being effective, in the sense of forcing change, when, in fact, part of that effectiveness is due to the devastation perpetrated on the state by military sanctions.

3.4.1.2 Multiple Goals

Over the course of their existence economic sanctions against Iraq had more than one clearly defined goal. UNSC resolutions alone indicated that economic sanctions against Iraq were being implemented to force Iraq to withdraw from Kuwait,⁵⁷² to refrain from developing nuclear or chemical weapons and weapons of mass destruction and not to commit acts of terrorism.⁵⁷³ Additionally, states were also motivated by other, more individual, concerns. It has been suggested that the economic sanctions were being used opportunistically against Iraq as they got wider support than military force would have done and that their goals shifted with the circumstances.⁵⁷⁴ The goals of states beyond those delineated in the UNSC resolutions are briefly considered before addressing the impact of multiple goals on the effectiveness of economic sanctions.

⁵⁷¹ Ahtisaari Report (n 422).

⁵⁷² UNSC Resolution 661 (n 44).

⁵⁷³ UNSC Resolution 687 (n 514).

⁵⁷⁴ Jack T Patterson, 'The Political and Moral Appropriateness of Sanctions' in David Cortright and George A Lopez (eds), *Economic Sanctions Panacea or Peacebuilding in a Post-Cold War World?* (Westview 1995) 90.

The US led the way with regard to both economic and military sanctions against Iraq and has been described as the ‘principal architect’ of UNSC Resolution 661.⁵⁷⁵ The US backed its intervention into Iraq with a far-reaching agenda. A State Department spokesperson, Margaret Tutwiler, indicated that the US, in addition to goals outlined in the resolutions,⁵⁷⁶ was seeking to ensure all of its citizens in the region were safe, that there was freedom of navigation in the Persian Gulf and the continued production of oil.⁵⁷⁷ Additionally, it has been suggested that the US wished to re-establish its status internationally, as a country that was capable of successfully fighting a war, following the war in Vietnam.⁵⁷⁸ Finally, it has been suggested that the US saw involvement in Iraq as an ideal opportunity to get a strategic military constellation in the Middle East, which would have economic, political and geo-strategic benefits.⁵⁷⁹

Aside from the US, only France and the UK have played any significant role in the formulation of policy in relation to Iraq.⁵⁸⁰ Both France and the UK found their loyalties divided between Iraq and Kuwait. France was an ‘instinctive opponent of Iraq’ and the UK had colonial ties with Kuwait but both also had significant economic interests in Iraq.⁵⁸¹ Despite being faced with a similar dilemma, the UK decided to aggressively align itself with the US whereas France found its government divided and ultimately focused on attempts to reach agreement through conciliation.⁵⁸²

Other states had various interests in the situation in Iraq. Japan and Germany found themselves constrained constitutionally with regard to any military action and largely failed to voice opinions on the situation as it unfolded.⁵⁸³ The USSR, and its successor, Russia, had strong economic links with Iraq and Iraq was indebted to it. It was therefore hopeful that economic sanctions would not remain in place for an extended period of time.⁵⁸⁴ The Gulf States generally were opposed to Iraq, if for no other reason than out of fear for the consequences should it be successful in its annexation of Kuwait.⁵⁸⁵ Iran had slightly broader motivations. It wished to bring its war with Iraq to a formal conclusion and win favour with the Western countries whose support was needed to rebuild the Iranian

⁵⁷⁵ Graham-Brown (n 504), 56.

⁵⁷⁶ Which were, the immediate withdrawal of Iraq from Kuwait and the restoration to power of a legitimate Kuwait government.

⁵⁷⁷ Ann Devroy and David Hoffman, ‘Bush Says U.N. Sanctions ‘Must Be Enforced’ to Isolate Iraq; President Presses Complete Embargo, Closing of Pipelines’ *Washington Post*, (Washington 7 August 1990).

⁵⁷⁸ Simpson, *From the House of War* (n 434) 211.

⁵⁷⁹ HC Von Sponeck, *A Different Kind of War The UN Sanctions Regime in Iraq* (Berghahn Books 2006) 5.

⁵⁸⁰ Graham-Brown (n 504), 59.

⁵⁸¹ Simpson, *From the House of War* (n 434) 120-121.

⁵⁸² *ibid*, 120-122.

⁵⁸³ *ibid*, 122-123.

⁵⁸⁴ Graham-Brown (n 504), 63.

⁵⁸⁵ Simpson, *From the House of War* (n 434) 123.

economy.⁵⁸⁶ Iran and the UK were not the only states that could see the strategic value attached to their choice to support either Iraq or Kuwait, states such as Turkey were motivated by the possibility of currying US favour and in Turkey's case the opportunity to expedite European Union membership.⁵⁸⁷

The multiple goals of economic sanctions against Iraq can cause difficulties in assessing the effectiveness of that system of economic sanctions. This difficulty is amplified as the goals set out in the UNSC resolutions have both short-term and long-term elements. The withdrawal of Iraq from Kuwait was certainly a short-term goal whereas the goals in relation to weapons and terrorism, whilst couched as short-term goals, were in practice long-term goals since Iraq was required not only to destroy weapons but also to refrain from developing more in the future. On the other hand, even states seeking the same goal, for example, those seeking peace between Iraq and Kuwait, may have had very different opinions as to over what time period they expected that to occur. For example, the US may not have felt that a speedy resolution to the difficulties was necessary as long as it stayed in occupation and had economic control over Iraq, whereas a state like Russia had an economic motivation to ensure that sanctions did not stay in place long-term.

3.4.1.3 Effectiveness in the Iraqi Context

In order to consider effectiveness in the Iraqi context, the time period needs to be divided in two, as occurred with the discussion of UNSC resolutions. Francois Mitterrand, the French prime minister, had indicated, prior to the military intervention, that Iraq could avoid being subjected to military sanctions if it released the hostages it had taken and withdrew from Kuwait.⁵⁸⁸ It is reasonable, in light of that statement, to assume that the same criteria would have applied at that point to a cessation of economic sanctions. In other words economic sanctions would have been effective had they exerted sufficient pressure on Iraq that it released the hostages and withdrew from Kuwait.

The second period of time under consideration started on 3 April 1991, following the ceasefire between Iraq and Kuwait signed on 28 February 1991. This assessment would necessarily take place over a longer time period, as the goals set out during this phase of sanctions were not achievable in a short time period. For economic sanctions to be considered effective for this period, Iraq would have needed to destroy and cease production of chemical and nuclear weapons and all other weapons of

⁵⁸⁶ *ibid.*, 123.

⁵⁸⁷ Simons, *The Scourging of Iraq* (n 423) 40.

⁵⁸⁸ Simpson, *From the House of War* (n 434) 204.

mass destruction. It would also have had to refrain from involvement in terrorist activity. It is more difficult to prove these goals than the goals of the first phase of economic sanctions. Unlike the end of unrepresentative rule in Southern Rhodesia or the withdrawal of troops from Kuwait, it would prove difficult if not impossible for a country to establish that it did not have certain types of weapons on its territory.

Whilst it is accepted that Iraq did not fully cooperate with the UN missions, which sought to verify that it was complying with the weapons requirements contained in UNSC resolutions,⁵⁸⁹ it is submitted that even full cooperation would not have provided sufficient evidence for economic sanctions to be lifted. This is because, even if weapons inspectors, with full right of access to Iraqi territory, stated that there were no weapons in Iraq it would not be possible for those weapons inspectors to maintain a simultaneous presence across all of Iraq, both urban and rural. As such, other states would always be in a position to suggest that Iraq did have weapons in a region not yet inspected or had moved storage and production to a region that had already been cleared by the weapons inspectors. This meant that Iraq would never be able to prove that it did not have weapons. This goal would only be satisfied if the UN or its Member States chose to believe that Iraq had decommissioned all of its weapons and was not developing more as Iraq would never be in a position to physically prove these contentions.

The other goal of economic sanctions during the second phase was the prevention of acts of terrorism. The achievement of this goal would cause difficulties of proof for three reasons. Firstly, acts of terrorism are not always attributable to or supported by states.⁵⁹⁰ It is unlikely, particularly in light of its history of uprisings, which have been briefly outlined in this chapter, that Iraq would have absolute control over acts of terrorism on its territory. Secondly, a legal definition for the term terrorism has not yet been agreed upon in international law.⁵⁹¹ This allows other states flexibility in deciding whether Iraq had or had not adhered to this requirement. Thirdly, it would be difficult to establish when the prevention of terrorism acts has been achieved. It is, of course, possible to prove that acts of state-supported terrorism have not occurred to date. However the fact that a terrorist act has

⁵⁸⁹ Hans Blix, *Disarming Iraq: The Search for Weapons of Mass Destruction* (Bloombury 2004) 30-31.

⁵⁹⁰ Article 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, deals with the attribution of acts to a state. It states: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.'

⁵⁹¹ Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (Oxford University Press 2005) 346; Shaw. (n 249) 1159.

not occurred by a given date does not mean that one will not occur in the future. As such, it would be difficult to establish at what point the absence of terrorist acts is sufficient to justify the lifting of a system of sanctions because such an act might still occur in the future.

3.4.2 Should Economic Sanctions Have Been Effective in this Case?

This section considers whether Iraq was a good target for economic sanctions. It does so by looking at whether Iraq had characteristics such that economic sanctions were likely to be effective at forcing change. It considers the effectiveness of economic sanctions in relation to the two phases of economic sanctions against Iraq.

3.4.2.1 Effectiveness of the First Phase of Economic Sanctions

Economic sanctions taken during the first phase were given less than five months to work before military force was initiated. Furthermore, preparation for military sanctions began to take place considerably earlier than the actual initiation of military sanctions as a result of the ‘failing’ of economic sanctions.⁵⁹²

As evidenced by the case study of Southern Rhodesia, UN economic sanctions should not be considered a short-term solution to a problem. Economic sanctions take time to paralyse the economy of a state.⁵⁹³ Regardless of how reactive to economic sanctions a state might be in the medium- to long-term, a state will be in a position to cope with economic sanctions in the short term. In the case of Iraq, whilst it was heavily reliant on imported food, it had sufficient supplies to last for a number of months in the initial stages of sanctions.⁵⁹⁴ As economic sanctions were given so little time to work in the initial phase it is very difficult to predict whether they could have been effective. The indicators discussed below in relation to the second phase of economic sanctions would of course have been present.

However, Iraq would also have been aware that states were considering further action in the form of military sanctions. The action taken by UK and US naval forces to enforce UNSC Resolution 661, which included US warships ‘firing across the bows of two Iraqi tankers’ and the deployment of

⁵⁹² Graham-Brown (n 504), 57.

⁵⁹³ Richard E Hull, *Imposing International Sanctions Legal Aspects and Enforcement by the Military* (National Defense University Press 1997).

⁵⁹⁴ Simpson, *From the House of War* (n 434) 180.

US and other troops to the Gulf,⁵⁹⁵ was a clear indication that military sanctions were imminent. The move towards military sanctions would have belied any attempt to convince Iraq that there was a belief amongst the implementing states that economic sanctions would work. This alone could serve to increase Iraq's belief that it would be largely unaffected by economic sanctions, which might in turn decrease their effectiveness. Furthermore, states that were not initially involved in the plans for military action might be discouraged from strict adherence to economic sanctions if they believed that military sanctions were, in any case, imminent.

3.4.2.2 Effectiveness of the Second Phase of Economic Sanctions

One of the difficulties with economic sanctions against Iraq is the UNSC's uncertainty surrounding their effectiveness. The first phase of economic sanctions was considered by the UNSC to have failed, which is why under UNSC Resolution 678 the UNSC authorised those Member States that were co-operating with Kuwait 'to use all possible means to uphold and implement' UNSC Resolution 660 and subsequent resolutions.⁵⁹⁶ Despite this, once military sanctions were completed economic sanctions continued.⁵⁹⁷ This suggests that the UNSC may have believed that economic sanctions could have been successful in the first phase had they been given adequate time to work. This section examines the second phase of economic sanctions against Iraq. The second phase refers to the period following the end of the Gulf war commencing with UNSC Resolution 687 taken on 3 April 1991.⁵⁹⁸ It will briefly consider four indicators for the success of economic sanctions – the reliance on imports, facilities for transportation, the actions of other states and oil.

3.4.2.2.1 The Importation of Goods

One of the key factors in whether economic sanctions can be confident of success is the degree to which a state subject to sanctions can rely on its own resources as opposed to requiring that goods and commodities be imported from other states. As discussed in the last chapter, South Rhodesia initially managed to mitigate the impact of economic sanctions by modifying its behaviour.⁵⁹⁹

⁵⁹⁵ Greenwood (n 570), 163. See discussion of UNSC Resolution 665 (n 493) in section 3.3.1.

⁵⁹⁶ UNSC Resolution 678 (n 507), 2.

⁵⁹⁷ Patterson (n 574), 90.

⁵⁹⁸ UNSC Resolution 687 (n 514).

⁵⁹⁹ See section 2.4.2.2.

The economy of Iraq was such that it was unlikely to be in a position to follow Southern Rhodesia's success in mitigating the effects of economic sanctions. Iraq had from the 1960's seen a shift in the economy which had resulted in a drastic reduction in the number of people employed in the agricultural sector from 56 per cent in 1960 to 12 per cent in 1990⁶⁰⁰ and it was importing 70 per cent of its food needs from other states by the time that economic sanctions were instigated.⁶⁰¹ These figures indicate that Iraq was heavily reliant on obtaining its food from other states.

Furthermore, because of the low percentage of workers involved in agriculture, Iraq would not have found it easy to modify its production output in order to decrease this reliance on imported food. It should also be noted that, unlike the situation in Southern Rhodesia, where white citizens were supportive of the Smith government and resentful of economic sanctions,⁶⁰² some commentators have suggested that the citizens of Iraq, whilst forced not to criticise the government regime, did little to support the government in overcoming the effects of economic sanctions.⁶⁰³ In fact, between February 1991 (immediately after the cessation of military sanctions) and 1997, it is estimated that 2 million Iraqis fled Iraq.⁶⁰⁴ This too would impact on the effectiveness of economic sanctions against Iraq.

As Iraq was heavily reliant on the importation of basic foodstuffs, economic sanctions limiting the exportation of such products to Iraq should have had severe consequences for the Iraqi population and encouraged Iraq to amend its behaviour.

3.4.2.2 Facilities for Transportation

By the time it was subjected to economic sanctions, Iraq's economy was largely driven by its exportation of oil. By 1980, oil was responsible for up to 98 per cent of foreign currency earnings amounting to 90 per cent of state revenue.⁶⁰⁵ Despite this, Iraq's export facilities were limited as it is almost completely land-locked. Iraq had attempted to develop the port facilities in the south of the country,⁶⁰⁶ but these facilities were targeted during the military offensive and in many cases destroyed.⁶⁰⁷ As such, like Southern Rhodesia before it, Iraq relied on other states to enable the

⁶⁰⁰ Eric Hoskins, 'The Humanitarian Impacts of Economic Sanctions and War in Iraq' in Thomas G Weiss, David Cortright, George A Lopez and Larry Minear (eds), *Political Gain and Civilian Pain Humanitarian Impacts of Economic Sanctions* (Rowman & Littlefield 1997) 91.

⁶⁰¹ Ahtisaari Report (n 422).

⁶⁰² Galtung (n 63), 378-416.

⁶⁰³ Simpson, *From the House of War* (n 434) 185; Hoskins (n 600), 109.

⁶⁰⁴ Hoskins (n 600), 109.

⁶⁰⁵ Abdullah (n 442), 171.

⁶⁰⁶ Abdullah (n 442), 171.

⁶⁰⁷ Simons, *The Scourging of Iraq* (n 423) 13.

exportation of oil. Iraq's only export pipelines ran through Saudi Arabia and Turkey.⁶⁰⁸ These were closed immediately following sanctions.

Iraq's limited facilities for exporting oil should have made it an ideal target for economic sanctions as it provided an easy way of controlling Iraq's access to foreign currency. This would cause Iraq particular difficulties when combined with its reliance on imported food.

3.4.2.2.3 The Position of Other States

As discussed in relation to Southern Rhodesia, a key factor in the effectiveness of a given system of economic sanctions is how states choose to react to that system.⁶⁰⁹ In the initial phases of economic sanctions taken against Iraq, states seemed willing to enforce the sanctions. Simpson contrasted the situations of Southern Rhodesia and Iraq when he stated that: '[sanctions against Iraq] were as fierce as the United Nations had voted against Rhodesia... the difference this time was that no one was likely to break them.'⁶¹⁰ This was confirmed by Greenwood who stated that 'resolution 661 was almost universally applied' and specifically that it was applied by 'all the major trading states.'⁶¹¹

Even where there was a risk of sanctions being breached, the repercussions were not in those initial phases as significant as similar situations that had arisen in the Southern Rhodesian context. For example, both Zambia in the Southern Rhodesian context and Jordan in the Iraqi context relied heavily on the target state for the survival of its own economy. However, Zambia and Southern Rhodesia's economies were interlinked to the extent that if Zambia breached sanctions it was in a position to prop up the Southern Rhodesian economy. Whereas, whilst the full implementation of economic sanctions against Iraq would have devastated Jordan's economy, bringing it almost to a standstill,⁶¹² despite causing estimated losses in excess of half a billion dollars to Jordan's economy,⁶¹³ whether Jordan did or did not implement economic sanctions would not make an appreciable difference to Iraq's economy or military status.⁶¹⁴

It should, however, be noted that as sanctions against Iraq progressed breaches did occur. These breaches occurred both through trade with neighbouring states and by breaching the Oil-for-

⁶⁰⁸ Tripp (n 436), 244.

⁶⁰⁹ See section 2.4.2.1.1 – 2.4.2.1.3.

⁶¹⁰ Simpson, *From the House of War* (n 434) 133.

⁶¹¹ Greenwood (n 570), 160.

⁶¹² Andrew Rosenthal, 'Confrontation in the Gulf: Strategy: Embargo; U.S. Bets Its Troops Will Deter Iraq While Sanctions Do the Real Fighting' *New York Times* (New York 9 August 1990).

⁶¹³ Simons, *The Scourging of Iraq* (n 423) 38.

⁶¹⁴ *ibid.*

Food Programme.⁶¹⁵ For example, sanctions were breached by AWB.⁶¹⁶ There are two significant differences between these breaches and the breaches against Southern Rhodesia.

Firstly, states showed considerable willingness in the initial stages to implement economic sanctions, which might have meant that economic sanctions alone would have been effective had military sanctions been not implemented so quickly after economic sanctions. Secondly, the breaches of sanctions against Iraq, particularly with respect to the Oil-for-Food Programme, were comprehensively investigated, both at state-level and by an independent inquiry,⁶¹⁷ which did not occur in the case of Southern Rhodesia.

The position of other states in relation to economic sanctions against Iraq was an indicator that economic sanctions were likely to be effective for two reasons. Firstly, states were generally prepared to implement economic sanctions. Secondly, where a state, such as Jordan, could not implement economic sanctions its breaches were insufficient to impact on the viability of the Iraqi economy. Furthermore, when breaches did occur there was a willingness to investigate such breaches, albeit that the investigations could have taken place earlier. This too is an indication that the economic sanctions regime against Iraq reacted to difficulties as they emerged.

3.4.2.2.4 Oil

Oil is a key commodity and had proven to be of significant importance during sanctions against Southern Rhodesia. In the Iraqi context it was also important although Iraq, as an oil producing state, presented different problems from Southern Rhodesia. These issues were exacerbated by Iraq's annexation of Kuwait, which is another oil-producing country.

Prior to the instigation of economic sanctions, oil had provided Iraq with 61 per cent of its GDP and in excess of 90 per cent of its export earnings.⁶¹⁸ Iraq was relying on oil to provide foreign currency, which it needed to purchase basic commodities, and, as such, restricting exports of oil would negatively impact on the economy of Iraq. If states strictly enforced the requirement not to import oil

⁶¹⁵ Charles Duelfer. 'Comprehensive Report of the Special Advisor to the DCI on Iraq's WMD' (Washington DC: Central Intelligence Agency, 2004) ('Duelfer Report').

⁶¹⁶ Daniel Stewart, 'Who's responsible? Justiciability of private and political decisions' in ' in Jeremy Farrall and Kim Rubenstein (eds). *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press 2009) 313.

⁶¹⁷ Duelfer Report (n 615); Paul A Volcker (Chairman), Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *The Management of the United Nations Oil-for-Food Programme* ('The Vockler Report'); The Honourable Terence RH Cole AO RFD QC, 'Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme' (November 2006) ('Cole Report').

⁶¹⁸ Economist Intelligence Unit, 'Iraq: EIU Country Report' (Economist Intelligence Unit, London 1994) 3.

from Iraq, its economy would have suffered significant damage and Iraq would have been forced to amend its behaviour in the hopes that sanctions would be lifted. However, other states relied on Iraq to supply them with oil.

This raises a question – is oil too valuable a commodity to allow its exportation to be restricted? The number of oil-producing states in the world is a small percentage of the number of states that require oil. As such, can those states that need oil ever sanction the exportation of oil and risk being left with a deficit of a vital commodity as a result? In the case of Iraq, it was estimated that 75 per cent of the deficit could be replaced in the short-term.⁶¹⁹ It would remain the case, however, that there would be a shortfall and it is unclear as to what that shortfall would be in the medium- to long-term and the impact of that on compliance with economic sanctions.

It should, however, be noted that states seemed willing to apply economic sanctions against Iraq regardless of the fact that Iraq was an oil-producing country. This willingness to apply economic sanctions would mitigate the desire to purchase oil from Iraq. It would therefore become a question of whether Iraq, or the other states involved, would be more reactive to the effect of economic sanctions. Commentators have suggested that Iraq would have been prepared to suffer the effects of economic sanctions considerably longer than the other states involved, with G Henry M Schuler from the Center for Strategic and International Studies stating that ‘the question is who feels the pain first, who flinches or blinks first. I am not sure it will be Iraq. We [the US] are feeling the pain already. I’ll bet Iraqis are still dancing in the street.’⁶²⁰ This is despite economic indicators suggesting that Iraq should have been more sensitive to economic sanctions than the US.⁶²¹ It is submitted here that oil would remain an issue that could impact on the effectiveness of economic sanctions against Iraq and would need to be followed closely.

On balance, it would seem that Iraq was a good target for economic sanctions. It required the importation of basic goods for survival, had little control over facilities required to transport its main commodity and states supported economic sanctions in a manner that had not been seen in the case of Southern Rhodesia. The issue most likely to impact on the effectiveness of economic sanctions was the fact that Iraq was an oil producing country.

⁶¹⁹ *ibid.*

⁶²⁰ Stuart Auerbach, ‘Iraq Seen as Vulnerable to Economic Warfare’ *Washington Post* (Washington 8 August 1990). See also Douglas A Borer ‘Inverse Engagement: Lessons from US-Iraq Relations, 1982-1990’ Summer 2003. Available at <http://www.carlisle.army.mil/usawc/parameters/Articles/03summer/borer.pdf> [last accessed 20 June 2009]; Simpson, *From the House of War* (n 434) 215.

⁶²¹ Borer.

3.4.3 Were Economic Sanctions Against Iraq in Fact Effective?

In the initial stages of economic sanctions an accurate assessment of the efficacy of economic sanctions proved very difficult. Greenwood argues that economic sanctions were at least universally applied.⁶²² However, there were a multitude of issues raised during economic sanctions against Iraq that limited any comprehensive assessment of the efficacy of economic sanctions. These included: the interjection of military sanctions shortly following economic sanctions; the complexity of the goals being sought; the extended period over which economic sanctions have ultimately been in place; and the focus on humanitarian issues.

Shortly after economic sanctions began, Hufbauer, Schott and Elliot suggested that they were optimistic that sanctions would be effective against Iraq and would prompt 'the withdrawal of Iraqi troops from Kuwait, the release of all hostages, and the restoration of a credible, independent government in Kuwait – but not the complete defeat of Saddam Hussein.'⁶²³ Equally, Simons argues that economic sanctions significantly impacted on the Iraqi economy shortly after their implementation. He states that within two weeks of the instigation of economic sanctions, Iraq had become isolated from the outside world, had lost a significant amount of revenue and was fast exhausting its food supplies.⁶²⁴ It was, however, also suggested that whilst economic sanctions were effective in the sense that they were being implemented, it remained unclear as to whether they would in fact force Iraq to withdraw from Kuwait.⁶²⁵ In any case, military sanctions soon replaced economic sanctions as the means of achieving the initial goals with the result that whether or not economic sanctions were effective remains impossible to quantify.

One of the more contentious issues of recent times relates to whether the second phase of economic sanctions against Iraq was effective because its invasion in March 2003 was justified on the premise that Iraq had significant weapons caches. George W Bush, in an address from the White House stated: '[i]ntelligence gathered by this and other governments leaves no doubt that the Iraq regime continues to possess and conceal some of the most lethal weapons ever devised...'⁶²⁶ British Prime Minister, Tony Blair, had also stated '[Saddam's] weapons of mass destruction programme is active,

⁶²² Greenwood (n 570), 160.

⁶²³ Gary Clyde Hufbauer, Jeffrey J Scott and Kimberley Ann Elliot, *Economic Sanctions Reconsidered, Supplemental Case Histories* (2nd edn, Institute for International Economics, Washington, DC 1990) 298.

⁶²⁴ Simons, *The Scourging of Iraq* (n 423) 38.

⁶²⁵ Oscar Schachter, 'United Nations Law in the Gulf Conflict' (1991) 85 AJIL 452.

⁶²⁶ George W Bush, White House Address, 17 March 2003. Full text available at: <http://www.cbsnews.com/stories/2003/03/17/iraq/main544377.shtml> [last accessed 9 May 2009].

detailed and growing. The policy of containment is not working. The weapons of mass destruction programme is not shut down; it is up and running now.⁶²⁷

Whilst it had been suggested, prior to the 2003 invasion, that Iraq, by the late 1990's, did not have nuclear weapons, had largely eliminated its ballistic missile programs and had disposed of its chemical weapons under supervision,⁶²⁸ there still remained concerns over whether Iraq had biological weapons.⁶²⁹ The reality, of course, is that Iraq did not have weapons of mass destruction at the time of the 2003 invasion. The reports received by the US prior to the invasion had been equivocal.⁶³⁰ Post-invasion searches were undertaken without success.⁶³¹ And, ultimately, the coalition was forced to concede that there were no weapons in Iraq.⁶³² As Blix has stated: 'the UN and the world had succeeded in disarming Iraq without knowing it.'⁶³³ Economic sanctions forced Iraq to admit inspectors, drastically reduced the income available to Iraq to re-arm once inspectors destroyed weapons and prevented the importation of goods that might have been used to develop weapons.⁶³⁴ As such, Iraq economic sanctions against Iraq achieved their aim to disarm Iraq.

The second phase of sanctions against Iraq demonstrates the difficulty with some of the goals of economic sanctions against it. Following the invasion, in March 2003, it seems clear that economic sanctions against Iraq did impact on its weapons procurement and production. However, it seems equally clear that some states were unwilling to believe that this had occurred and that Iraq was unable to prove that it had complied with the goals set out in the relevant resolutions. As such, military sanctions were justified on the erroneous ground that economic sanctions had not been successful with serious repercussions for Iraq.

3.5 The Humanitarian Impact of Economic Sanctions Against Iraq

Economic sanctions taken against Iraq, whilst arguably successful, were predominantly associated with the humanitarian problems that emanated therefrom. Prior to the implementation of economic and military sanctions, Iraq had become a relatively advanced society relying heavily on energy and

⁶²⁷ Hansard HC vol 390 col 3 (24 September 2002).

⁶²⁸ Cortright and Lopez, *The Sanctions Decade* (n 72) 53.

⁶²⁹ *ibid.*

⁶³⁰ Thomas E Ricks, *Fiasco The American Military Adventure in Iraq* (Allen Lane 2006) 40-41.

⁶³¹ *ibid.*, 147.

⁶³² *ibid.*, 375.

⁶³³ Blix (n 589), 259.

⁶³⁴ David Cortright and George A Lopez, 'Containing Iraq: Sanctions Worked' (2004) 83 *Foreign Affairs* 90.

technology.⁶³⁵ The combination of economic and military sanctions devastated Iraq, destroying the advances made.⁶³⁶ Furthermore, the imposition of economic sanctions in the immediate aftermath of military sanctions gave Iraq no opportunity to rebuild any of the infrastructure destroyed by military sanctions thus exacerbating the impact of economic sanctions.⁶³⁷ The impact of these factors combined led to such significant humanitarian problems in Iraq that some human rights advocates have charged the UNSC with genocide⁶³⁸ and even some branches of the UN itself criticised the imposition of economic sanctions.⁶³⁹

This section examines four aspects of the humanitarian crisis in Iraq: nutrition; disease and death; children; and access to goods for humanitarian purposes.

3.5.1 Nutrition

Iraq was importing 70 per cent of its food prior to sanctions.⁶⁴⁰ It is therefore unsurprising that the provision of adequate nutrition to the population caused concern from the early stages of sanctions. Ahtisaari stated in March 2001 that: ‘the flow of food through the private sector has been reduced to a trickle... many food prices are already beyond the purchasing reach of most Iraqi families... widespread starvation conditions are a real possibility.’⁶⁴¹ Food for one month for a family increased in price from 100 dinars in July 1990, to 2,500 dinars in January 1993, to almost 100,000 by July 1995 despite rising unemployment and an average salary of only 3,000 to 5,000 dinars.⁶⁴² As families could not afford to purchase food, they relied on the government’s rationing programme, which provided less than 50 per cent of a person’s average daily nutritional requirements.⁶⁴³

The right to adequate food has been accorded special consideration by the CESCR in General Comment 12.⁶⁴⁴ It states that states parties to the ICESCR must ‘refrain at all times from food embargos or similar measures which endanger conditions for food production and access to food in other countries’ and that ‘food should never be used as an instrument of political and economic

⁶³⁵ Ahtisaari Report (n 422).

⁶³⁶ Cortright and Lopez, *The Sanctions Decade* (n 72) 43.

⁶³⁷ Hoskins (n 600), 106.

⁶³⁸ Mary Ellen O’Connell, ‘Debating the Law of Sanctions’ (2002) 13 EJIL 63 at 72.

⁶³⁹ Karima Bennoune, ‘“Sovereignty vs. Suffering”? Re-examining Sovereignty and Human Rights through the Lens of Iraq’ (2002) 13 EJIL 243 at 251, 253.

⁶⁴⁰ Ahtisaari Report (n 422).

⁶⁴¹ *ibid.*

⁶⁴² Hoskins (n 600), 112.

⁶⁴³ Cortright and Lopez, *The Sanctions Decade* (n 72) 46.

⁶⁴⁴ CESCR, General Comment 12, ‘The right to adequate food (Art 11)’ E/C.12/1999/5.

pressure.’⁶⁴⁵ The UNSC is not obliged to follow General Comment 12, as it is neither a state nor a party to the ICESCR. However, by choosing to do so the UNSC could reduce the impact of economic sanctions on the general population of a state subjected to economic sanctions. Such action would not affect the effectiveness of an economic sanctions regime because the general population are usually not in a position to force the change necessary for economic sanctions to be lifted.

It should be noted that sanctions restricted not only the importation of food but also of agricultural machinery, which could have been used to make Iraq more self-sufficient.⁶⁴⁶ The result was that Iraq’s own, admittedly limited, food production also decreased during economic sanctions.⁶⁴⁷ The most economically efficient manner of obtaining food was the importation of products past their sell-by date or unfit for human consumption.⁶⁴⁸

3.5.2 Disease and Death

One of the most significant causes of disease and ultimately death in Iraq was the destruction of clean water sources as a result of the military sanctions of January and February 1991.⁶⁴⁹ By February 1991, the piped water supply in Baghdad was less than 5 per cent of the pre-hostilities levels.⁶⁵⁰ Furthermore, waste treatment plants were also impacted, with the result that raw sewage was being pumped into the Tigris, which was the main source of Iraq’s drinking water.⁶⁵¹ Certain diseases such as cholera, diarrhoea and typhoid increased, as did death as a result of those ordinarily imminently treatable diseases.⁶⁵²

Problems were not limited, however, to certain types of disease. Only 25 per cent of medicine was produced locally.⁶⁵³ In 1997 the Secretary-General estimated that Iraq had received only 4 per cent of the medicine it needed,⁶⁵⁴ the result of which was inadequacies in the treatment of any illness or disease and ultimately an increase in the mortality rate.

⁶⁴⁵ *ibid.*, para 37.

⁶⁴⁶ Pellett (n 25), 187.

⁶⁴⁷ Hoskins (n 600), 108.

⁶⁴⁸ Pellett (n 25), 187.

⁶⁴⁹ Phyllis Bennis, and Denis J Halliday (interviewed by David Barsamian), ‘Iraq: The Impact of Sanctions and US Policy’ in Anthony Arnove (ed), *Iraq Under Siege The Deadly Impact of Sanctions and War* (2nd edn, South End Press 2002) 53.

⁶⁵⁰ World Health Organization and United Nations Children’s Fund, ‘Joint WHO/UNICEF Team Report: A Visit to Iraq’ (WHO and UNICEF, New York 16-21 February 1991)’

⁶⁵¹ Cortright and Lopez, *The Sanctions Decade* (n 72) 45.

⁶⁵² Bennis and Halliday (n 649), 53; Hoskins (n 600), 121.

⁶⁵³ Hoskins (n 600), 107.

⁶⁵⁴ Report of the Secretary General pursuant to paragraph 11 of Resolution 986 (1995) (2 June 1997) UN Doc S/1997/419.

3.5.3 Children

Normand underlines the suffering experienced by children in Iraq as a result of economic sanctions stating that ‘in simple terms, more Iraqi children have died as a result of sanctions than the combined toll of two atomic bombs.’⁶⁵⁵ The CESCR has noted that economic sanctions can have a disproportionate impact on vulnerable groups.⁶⁵⁶ Children are considered especially vulnerable under human rights law and have been granted special protection under human rights law, including under the Convention on the Rights of the Child.⁶⁵⁷ This was reflected during economic sanctions against Iraq where children were particularly affected. A German doctor visiting Iraqi hospitals in March 1991 found a significant number of cases of children suffering from malnutrition and vitamin deficiencies and dying from colds and flu. Returning four months later she found hospitalised children being fed only water and sugar.⁶⁵⁸ A 1996 report indicated that 4,500 children under five were dying every month in Iraq from preventable hunger and disease.⁶⁵⁹ By 1998, it was reported that 27 per cent of Iraqi children were suffering from chronic malnutrition, 9 per cent from acute malnutrition and 24 per cent were underweight.⁶⁶⁰

Infant mortality rates in Iraq were 120 per 1000 live births in 1960, had decreased to 45 by the late 1980’s and increased to more than 100 by 1998.⁶⁶¹ 1997 statistics produced by the Iraqi Ministry of Health, with UNICEF support, made clear that sanctions had caused the death of 878,856 children up to that point.⁶⁶² Results produced separately from both the Iraqi Ministry of Health and the UN suggest that, to March 1998, between 100,000 and 227,000 children died with 75 per cent of those deaths attributable to economic sanctions.⁶⁶³

⁶⁵⁵ Roger Normand, ‘A Human Rights Assessment of Sanctions: The Case of Iraq, 1990-1997’ in Willem JM van Genugten and Gerard A de Groot (eds), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights. A Multi-disciplinary Approach* (Intersentia 1999) 19.

⁶⁵⁶ CESCR, General Comment 8, ‘The relationship between economic sanctions and respect for economic, social and cultural rights, E/C.12/1997/8, para 14.

⁶⁵⁷ Normand (n 655), 29.

⁶⁵⁸ Geoff Simons, *Imposing Economic Sanctions, Legal Remedy or Genocidal Tool?* (Pluto Press 1999) 174 (‘Simons, *Imposing Economic Sanctions*’).

⁶⁵⁹ Unicef press release, ‘Disastrous Situation of Children in Iraq’ (New York 4 October 1996).

⁶⁶⁰ Ministry of Health and UNICEF/Iraq, ‘Nutritional Status Survey of Infants in Iraq’, Baghdad, Iraq, 1997 (‘Nutritional Status Survey of Infants in Iraq’).

⁶⁶¹ Pellett (n 25), 186.

⁶⁶² Nutritional Status Survey of Infants in Iraq (n 660).

⁶⁶³ Richard Garfield, *Morbidity and Mortality Among Iraqi Children from 1990 Through 1998: Assessing the Impact of the Gulf War and Economic Sanctions*, Report Commissioned by the Fourth Freedom Forum and the Joan B. Kroc Institute for International Peace Studies at the University of Notre Dame, 1999.

3.5.4 Access to Goods for Humanitarian Purposes

Segall notes that 'sanctions may adversely affect not only the humanitarian situation of the population of the target State but also the delivery of humanitarian assistance.'⁶⁶⁴ In Iraq the negative impact of economic sanctions was exacerbated by some of the seemingly illogical restrictions on the admittance of goods. The 661 Committee, which decided what goods could be imported in Iraq, refused access to goods that might be considered by many as serving a humanitarian purpose. They refused pencils, sharpeners, erasers and school notebooks, water purification chemicals, cotton for medical use and communication links for hospital use.⁶⁶⁵ The US was also charged with restricting food and medical supplies, which constituted material exempted from economic sanctions, from being exported to Iraq.⁶⁶⁶ It should, however, be noted, that, by the mid-1990's, the 661 Committee had decided that foodstuff and material and supplies that the Secretary-General had identified as essential,⁶⁶⁷ once notified to or approved by the Committee, would be allowed to be exported to Iraq on a no-objections basis.⁶⁶⁸

These more than anything are a damning indictment of economic sanctions against Iraq. States are limited in what action they can take with respect to economic sanctions. Under Articles 25 and 103 of the UN Charter they are obligated to apply UNSC resolutions, regardless of the impact of those resolutions. Within the Iraqi sanctions framework they did, however, have some control over humanitarian exemptions because they could make an application to export goods to Iraq that could qualify for such status. However, even when states or entities were fully cognisant of the repercussions of economic sanctions they chose not to fully utilise the powers that they did have to lessen the effects of sanctions on the civilian population of Iraq. The UNSC itself did take steps to rectify the humanitarian impact of economic sanctions, which will be discussed in the next section.

⁶⁶⁴ Anna Segall, 'Economic sanctions: legal and policy constraints' (1999) 836 *International Review of the Red Cross*.

⁶⁶⁵ Simons, *The Scourging of Iraq* (n 423) 118.

⁶⁶⁶ Simons, *Imposing Economic Sanctions* (n 658) 175.

⁶⁶⁷ Ahtisaari Report (n 422).

⁶⁶⁸ Report of the Security Council Committee established by Resolution 661 (1990) concerning the situation between Iraq and Kuwait (26 August 1996) S/1996/700. 15.

3.6 Attempts to Rectify the Humanitarian Impact of Economic Sanctions

Economic sanctions against Iraq are renowned for two things. Firstly, as discussed, they are known for the humanitarian crisis that ensued. Secondly, they are known for the actions that were taken in an attempt to stem that crisis. This part examines those attempts.

3.6.1 The Oil-for-Food Programme

One of the difficulties with humanitarian exemptions is that in drafting such measures it is assumed that the state the target of sanctions has the resources to purchase the goods in question and the infrastructure to delivery them.⁶⁶⁹ This may not always be the case. However, Iraq was in a unique position when it came to economic sanctions. On one hand, as mentioned previously, it had suffered considerable infrastructural damage during the Gulf Conflict and was also suffering significant humanitarian difficulties. As a result of the severity of economic sanctions it was not in a position to rebuild its infrastructure or to provide humanitarian aid. On the other hand, Iraq was in possession of one of the most valuable commodities in the world - oil. The Oil-for-Food Programme was an attempt to enable Iraq to use oil to resolve some of their humanitarian problems.

The initial resolutions that sought to make use of Iraq's oil resources, UNSC Resolutions 706 and 712, were never used because of Iraq's criticisms that they breached its sovereignty,⁶⁷⁰ which in Bennoune's words '[reflects] a typical government misuse of the notion of sovereignty.'⁶⁷¹ Those criticisms were made on three grounds: that there was no precedent for economic sanctions of the nature of those used against Iraq; that the UNSC required that the UN rather than Iraq be responsible for Iraq's oil revenues; and that compensation payments in relation to Kuwait were to be made.⁶⁷² UNSC Resolution 778 requested that states that held Iraqi assets transfer those assets to an escrow account⁶⁷³ but ultimately only two states indicated that they had assets for transferral.⁶⁷⁴ Finally UNSC Resolution 986 was implemented.⁶⁷⁵ It acknowledged both Iraqi sovereignty and the temporary nature of the proposed arrangements.⁶⁷⁶ It allowed for the sale of up to \$1 billion of Iraqi oil every three

⁶⁶⁹ Matthew Craven, 'Humanitarianism and the Quest for Smarter Sanctions' (2002) 13 EJIL 43 at 50.

⁶⁷⁰ Niblock (n 551), 117.

⁶⁷¹ Bennoune (n 639), 251.

⁶⁷² Von Sponeck (n 579), 7.

⁶⁷³ UNSC Resolution 778 (n 539).

⁶⁷⁴ Cortright and Lopez. *The Sanctions Decade* (n 72) 49.

⁶⁷⁵ UNSC Resolution 986 (n 555).

⁶⁷⁶ Niblock (n 551), 117.

months and gave Iraq some control over the distribution of humanitarian aid⁶⁷⁷ although the UN would, of course, monitor imports under the programme.⁶⁷⁸

The Oil-for-Food Programme should have afforded Iraq the possibility of resolving some of the humanitarian issues that had arisen. Ultimately the administration of the programme was widely criticised and breaches of sanctions against Iraq were attributed to it.⁶⁷⁹ However, it is relevant to this thesis for three other reasons.

Firstly, the amount of money ultimately available for humanitarian purposes under the Oil-for-Food Programme was insufficient. An immediate problem was that only 50 per cent of the money generated through the sale of oil was used for humanitarian purposes because UNSC Resolution 986 required that the money also be used to pay for other expenses such as the cost of UN inspections and the servicing of the Compensation Fund.⁶⁸⁰ The money was divided: 50 percent for use for humanitarian purposes by the Iraqi government for the territory of Iraq; 15 per cent for use by the UN for humanitarian purposes in three Kurdish territories outside of Iraqi control; 30 per cent for payment into the Kuwaiti Compensation Fund; and 5 per cent for UN administration expenses.⁶⁸¹ Normand notes that the amount actually available for use as humanitarian aid in Iraq – being \$2 billion a year – fell far short of either the 1989 import bill for food, medicines and preventive water sanitation purification or the estimates of needs prepared by various UN agencies.⁶⁸² Sponeck states that, despite earning \$44.4 billion of oil revenue from 16 December 1996 to 13 July 2001, only \$13.5 billion worth of humanitarian aid arrived in Iraq during that time period.⁶⁸³ The result was that the Oil-for-Food Programme was not in a position to rectify the humanitarian problems in Iraq.

This was compounded by the fact that, whilst under previous resolutions states were urged to contribute money to the escrow account from other sources,⁶⁸⁴ under the Oil-for-Food Programme there were no such provisions. The result was that Iraq's only source of humanitarian aid at that point was the exportation of oil and 'the source of funding was entirely Iraqi.'⁶⁸⁵ This resulted in a short fall

⁶⁷⁷ Cortright and Lopez, *The Sanctions Decade* (n 72) 49.

⁶⁷⁸ Niblock (n 551), 119.

⁶⁷⁹ Duelfer Report (n 615); General Accounting Office, 'United Nations: Observations on the Oil for Food Program' GAO-04-651T (7 April 2004); Joy Gordon, *Invisible War The United States and the Iraq Sanctions* (Harvard University Press 2010) 173-189.

⁶⁸⁰ UNSC Resolution 986 (n 555), 8.

⁶⁸¹ Normand (n 655), 20.

⁶⁸² *ibid.* 21.

⁶⁸³ HC Graf Sponeck, 'Sanctions and Humanitarian Exemptions: A Practitioner's Commentary' (2002) 13 EJIL 81 at 82.

⁶⁸⁴ UNSC Resolution 778 (n 539), 3.

⁶⁸⁵ Von Sponeck (n 579), 11.

in the money being received compared with what was needed for Iraq to recover and, in fact, it has been suggested that the gain that Iraq made from breaches of sanctions was probably used to address that shortfall.⁶⁸⁶ As time passed, and the humanitarian situation did not improve, the UNSC decided that it was necessary to allow Iraq to export more oil. However, Iraq did not have the capacity to do so because of its damaged infrastructure.⁶⁸⁷ The UNSC also attempted to improve Iraq's capacity by allowing some of its sanctioned imports to be comprised of spare parts and equipment relating to oil production.⁶⁸⁸ This did not however serve to increase oil production in the short term.⁶⁸⁹ The third difficulty with the oil for food programme relates to the 661 Committee and will be discussed in the next section.

The second reason that the Oil-for-Food Programme was an important development for UN economic sanctions is that it was an attempt by the UNSC to address the humanitarian problems in Iraq by using the resources that Iraq had available to it. The Oil-for-Food Programme was not successful. As well as difficulties in relation to providing adequate resources as outlined, it was beset with reports of 'waste, inefficiency, and corruption, even within the United Nations itself.'⁶⁹⁰ Had it been successful the Oil-for-Food Programme would have alleviated Iraq's humanitarian concerns without requiring humanitarian aid from other states. Whilst it was unsuccessful the UNSC should be praised for attempting to use Iraq's resources to resolve the humanitarian problems prevalent in the state at that time.

The final reason that the Oil-for-Food Programme is important for the purpose of this thesis is that it underlines the lack of accountability in UN economic sanctions regimes. The Volcker Report attributes the problems in the Oil-for-Food Programme to five key issues.⁶⁹¹ Firstly, the parameters, policies and administrative responsibilities were not adequately defined by the UNSC. Secondly, the administrative structure and personnel practices of the UN were not suitable to deal with the challenges posed by the Oil-for-Food Programme. Thirdly, there was an absence of auditing and management controls. Fourthly, corruption extended to the top of the administration in the Oil-for-Food Programme. Finally, there were difficulties in effective cooperation between UN Agencies, with no means of tracking expenditure across the various agencies. All of these issues go to accountability in the UN at

⁶⁸⁶ Gordon (n 679), 182.

⁶⁸⁷ Niblock (n 551), 120.

⁶⁸⁸ UNSC Res 1175 (19 June 1998) UN Doc S/RES/1175.

⁶⁸⁹ Niblock (n 551), 119.

⁶⁹⁰ The Volcker Report (n 617), Volume I, 2.

⁶⁹¹ The Volcker Report (n 617), Volume I, 3-4.

that time. The accountability of the UNSC in its dealing with economic sanctions has already been raised with respect to the failure to deal with breaches by states, including P-5 states, of sanctions against Southern Rhodesia.⁶⁹² The Volcker report provides evidence that accountability remained a key issue during economic sanctions against Iraq and one that would require resolution.

3.6.2 The 661 Committee

It is clear that 'humanitarian exemptions, [in the case of Iraq], have not adequately protected the population from the impact of comprehensive economic sanctions.'⁶⁹³ This is due in no small part to the inadequacies of the 661 Committee. The purpose of the 661 Committee was, firstly, to facilitate the exportation of approved humanitarian goods and commodities and secondly, to ensure that the money that Iraq was getting for exporting oil was not abused. The 661 Committee should have been in a position to direct the importation of goods for humanitarian purposes in such a way that the general Iraqi population suffered as little as possible whilst economic sanctions were in place. This did not happen as the 661 Committee became involved in hotly debating every application for exemptions,⁶⁹⁴ thus preventing the system working efficiently and preventing acceptable items from being granted exemptions.

Furthermore, as outlined above, when decisions were taken sometimes goods were illogically refused a humanitarian exemption. This micro-management of decisions as to what would be allowed to be imported into Iraq continued once the Oil-for-Food Programme was established, which left the system less efficient than it might otherwise have been.⁶⁹⁵ The system could have been made more efficient by either the creation of a comprehensive list of items that could be exported to Iraq without the need for notification, or by allowing states some autonomy as to what could be exported to Iraq.

3.6.3 Proposals for Ending Economic Sanctions

By 1999, Iraq was still subjected to economic sanctions. In order that Iraq might get the opportunity to have economic sanctions lifted, a new system of monitoring whether it was complying with the weapons provisions in UNSC resolutions was required.

⁶⁹² See section 2.4.2.1.5.

⁶⁹³ Sponeck (n 683), 82.

⁶⁹⁴ Simons, *Imposing Economic Sanctions* (n 658) 172.

⁶⁹⁵ Niblock (n 551), 119.

This ultimately culminated in UNSC Resolution 1284.⁶⁹⁶ It should be noted that only two P-5 Member States (UK and US) affirmed this resolution. Under this resolution, the UNSC established, as a subsidiary body of the Council, the UNMOVIC, which would replace the Special Commission, established pursuant to paragraph 9(b) of Resolution 687.⁶⁹⁷ It decided that the UNMOVIC would, undertake the responsibilities mandated to its predecessor with regard to the verification of compliance by Iraq with its obligations under UNSC Resolution 687 and other related resolutions, as well as establishing and operating a reinforced system of ongoing monitoring and verification and identifying additional sites in Iraq for such monitoring.⁶⁹⁸

The UNSC expressed its intention to suspend the economic sanctions provisions in relation to goods imported from Iraq and delivery to Iraq of civilian commodities and products with the fundamental objective of improving the humanitarian situation in Iraq and securing the implementation of the UNSC resolutions.⁶⁹⁹ Its criteria for allowing for the suspension of economic sanctions against Iraq was that the reinforced system of monitoring had to be in place for 120 days and the Executive Chairman of UNMOVIC and Director General of the IAEA had to report that Iraq had cooperated in all respects with them over this period.⁷⁰⁰ The suspension would last for a period of 120 days renewable by the UNSC, and subject to measures to ensure that Iraq did not acquire prohibited items. It decided that if at any time the Executive Chairman of UNMOVIC or the Director General of the IAEA reported that Iraq was not cooperating in all respects or that Iraq was in the process of acquiring any prohibited items the suspension would terminate on the fifth working day following the report, unless the UNSC decided to the contrary.⁷⁰¹

Ultimately this measure was not a success. The absence of weapons was too difficult to prove and the UNMOVIC and IAEA had too much subjective decision-making power as to what would constitute compliance.

Iraq, as a state that had its own natural resources, offered the UNSC an unparalleled opportunity to develop systems for situations in which there were significant humanitarian problems. Equally, there should have been a clear system in place under which economic sanctions could have been lifted upon compliance with certain requirements by Iraq. Despite creating the most

⁶⁹⁶ UNSC Res 1284 (17 December 1999) UN Doc S/RES/1284.

⁶⁹⁷ *ibid.* 1.

⁶⁹⁸ *ibid.* 2.

⁶⁹⁹ *ibid.* 33.

⁷⁰⁰ *ibid.* 33.

⁷⁰¹ *ibid.* 35.

comprehensive system of economic sanctions, which was significantly impacting on the civilian population of Iraq, the UNSC failed on both counts.

3.7 Issues for Future Consideration Arising Out of Iraq

The situation that arose in Iraq raised different issues to those that had arisen during sanctions against Southern Rhodesia. Whereas sanctions against Southern Rhodesia were ineffective and had relatively little impact on the civilian population, economic sanctions against Iraq were largely effective (being both generally implemented by states and resulting in Iraqi compliance with their weapons requirements) but also devastated the civilian population of Iraq and sparked a worldwide debate on the use of economic sanctions by the UNSC.⁷⁰² Mary Ellen O'Connell suggests that the case of economic sanctions against Iraq was the point at which agreement was reached by international commentators that some legal standard must apply to the application of UN economic sanctions.⁷⁰³

Economic sanctions cannot easily be subjected to any absolute limits that might impact on their effectiveness, O'Connell, therefore, suggests that economic sanctions should be applied in a proportionate manner.⁷⁰⁴ Taking an approach rooted in proportionality when dealing with economic sanctions would mean that ensuring that sanctions are effective must be balanced against the impact of the sanctions themselves. In the Iraqi context this would have meant seeking to achieve a balance between paralysing the economy, such that economic sanctions would be effective, and ensuring that humanitarian suffering is minimised. It would have meant that economic sanctions could still have been applied even though there was some measure of humanitarian suffering.

The AFSC has made a number of useful observations in relation to achieving a balance between economic sanctions and the wellbeing of civilian populations.⁷⁰⁵ Firstly, they suggest that whether or not to take economic sanctions in a given situation is directly related to the context. They have supported economic sanctions in situations where they seemed unlikely to work and failed to support systems that would have been effective but would have caused unjustifiable humanitarian suffering. Sanctions against Iraq clearly demonstrate this. Economic sanctions should be approached with caution. It may be that, in certain circumstances, as illustrated by the humanitarian suffering in Iraq, they cause too much damage to a state and its citizens to be justified. The UNSC should explore

⁷⁰² O'Connell (n 638), 67.

⁷⁰³ *ibid.*, 79.

⁷⁰⁴ O'Connell (n 638), 64.

⁷⁰⁵ Patterson (n 574), 90-94.

all of its options. In some situations, a short period of military sanctions may be preferable to economic sanctions and the UNSC should ascertain whether that is the case before instigating any system of sanctions against a Member State.

Secondly, there is a responsibility on those implementing economic sanctions to monitor the effects of those sanctions to ensure they are not significantly impacting on the civilian population. In this case these effects were known but were not being adequately addressed.

Thirdly, economic sanctions must be implemented in a way that is sensitive to the humanitarian needs of the population against which they are implemented. At a minimum, in Iraq economic sanctions should not have been allowed to impact on commodities needed for humanitarian purposes. As will be demonstrated in the next chapter, targeted sanctions address this issue but the UNSC should also consider a blanket exemption on foodstuffs. Equally, where the UN, the ICRC or other designated international organisation have people in a state subject to economic sanctions the UNSC should consider a blanket exemption on medical supplies to that organisation, which would be responsible for their distribution within the targeted state.

What became apparent from sanctions taken against Iraq was that the UNSC was developing its economic sanctions regimes in a reactive fashion. Sanctions against Iraq sought to resolve the difficulties seen with economic sanctions against Southern Rhodesia in that they were put in place faster and they were more comprehensive. Furthermore, the UNSC was willing to move to force when it felt that economic sanctions were being ineffective. However, in so doing other difficulties emerged, which reflects Charlesworth's concern that by being so reactive international law concentrates on individual events at the risk of missing the larger picture.⁷⁰⁶ For example, the comprehensive nature of economic sanctions created a humanitarian crisis and the combination of military and economic sanctions worsened that crisis. This reactive response would continue throughout sanctions against Iraq, as for example the Oil-for-Food Programme, which was an attempt to address humanitarian difficulties that arose within the sanctions against Iraq, and would also result in the move to targeted sanctions, which will be discussed in the next chapter.

⁷⁰⁶ Charlesworth (n 2), 384.

The Development of UN Targeted Economic Sanctions

The use of targeted economic sanctions (also known as smart sanctions) by the UN is rooted in an attempt to make UN economic sanctions a more proportionate measure.⁷⁰⁷ The situation in Iraq had two facets that prompted the development of targeted economic sanctions. Firstly, unlike earlier economic sanctions, as economic sanctions against Iraq progressed it became clear that the ordinary citizens of Iraq were suffering significant humanitarian problems as a consequence of the sanctions. Secondly, those ordinary Iraqi citizens, despite their suffering, had no control over the actions of the state that had prompted the invocation of economic sanctions. Sponeck notes that the assumption that ‘economic pressure on the population would lead to political change at government level... turned out to be a fallacy with significant human costs.’⁷⁰⁸ As such, subjecting them to sanctions could not be justified because they would not prompt regime change. The use of targeted economic sanctions would, in light of these difficulties, have been a more proportionate measure as they would have been applied only on the individuals who could force change in Iraq and would therefore have reduced, if not eliminated, the humanitarian suffering experienced by the general population.

This chapter traces the initial development and solidification of targeted economic sanctions within the UN framework. It opens by discussing the various types of targeted economic sanction that are used by the UNSC. It considers how targeted economic sanctions could have been developed by the UN before discussing the method chosen, the European Conferences. It identifies the principal recommendations made at the Conferences and analyses their suitability for implementation as the use of targeted economic sanctions by the UN unfolded.

4.1 What are Targeted Economic Sanctions?

In seeking to rectify the problems experienced by the citizens of Iraq the UNSC had to reconcile two conflicting aims of economic sanctions. Firstly, economic sanctions need to be sufficient to impact on the decision makers in a target state. Secondly, economic sanctions should not adversely impact on the people within a state who are not in a position to rectify the cause of the sanctions.

⁷⁰⁷ O’Connell (n 638), 70.

⁷⁰⁸ Sponeck (n 683), 84.

Targeted economic sanctions offered the UNSC the opportunity to reconcile those goals. Such sanctions have a focused, negative impact on those in control of the behaviour being targeted whilst also allowing for the free movement of goods and funds necessary for the survival of the citizens of a state. Targeted economic sanctions had already been used piecemeal by the UNSC in conjunction with broad economic sanctions against states.⁷⁰⁹

There are two types of targeted economic sanctions. Firstly, economic sanctions can be targeted at certain assets or resources of a state. Common examples include arms⁷¹⁰ and oil or petroleum products.⁷¹¹ Secondly, economic sanctions can be targeted at specific people or groups of people. These will usually be against government officials and their families⁷¹² or opposition or rebel forces,⁷¹³ although recently economic sanctions have also been targeted against individuals.⁷¹⁴

This section explores the two broad categories of targeted economic sanctions in more detail. It also discusses travel sanctions, which are a hybrid of economic sanctions against identified assets or resources and economic sanctions against identified entities or individuals.

4.1.1 Targeted Economic Sanctions Against Identified Assets or Resources

Both Southern Rhodesia⁷¹⁵ and South Africa⁷¹⁶ were subjected to targeted economic sanctions against arms and oil. As such, the concept of targeted economic sanctions against assets or resources was not a new phenomenon for the UNSC in the 1990's. However, previous use of economic sanctions in this manner had occurred either, in the case of South Africa, because broader measures could not be agreed upon⁷¹⁷ or, in the case of Southern Rhodesia, in conjunction with extensive broad economic sanctions. Furthermore, as they developed, the UNSC began to use targeted economic sanctions against a wide range of resources that were of strategic importance to the state against which sanctions were invoked.

⁷⁰⁹ Southern Rhodesia had been subjected to sanctions targeted at the exportation of oil to Southern Rhodesia (UNSC Resolution 232 (n 123)) and the Iraqi government and state entities had been subjected to targeted economic sanctions whilst the state of Iraq was under broad economic sanctions (UNSC Resolution 778 (n 539)).

⁷¹⁰ For example arms have been targeted during sanctions against: Afghanistan, UNSC Res 1333 (19 December 2000) UN Doc S/RES/1333 ('UNSC Resolution 1333'); Haiti, UNSC Resolution 917 (n 89); and Liberia, UNSC Res 1343 (7 March 2001) UN Doc S/RES/1343 ('UNSC Resolution 1343') amongst others.

⁷¹¹ For example: Haiti UNSC Resolution 841 (n 42); Sierra Leone UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132 ('UNSC Resolution 1132'); and Southern Rhodesia UNSC Resolution 232 (n 123) amongst others.

⁷¹² For example, economic sanctions against Iraq, UNSC Resolution 778 (n 539).

⁷¹³ For example, economic sanctions against UNITA in Angola, UNSC Res 864 (15 September 1993) UN Doc S/RES/864 ('UNSC Resolution 864').

⁷¹⁴ For example, economic sanctions against those persons considered a threat to international peace and security, UNSC Resolution 1373 (n 164).

⁷¹⁵ UNSC Resolution 232 (n 123).

⁷¹⁶ UNSC Res 418 (4 November 1977) UN Doc S/RES/418.

⁷¹⁷ Anglin (n 178), 45.

This part looks at the categories of assets and resources that have been subjected to sanction by the UNSC.

4.1.1.1 Arms Embargoes

Arm embargoes, which take the form of a prohibition on the exportation of arms and related material to a target state, are the most common kind of targeted economic sanctions.⁷¹⁸ They have two advantages over broader economic sanctions.

Firstly, where sanctions are adopted because of the use of force or aggression by a state or unrest within a state, arms embargoes specifically restrict the means of that behaviour and thus stifle its continuance. For example, sanctions were invoked against UNITA because of the hostilities caused by its refusal to accept the parliamentary and presidential elections in Angola.⁷¹⁹ Over the course of two years UNITA used force to seek control of a number of government-controlled areas causing mass destruction.⁷²⁰ The UNSC put an arms embargo in place in order to force a ceasefire.⁷²¹ The assumption was that a properly implemented arms embargo would inhibit UNITA's engagement in hostilities because it would vastly restrict the number of arms available to it.

Secondly, arms embargos are not of themselves going to have unintended humanitarian consequences. Arms have no humanitarian purpose and restricting their exportation to an area will not restrict the exportation of items with a humanitarian purpose, such as food and medicinal products. Furthermore, a reduction in arms in a state should correlate to a reduction in the number of civilian deaths from the use of arms.

Despite their advantages arms embargoes have experienced difficulties in implementation with the result that they have not yet become a decisive tool in the arsenal of the UNSC. As the use of targeted economic sanctions by the UNSC expanded three main problems became prevalent in the use of arms embargoes.

The most significant issue with respect to arms embargoes is that, like other types of economic sanctions, they are frequently breached. It has been stated that 'the nature of today's armed conflicts, which are fuelled primarily by internal rivalries and disputes over territory and resources, has

⁷¹⁸ David Cortright and George A Lopez, *Sanctions and the Search for Security: Challenges to UN Action* (Rienner 2002) 153 ('Cortright and Lopez, *Sanctions and the Search for Security*').

⁷¹⁹ Meredith (n 287), 608.

⁷²⁰ *ibid.*, 610-611.

⁷²¹ UNSC Resolution 864 (n 713), 17, 19.

triggered an unchecked proliferation of arms, particularly of light weapons, cascading from war zone to war zone (often through illicit channels)'.⁷²² As the use of arms embargos has increased, those states that have been subject to sanctions have discovered a variety of ways of circumventing them.

States may strategically breach arms embargoes in order to support one side over another in hostilities. Both the US and the UK have been accused of giving covert support to private security companies who supplied arms in breach of UN arms embargoes.⁷²³ The UNSC is cognisant of these breaches and has made one attempt to address them when the arms embargo imposed on Liberia in UNSC Resolution 1343⁷²⁴ was established as a result of Liberia's 'support for armed rebel groups in neighbouring countries, and in particular its support for the RUF in Sierra Leone.'⁷²⁵ Given, however, that the P-5 Member States are both the world's largest arms producers and are also protected from being subjected to arms embargoes the case of Liberia may not be a suitable roadmap for punishing or preventing breaches by states generally.

The availability of arms in a state has also been attributed to the proximity of that state to other states that are engaged in hostilities and that may even have been subjected to arms embargoes themselves.⁷²⁶ Prendergast describes the Horn of Africa⁷²⁷ as an integrated conflict zone stating that the cross-border flow of arms between, *inter alia*, Sudan and insurgent groups in Ethiopia, Eritrea and Uganda and the main rebel groups in Sudan has served to deepen conflict within each of those states.⁷²⁸ Weapons may also be obtained from opposition forces during hostilities.⁷²⁹ Finally, the Conventional Armed Forces in Europe Treaty⁷³⁰ placed restrictions on the number of weapons that could be held by Eastern European States. Mollander, in his report to the UNSC, indicated that the resulting disposition

⁷²² Loretta Bondi, 'Arms Embargoes: In Name Only?' in David Cortright and George A Lopez, *Smart Sanctions: Targeting Economic Statecraft* (Rowman & Littlefield 2002) 110.

⁷²³ *ibid.* 111.

⁷²⁴ UNSC Resolution 1343 (n 710).

⁷²⁵ *ibid.*

⁷²⁶ Cortright and Lopez, *Sanctions and the Search for Security* (n 679) 158; Letter from the Chairman of the Security Council Committee established pursuant to resolution 864 (1993) concerning the situation in Angola addressed to the President of the Security Council, 4 June 1999, S/1999/644, para 7.

⁷²⁷ The Horn of Africa is a region in the North East of Africa often taken to cover the states of Djibouti, Ethiopia, Eritrea and Somalia, but sometimes, as in this study, also taken to include Kenya, Sudan and Uganda.

⁷²⁸ John Prendergast, *Building for Peace in the Horn of Africa: Diplomacy and Beyond* (United States Institute of Peace 1999) 2.

⁷²⁹ Anders Mollander, 'Report of the Panel of Experts on Violations of Security Council Sanctions Against UNITA', attached to Letter dated 10 March 2000 from the Chairman of the Security Council Committee Established Pursuant to Resolution 864 (1993) Concerning the Situation in Angola Addressed to the President of the Security Council, (10 March 2003) S/2000/203 para 39 ('Mollander Report').

⁷³⁰ Treaty on Conventional Armed Forces in Europe (19 November 1990) 2443 UNTS 3.

of surplus weapons by those states, in order that they comply with the limitations set by the Treaty, flooded the international markets with arms.⁷³¹

The second problem that has arisen as a result of UNSC arms embargoes occurs when a blanket arms embargo against a state is put in place. Such a blanket embargo may mean that the effects of that embargo ultimately apply very unequally. This phenomenon was clearly illustrated during economic sanctions against the FRY.⁷³² Due to conflict in the region during the dissolution of FRY, UNSC Resolution 713⁷³³ placed an arms embargo on all of the SRs that formed part of FRY.⁷³⁴ By 25 June 1991, when Croatia and Slovenia declared independence from FRY, Serbia had effective control of the JNA.⁷³⁵ The JNA was at that time one of the strongest military forces in Europe.⁷³⁶ Since the arms embargo prevented the exportation of arms to any of the states that had formed part of FRY it served to preserve this military *status quo* to the advantage of Serbia and to the detriment of the other states.⁷³⁷ The result of the arms embargo was that Bosnia, which had just become an independent state, had its opportunity for self-defence against Serbia limited although the arms embargo had been intended to impact on all of the FRY SRs equally.⁷³⁸ Ultimately the impact of the arms embargo had nothing to do with the culpability of the states involved.

The third problem that will be briefly examined here is the selection of arms embargoes as a form of targeted economic sanctions. Arms embargoes are implemented against a state or entity that is involved in conflict. As such, they must be instigated in situations where they can be effective. In the case of Ethiopia and Eritrea a non-binding arms embargo was put in place in February 1999⁷³⁹ but a binding resolution was not established until 15 months later in May 2000.⁷⁴⁰ By December 2000, it was estimated that between 75,000 and 100,000 people had been killed as a result of the hostilities.⁷⁴¹ Both states had spent a 'staggering' amount on arms.⁷⁴² In fact, so great was expenditure on arms that the

⁷³¹ Mollander Report (n 729), para 39.

⁷³² Cortright and Lopez, *The Sanctions Decade* (n 72) 63-65.

⁷³³ UNSC Resolution 713 (n 85).

⁷³⁴ The states within the Federal Republic of Yugoslavia were: Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia.

⁷³⁵ Horowitz, (n 143) 197.

⁷³⁶ Reneo Lukic and Allen Lynch, *Europe from the Balkans to the Urals: The Disintegration of Yugoslavia and the Soviet Union* (Oxford University Press 1996) 295.

⁷³⁷ Horowitz (n 143), 173.

⁷³⁸ Cortright and Lopez, *The Sanctions Decade* (n 72) 65; Paul R Williams, 'Why the Bosnian Arms Embargo is Illegal' *The Wall Street Journal* (15 June 1995).

⁷³⁹ UNSC Res 1277 (10 February 1999) UN Doc S/RES/1277.

⁷⁴⁰ UNSC Res 1298 (17 May 2000) UN Doc S/RES/1298 ('UNSC Resolution 1298').

⁷⁴¹ Editorial Opinion, 'Peace in the Horn of Africa' *The New York Times* (New York 12 December 2000).

⁷⁴² Cortright and Lopez, *The Sanctions Decade* (n 72) 159.

IMF suspended its program in Ethiopia.⁷⁴³ The delay in taking decisive UN action, which allowed arms to flow freely into Ethiopia and Eritrea, therefore created a situation in which by the time a binding arms embargo was imposed there were already too many weapons in both states for it to be effective.

The unsuitability of the use of an arms embargo, as opposed to other sanctions, in order to effect change in Rwanda, in light of the situation that was unfolding there, may also have had fatal consequences. Despite intelligence from Romeo Dallaire, Commander of the UN Assistance Mission for Rwanda, in January 1994, that there was a significant build up of weapons and indications that they would be used to exterminate the Tutsi population in Rwanda, the UN refused to seize these arms and failed to put an arms embargo in place.⁷⁴⁴ On 6 April 1994 the assassination of President Juvénal Habyarimana saw the Hutu population take up arms against the Tutsis.⁷⁴⁵ In the 100 days that followed, 800,000 members of the Tutsi population of Rwanda would be slaughtered by their fellow countrymen.⁷⁴⁶

The UNSC put in place an arms embargo prohibiting states from exporting arms to Rwanda on 17 May 1994.⁷⁴⁷ By the time the UNSC invoked the arms embargo, it was wholly insufficient to effect change in Rwanda. The crisis had reached a point where the only chance for the resolution of the genocide that was unfolding would have been military sanctions. An arms embargo would not have overcome the ‘propaganda and hate that had already developed’ in Rwanda.⁷⁴⁸ A further flaw with the concept of using an arms embargo in an attempt to combat the genocide in Rwanda was that much of the killing was being undertaken by the use of machetes and other unsophisticated arms, which did not come within the remit of a UNSC arms embargo.⁷⁴⁹ Such weapons are unlikely to ever be captured by a UN arms embargo because they do not come within the traditional understanding of ‘arms’ and because they have a wide range of legitimate uses.

One further issue should be noted in relation to arms embargoes. Arms embargoes can be very difficult to monitor. They necessitate the presence of monitoring personnel on the ground in a state subject to economic sanctions. This has cost implications and, as mentioned in the previous chapter in relation to Iraq, may in any case fail to produce evidence that sufficiently satisfies the UNSC that the

⁷⁴³ Jane Perlez, ‘U.S. Did Little to Deter Build-Up as Ethiopia and Eritrea Prepared for War’ *The New York Times* (New York 22 May 2000).

⁷⁴⁴ Meredith (n 287), 504.

⁷⁴⁵ *ibid.*, 507.

⁷⁴⁶ Samantha Power, *“A Problem From Hell” America and the Age of Genocide* (Flamingo 2003) 334.

⁷⁴⁷ UNSC Resolution 918 (n 91), 3.

⁷⁴⁸ Cortright and Lopez, *The Sanctions Decade* (n 72) 196.

⁷⁴⁹ Jean Hatzfeld, *Machete Season: The Killers in Rwanda Speak* (Farrar, Straus and Grioux 2005).

arms embargo has been successful.⁷⁵⁰ However, it should also be noted that the presence of monitoring personnel may have unpredicted benefits. Owen, in discussing the arms embargo in Bosnia-Herzegovina, notes that the UN observers sent under UNSC Resolution 758⁷⁵¹ saved hundreds of thousands of lives by using the access they had to the territory for humanitarian purposes.⁷⁵²

4.1.1.2 Commodity Sanctions

The other type of targeted economic sanctions on assets or resources that will be briefly outlined here is commodity sanctions. Commodity sanctions typically take the form of a prohibition on the importation of key resources from a targeted state. The purpose of this type of sanction is to prevent states from raising funds, which would be used for further illicit actions, through the sale of natural resources. Targeted economic sanctions against a key commodity reflect the fact that some states rely heavily on the exportation of a limited number of key resources to provide foreign currency. An example of this has already been mentioned with respect to Southern Rhodesia, which relied on tobacco and asbestos for almost fifty per cent of its exports prior to the instigation of economic sanctions.⁷⁵³

Oil aside, the most common type of commodity sanction invoked by the UNSC has been sanctions against diamonds, which were used against Angola,⁷⁵⁴ Sierra Leone⁷⁵⁵ and Liberia.⁷⁵⁶ Angola was, when it was subjected to UNSC sanctions, and remains today, amongst the world's largest diamond producing states.⁷⁵⁷ During the conflict in Angola, UNITA controlled much of Angola's diamond industry.⁷⁵⁸ UNITA's estimated revenue from the sale of diamonds between 1992 and 1998 was \$3.72 billion.⁷⁵⁹ Diamonds are the ideal currency for war. They have a high value and are small in size, which makes them easy to transport. They are also untraceable. UNITA used its dominant position in Angola's diamond production cleverly. Diamond revenues allowed UNITA to pay inflated

⁷⁵⁰ Section 3.4.3.

⁷⁵¹ UNSC Res 758 (8 June 1992) UN Doc S/RES/758, 3.

⁷⁵² David Owen, *Balkan Odyssey* (Indigo 1996) 382.

⁷⁵³ Section 2.1.3.

⁷⁵⁴ UNSC Res 1173 (12 June 1998) UN Doc S/RES/1173, 12 ('UNSC Resolution 1173').

⁷⁵⁵ UNSC Resolution 1306 (n 117), 1.

⁷⁵⁶ UNSC Resolution 1343 (n 710), 2.

⁷⁵⁷ Cortright and Lopez, *The Sanctions Decade* (n 72) 151.

⁷⁵⁸ Joseph Hummel, 'Diamonds are a Smuggler's Best Friend: Regulation, Economics, and Enforcement in the Global Effort to Curb the Trade in Conflict Diamonds' (2007) 41 *International Lawyer* 1145.

⁷⁵⁹ Global Witness, 'A Rough Trade: The Role of Companies and Government in the Angolan Conflict' December 1997, available at http://www.globalwitness.org/media_library_detail.php/90/en/a_rough_trade [last accessed 27 August 2009] ('Global Witness Report')

arms prices.⁷⁶⁰ It also stockpiled diamonds prior to handing over two key trading centres to the government of Angola.⁷⁶¹ UNSC sanctions on Angola's diamonds commenced in June 1998 and prohibited the importation of diamonds from Angola that did not have a Certificate of Origin from Angola's government.⁷⁶²

Economic sanctions, which target a resource like diamonds, allow resources that have a humanitarian value such as food or medicine to remain freely available to a targeted state. The certification programmes, which were developed alongside commodity sanctions, allowed the legitimate government of a state to export a targeted commodity and thus raise money.

There are however some disadvantages to commodity sanctions. This was demonstrated during the period of economic sanctions targeted at the exportation of diamonds from Sierra Leone,⁷⁶³ where, much like the situation in Angola, an opposition force, the RUF, was funding a war against the government through the sale of diamonds.⁷⁶⁴ Diamonds are, like most natural resources including timber, which has also been subject to targeted economic sanctions,⁷⁶⁵ not easily traceable. In relation to sanctions against UNITA, both Côte d'Ivoire and Zambia, as well as private companies, were prepared to provide false certification⁷⁶⁶ although, as Global Witness indicated in 1997, at that time only diamond producing nations subject to sanction required certification of origin.⁷⁶⁷

In Sierra Leone, the RUF breached UNSC sanctions on diamonds by exporting them to third countries in exchange for food and arms.⁷⁶⁸ In large part, they were moved to Liberia, although they were also exported to Guinea and Gambia.⁷⁶⁹ Once exported to these states there was no means of ensuring that these diamonds did not enter the official export systems in those states and that they were not exported on to other states, which were either unaware of or disregarded their origin. It has been noted for example that in reporting their diamond imports states frequently confuse the terms 'country of origin', which is the state that the diamond was mined in, and 'country of province', which is the last state through which a diamond has transited. The result is that states frequently name as a 'country of

⁷⁶⁰ Cortright and Lopez, *The Sanctions Decade* (n 72) 159.

⁷⁶¹ *ibid.* 159.

⁷⁶² UNSC Resolution 1173 (n 754), 12.

⁷⁶³ UNSC Resolution 1306 (n 117), 1.

⁷⁶⁴ Cortright and Lopez, *Sanctions and the Search for Security* (n 718) 185.

⁷⁶⁵ UNSC Res 1478 (6 May 2003) UN Doc S/RES/1478, 17(a).

⁷⁶⁶ Cortright and Lopez, *The Sanctions Decade* (n 72) 160.

⁷⁶⁷ Global Witness Report (n 759) 13.

⁷⁶⁸ Martin Chungong Ayafor, 'Report of the Panel of Experts appointed pursuant to Security Council resolution 1306 (2000), paragraph 19, in relation to Sierra Leone', (December 2000) S/2000/1195, para 81-89.

⁷⁶⁹ *ibid.* para 82, 84-85.

origin' a state that does not mine diamonds.⁷⁷⁰ This demonstrates that states may not be cognisant of the origin of diamonds that they are importing.

Targeted economic sanctions against oil or petroleum would come within the category of commodity sanctions. Sanctions against oil have been discussed in chapter 2 in relation to Southern Rhodesia and chapter 3 in relation to Iraq and will not be discussed in detail here. There are, however, two distinctions between sanctions against oil and those against other commodities that should be noted. Firstly, whereas generally commodity sanctions apply to imports from a targeted state, sanctions on oil may also apply to exports to a targeted state, as they did in relation to Southern Rhodesia.⁷⁷¹ Secondly, the general purpose of commodity sanctions is to prevent the targeted state from raising money through sale of the sanctioned commodity but this is not the only purpose of sanctions against oil. The sanctioning of oil may also limit the state from functioning in other respects as oil is used for transportation, both of goods and of people, and is also a component in the manufacture of many other products.

4.1.2 Targeted Economic Sanctions Against Identified Entities or Persons

Unlike targeted sanctions against identified assets, targeted sanctions against identified entities or persons are a relatively new phenomenon. This type of UNSC sanction was introduced during economic sanctions against Iraq when funds of the sale of petroleum by Iraqi Government and state bodies, agencies and corporations were to be transferred to an escrow account.⁷⁷² They were established in order to address the fact that 'in some cases regime leaders and their loyal supporters escape virtually unscathed' from broad economic sanctions.⁷⁷³ This is because those people are in a position to hide their own assets whilst retaining the majority of the limited commodities that are available during economic sanctions. As such, broad economic sanctions have a disproportionate impact on the general population of a state, which is subject to sanctions, whilst leaving those responsible for the action that necessitated the invocation of sanctions largely unscathed.

Economic sanctions taken against identified entities or persons can be broad, restricting the importation or exportation of assets to or from a specific entity, for example economic sanctions

⁷⁷⁰ *ibid.*, para 115-121.

⁷⁷¹ UNSC Resolution 232 (n 123).

⁷⁷² UNSC Resolution 778 (n 539), 1.

⁷⁷³ Hufbauer, Schott, Elliot and Oegg (n 15), 138.

against UNITA. They may also be narrow, freezing the assets of named individuals. Both will be outlined here.

4.1.2.1 Targeted Economic Sanctions Against Identified Entities

Targeted economic sanctions against identified entities, in their initial stages, have been taken as part of wide-sweeping sanctions against states. For example, as mentioned in the introduction to this section, whilst there were comprehensive economic sanctions in place against Iraq, targeted sanctions were taken against the proceeds of the sale of Government oil and oil produced by state bodies, entities and corporations.⁷⁷⁴

As the 1990's progressed, however, economic sanctions were increasingly being targeted at specific regimes within states. Two notable instances have previously been outlined in this chapter. UN sanctions were taken against UNITA in Angola⁷⁷⁵ and the RUF in Sierra Leone.⁷⁷⁶ In both cases, economic sanctions were taken, in the midst of civil wars, against groups that were engaged in hostilities against the legitimate government of the state. In this political situation, economic sanctions that target the rogue group whilst allowing the legitimate government to operate as normally as possible offer advantages over broad economic sanctions against the entire state.

Firstly, by targeting those who are causing unrest whilst leaving the government free from sanctions they ensure that key resources such as food and medicine can remain available to the general population. On the assumption that those commodities remain available to the legitimate government of a state and that the government in question is prepared to distribute them, this type of economic sanction addresses the situation that arose in Iraq, whereby there was widespread humanitarian suffering as a result of insufficient food and medical care.⁷⁷⁷

Secondly, as well as allowing access to goods necessary for the humanitarian well-being of a state, this type of sanction allows other goods to flow to and from a state. Because the sanctions only apply to certain entities and people, the state itself (when it is not the target of sanctions) can still raise money through exports and other states can export goods to it, which avoids the situation in FRY

⁷⁷⁴ UNSC Resolution 778 (n 539).

⁷⁷⁵ UNSC Resolution 864 (n 713).

⁷⁷⁶ UNSC Res 1171 (5 June 1998) UN Doc S/RES/1171.

⁷⁷⁷ Ahtisaari Report (n 422); Simons, *The Scourging of Iraq* (n 423) xviii; LaRae-Perez (n 424), 161; Pilger (n 424), 77; Popal (n 424), 791.

whereby the blanket arms embargo maintained a weapons imbalance, which favoured the perpetrators of the unrest.⁷⁷⁸

Thirdly, this type of sanction sends a clear message to those who have been subject to it that their behaviour specifically, rather than the broader issue, of for example, hostilities within a state, is considered worthy of being subjected to economic sanctions. It is also a strongly symbolic gesture, which may serve to discourage other states from supporting the rogue regime.

Despite their benefits, economic sanctions targeted against identified entities also present some difficulties. Firstly, as previously discussed in relation to arms embargoes and, as with broad sanctions against states, breaches of economic sanctions targeted at entities such as UNITA still occur.⁷⁷⁹ Secondly, groups may be able to circumvent the supposed benefits of economic sanctions. In its attempts to gain control of Sierra Leone the RUF physically tortured the citizens of Sierra Leone, including through the use of sexual exploitation.⁷⁸⁰ It also sought to starve the citizens of that country by disrupting shipments and destroying crops.⁷⁸¹ The destruction of food has also been described as a weapon during hostilities in Somalia.⁷⁸² This prevents the general population of a state from obtaining the supposed benefit of targeted economic sanctions, i.e. that food and other essential commodities are still available.

Thirdly, this type of economic sanction may be labour-intensive to monitor because it affects some imports to and exports from a state whilst not impacting on others. It, therefore, requires close attention to ensure that no breaches take place. Monitoring difficulties are compounded in a state like Sierra Leone, which had varying factions seeking power without any true governance of the state.⁷⁸³ There the dispersal of essential commodities to the general population could not be done by the government and required the presence of humanitarian agencies in the state to do so.

Fourthly, in some respects targeting a person because of his or her membership of a certain group may be inequitable. This is because such measures apply equally to the leader of an organisation, who makes decisions with regard to the functioning of the group and takes full benefit of the financial position of the group, as it does to an ordinary soldier in the organisation, who has no power over the

⁷⁷⁸ Cortright and Lopez, *The Sanctions Decade* (n 72) 63-65.

⁷⁷⁹ Bondi (n 722), 109-123.

⁷⁸⁰ Nsongurua J Udombana, 'Globalization of Justice and the Special Court for Sierra Leone's War Crimes' (2003) 17 *Emory International Law Review* 55.

⁷⁸¹ Udombana (n 780); Cortright and Lopez, *The Sanctions Decade* (n 72) 175.

⁷⁸² David Vesel, 'The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World' (2003) 18 *Brigham Young University Journal of Public Law* 1.

⁷⁸³ Meredith (n 287), 562.

movement of the group and may not have joined of his or her own volition. For example, the RUF in Sierra Leone forcibly recruited children, drugging them and teaching them how to kill.⁷⁸⁴ It is difficult to see how such a child soldier is culpable and economic sanctions will have no impact on his or her behaviour, which is controlled by a senior member of the army. This creates a similar difficulty to sanctions taken against states, in that the sanctions may impact on persons who have little to do with the behaviour being sanctioned. In those cases it is necessary to target sanctions even more specifically at the leadership of the group in question.

4.1.2.2 Targeted Economic Sanctions Against Identified Individuals

Economic sanctions taken against identified individuals are even more narrowly targeted than those against identified entities. The individuals may be senior members of a government or rebel group or may be associated with a certain type of behaviour that contravenes international law such as terrorist activity. Such measures directly address the problem of collateral suffering by citizens of a state or members of an organisation that have no control over the decisions being made.

The first UN system of economic sanctions targeted at identified individuals was taken during economic sanctions against Haiti.⁷⁸⁵ Economic sanctions against Haiti had been in place, in the form of a fuel and arms embargo,⁷⁸⁶ for almost a year before UNSC Resolution 917 was invoked in May 1994. The resolution set out three groups of people who would come within the ambit of the assets freeze: all officers of the Haitian military and their immediate families;⁷⁸⁷ the major participants in the *coup d'état* of 1991 and the illegal governments since that *coup d'état* together with their immediate families;⁷⁸⁸ and those employed by or acting on behalf of their immediate families.⁷⁸⁹ The committee created under UNSC Resolution 841 ('the 841 Committee')⁷⁹⁰ was responsible for keeping a list of the individuals to be subject to sanction.⁷⁹¹

Targeted sanctions against identified individuals offer the same potential benefits outlined in relation to targeted sanctions against identified entities. Furthermore, in two respects they offer advancement from the position of targeted sanctions against identified entities. Firstly, they are

⁷⁸⁴ *ibid.* 563.

⁷⁸⁵ UNSC Resolution 917 (n 89).

⁷⁸⁶ UNSC Resolution 841 (n 42).

⁷⁸⁷ UNSC Resolution 917 (n 89), 3(a).

⁷⁸⁸ *ibid.* 3(b).

⁷⁸⁹ *ibid.* 3(c).

⁷⁹⁰ Created under UNSC Resolution 841 (n 42), 10.

⁷⁹¹ UNSC Resolution 917 (n 89), 3.

absolutely targeted towards those responsible for the behaviour being sanctioned. Secondly, they are a symbolic tool in that they communicate that a specific person's behaviour is not acceptable to the UNSC. Since they identify the individuals responsible for undesirable behaviour they express a level of censure that cannot be achieved through the use of economic sanctions previously outlined.

Although Haiti was the first instance of targeted economic sanctions against identified individuals it offers no useful lessons as to the implementation of that type of sanction. This is because military force was sanctioned by the UNSC less than three months after the adoption of economic sanctions.⁷⁹² And, on 19 September 1994, the sanctioned regime agreed to step down when threatened with military intervention by US forces.⁷⁹³ A multi-national force peacefully entered Haiti that day and the UNSC announced on 29 September that economic sanctions would end the day after President Aristide returned to Haiti.⁷⁹⁴ Following Aristide's return to Haiti UN sanctions were lifted on 15 October 1994.⁷⁹⁵

In another case, five years after sanctions against UNITA in Angola were initiated the UNSC froze the assets of designated⁷⁹⁶ members of the regime.⁷⁹⁷ The reports of the committee established pursuant to UNSC Resolution 864 ('the 864 Committee'), record the main difficulties with this type of economic sanction, which relies heavily on its implementation by states and reporting of that implementation to the relevant sanctions committee.⁷⁹⁸ Six months after sanctions were to be implemented only 35 states had reported to the 864 Committee.⁷⁹⁹ A year later, only thirteen further states had reported.⁸⁰⁰ Although six states reported that they had found sanctioned assets in their jurisdiction, it is possible that assets were held in other states that did not report to the 864 Committee.⁸⁰¹

This problem is linked to another difficulty with this type of economic sanctions, and that is that its implementation assumes that the individuals subject to sanctions act within a sophisticated

⁷⁹² UNSC Resolution 940 (n 90), 4.

⁷⁹³ Douglas Jehl, 'Showdown in Haiti: The Overview; Haiti's Military Leaders Agree to Resign; Clinton Halts Assault. Recalls 61 Planes: Troops in Today' *The New York Times* (New York 19 September 1994).

⁷⁹⁴ UNSC Res 944 (29 September 1994) UN Doc S/RES/944, 4.

⁷⁹⁵ UNSC Res 948 (15 October 1994) UN Doc S/RES/948.

⁷⁹⁶ Designated under UNSC Res 1127 (28 August 1997) UN Doc S/RES/1127, 11.

⁷⁹⁷ UNSC Resolution 1173 (n 754), 11.

⁷⁹⁸ Report of the Security Council Committee established pursuant to resolution 864 (1993) concerning the situation in Angola (12 February 1999) S/1999/147, para 7(b) ('Report of 864 Committee, February 1999'); Report of the Security Council Committee established pursuant to resolution 864 (1993) concerning the situation in Angola (3 February 2000) S/1999/83, para 11(c) ('Report of 864 Committee, February 2000').

⁷⁹⁹ Report of 864 Committee, February 1999 (n 798), para 2.

⁸⁰⁰ Report of 864 Committee, February 2000 (n 798), para 5.

⁸⁰¹ Supplementary Report of the Monitoring Mechanism on Sanctions against UNITA (12 October 2001) S/2001/966, para 223.

banking system, which will be capable of freezing their assets. For example, the 864 Committee's report of 1999 proposes that states 'enlist the assistance of banks and sources of financial information and expertise to identify and track the financial flows of UNITA and those of its senior officials and adult members of their immediate families.'⁸⁰² However, if an individual does not act within a formal banking system his or her financial movements will not be easily traceable. Of the six states that reported holding assets of the designated individuals, five were developed states.⁸⁰³ Given that the majority of those states are geographically distant from Angola and, assuming that states that did not report are less likely to be implementing sanctions, it would seem likely that not all assets that should have been frozen under UNSC Resolution 1173 were being reported.

This links to the final difficulty with this type of economic sanction, the problem of tracing breaches that do occur. When the exportation of a particular commodity to a state is prohibited, the presence of that commodity in the state indicates that sanctions have been breached. When personal assets are sanctioned their presence in a state is less visible. Equally, if the sanctioned assets remain unfrozen in other jurisdictions that fail to report their presence, either because those states cannot trace them or because they choose not to, the 864 Committee will be unaware of their existence.

4.1.3 Travel Sanctions

Travel sanctions can take two forms. Firstly, they can be a prohibition on flights to and from a state. Secondly, they can be a prohibition on identified people travelling. Travel sanctions have been a facet of UN economic sanctions since the outset. Sanctions against Southern Rhodesia included a prohibition on the admittance of persons travelling on Southern Rhodesian passports and the operation of aircraft to it.⁸⁰⁴ They have been used frequently as part of UN sanctions regimes since then although they have yet to be taken in isolation.⁸⁰⁵

Travel sanctions have a high symbolic value. They send a message that the state or person sanctioned is considered to be acting outside of the international system. When implemented against a state, they prevent participation in sporting and cultural events as well as limiting educational opportunities. They also strengthen the implementation of other sanctions by preventing sanctioned

⁸⁰² Report of 864 Committee, February 1999 (n 798), para 7(a)(iv).

⁸⁰³ Ireland, Italy, Portugal, Switzerland and USA. Cote D'Ivoire is the sixth state.

⁸⁰⁴ UNSC Resolution 253 (n 314), 5(b), 6.

⁸⁰⁵ For example, Libya: UNSC Resolution 748 (n 41), 4; Sierra Leone: UNSC Resolution 1132, 5 (n 711); Afghanistan: UNSC Resolution 1333 (n 710), 5.

goods being transported to a state. For example, UNITA was being supplied with weapons that were being transported to Angola by air.⁸⁰⁶ Prohibitions on flights to or from a state should also, theoretically, be easy to monitor, if not to enforce, through the use of technology, such as radar and satellite systems.

Travel sanctions do, however, have some potential flaws. Broad prohibitions on flights may inhibit the provision of humanitarian assistance. This is generally addressed by providing for humanitarian exemptions to travel sanctions. However, these exemptions do not always fully rectify the issue in a given state. For example, during travel sanctions imposed against Haiti,⁸⁰⁷ many asylum seekers were stranded in Haiti because the regime refused to allow evacuation flights in retaliation to the travel sanctions that had been put in place.⁸⁰⁸

Such sanctions are also difficult to monitor when applied against identified individuals. False documentation is available to those with sufficient money, which is, ironically, more likely to be the elite members of a state who are likely to be the intended targets of a UN travel ban. In Angola, the problem that arose was that many members of UNITA were not Angolan but were citizens of European and other African states, which made it more difficult to restrict their travel as they would not be travelling on Angolan passports.⁸⁰⁹

The most comprehensive set of UN travel sanctions was established against Libya on the basis of its involvement in the bombings of Pan Am flight 103 ('the Lockerbie bombing') and Union de transports aériens flight 772 ('the UTA bombing').⁸¹⁰ Travel sanctions were initially taken in March 1992.⁸¹¹ UNSC Resolution 748 demanded that Libya return hostages and cease both terrorist action and the support of terrorist action.⁸¹² It ordered states to refuse permission to any aircraft, destined for or coming from Libya, to land, take off or over-fly their territory.⁸¹³ Furthermore, states were to prohibit the supply or servicing of aircraft or aircraft components, the certification of airworthiness and the provision of aircraft insurance or any payment under any such insurance in relation to Libya.⁸¹⁴ These sanctions were strengthened the following year in UNSC Resolution 883, which contained four new

⁸⁰⁶ Mollander Report (n 729), para 164.

⁸⁰⁷ UNSC Resolution 917 (n 89), 2.

⁸⁰⁸ Richard W Conroy, 'The UN Experience with Travel Sanctions: Selected Cases and Conclusions' in David Cortright and George A Lopez, *Smart Sanctions: Targeting Economic Statecraft* (Rowman & Littlefield 2002) 157.

⁸⁰⁹ Cortright and Lopez, *Sanctions and the Search for Security* (n 718) 143.

⁸¹⁰ UNSC Res 731 (21 January 1992) UN Doc S/RES/731.

⁸¹¹ UNSC Resolution 748 (n 41).

⁸¹² *ibid.*, 2-3.

⁸¹³ *ibid.*, 4(a).

⁸¹⁴ *ibid.*, 4(b).

provisions in relation to travel.⁸¹⁵ In relation to Libyan Arab Airlines, it ordered that states require the immediate closure of its offices in their territories and prohibit transactions with it including the honouring of its tickets.⁸¹⁶ States were also to prohibit the supply of goods or services destined for the construction, improvement or maintenance of civilian or military airfields or associated facilities.⁸¹⁷ Finally, UNSC Resolution 883 prohibited the assistance and training of any personnel associated with the operation of aircraft within Libya.⁸¹⁸

From the outset it was clear that Libya was willing to reach a solution to the problems that were motivating economic sanctions. It offered to hand over those suspected of the UTA bombing to a French court and those suspected of the Lockerbie bombings to an international tribunal in order to avoid being subject to UN sanctions.⁸¹⁹ The UK and US refused. Instead they demanded that the suspects be handed over for trial on their territory,⁸²⁰ which was in turn rejected by Libya.⁸²¹ Throughout the period during which Libya was subject to UN sanctions it continued to press for a trial on neutral territory, including, in February 1994, a suggestion that the two suspects should be tried under Scottish law, in front of Scottish judges at the ICJ.⁸²²

It has been suggested that Qaddafi's willingness to hand over the suspects was out of concern about the impact of sanctions.⁸²³ However, Libya's stance remained consistent from when the initial accusations, that it was harbouring persons suspected of committing the bombing, were made through to the end of sanctions so it is difficult to attribute too much persuasive power to sanctions at that point. That said, once sanctions commenced Libya suggested that sanctions were effective, indicating that it had suffered losses running to billions of dollars as a result of them.⁸²⁴ Niblock, however, argues that these losses maybe more properly attributed to a combination of sanctions, mismanagement of the economy by Libyan authorities and the prevailing global economic climate.⁸²⁵

In any case, in terms of using behaviour modification as the measurement of the effectiveness of sanctions, Libya remained steadfast in its refusal to hand over the suspects of the terrorist bombing

⁸¹⁵ UNSC Res 883 (11 November 1993) UN Doc S/RES/883.

⁸¹⁶ *ibid.*, 6(a)-6(b).

⁸¹⁷ *ibid.*, 6(d).

⁸¹⁸ *ibid.*, 6(e).

⁸¹⁹ Cortright and Lopez, *Sanctions and the Search for Security* (n 718); Niblock (n 551), 39.

⁸²⁰ Niblock (n 551), 37.

⁸²¹ Report on the Libyan Crisis by UN Secretary General Dr Boutros Boutros-Ghali, S/23574, 11 February 1992.

⁸²² Niblock (n 551), 44.

⁸²³ Cortright and Lopez, *The Sanctions Decade* (n 72) 111.

⁸²⁴ UNSC, Letter from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations Secretary General, S/1997/404, New York, 27 May 1997.

⁸²⁵ Niblock (n 551), 60-71.

throughout the period during which it was subject to UNSC sanctions. As sanctions against Libya continued, the OAU supported the Libyan position that the bombing suspects be tried in a neutral country and called on the UNSC to lift economic sanctions in light of Libya's willingness to cooperate on this issue.⁸²⁶ By June 1997, the OAU decided that it would cease to implement economic sanctions against Libya unless a trial in a neutral country was agreed upon.⁸²⁷

UNSC Resolution 1192 welcomed the initiative agreed by the UK, US and Netherlands whereby the Lockerbie suspects would be tried before a Scottish court sitting in the Netherlands at Camp Zeist, a disused US Air Force base, which was made part of Scottish territory for the duration of the trial.⁸²⁸ It further stated that sanctions under UNSC Resolutions 748 and 883 would be suspended against Libya once the accused arrived in the Netherlands for trial or had appeared before an appropriate court in either the US or UK and once the French government was satisfied with the response to the bombing of UTA 772.⁸²⁹ The suspects were delivered for trial in April 1999,⁸³⁰ although, due to questions over compliance with UNSC Resolution 748, sanctions against Libya were not ultimately terminated until September 2003.⁸³¹

Given that the US and UK ultimately conceded to Libyan demands and held a trial of the suspects on neutral territory it is difficult to see that travel sanctions were very effective. In fact, Aust attributes the ultimate agreement on the trial to 'stubbornness, imagination, political will – and the right timing.'⁸³² It remains the situation following sanctions against Libya that travel sanctions are still seen as a largely symbolic gesture.⁸³³

4.1.4 Continuation of Humanitarian Problems

This chapter so far has focused on the type of targeted sanctions available to the UNSC and both the advantages and disadvantages of the use of each of those instruments. It has not addressed whether targeted sanctions, in their initial stages, were an improvement, in terms of humanitarian impact, compared with broad sanctions against states. Craven suggests that 'it is barely credible to suggest that

⁸²⁶ OAU, Resolution on the Crisis between the Great Libyan Arab Jamahiriya and the United States of America, the United Kingdom and France (27 January 1995) CM/Res.1566 (LXI).

⁸²⁷ Niblock (n 551), 47.

⁸²⁸ UNSC Resolution 1192 (27 August 1998) UN Doc S/RES/1192, 2.

⁸²⁹ *ibid.*, 8.

⁸³⁰ Statement by the President of the Security Council (8 April 1999) S/PRST/1999/10.

⁸³¹ UNSC Res 1506 (12 September 2003) UN Doc S/RES/1506.

⁸³² Anthony Aust, 'Lockerbie: The Other Case' (2000) 49 ICLQ 278 at 296.

⁸³³ Gary C Hufbauer and Barbara Oegg, 'Targeted Sanctions: A Policy Alternative?' (2000) 32 Law & Policy in International Business 11.

in directing measures against the government, the civilian population will be immunized from harmful effects.⁸³⁴ This section briefly examines the humanitarian impact of the targeted economic sanctions.

The humanitarian problems that prevailed in Somalia and Sierra Leone as a result of economic sanctions, as previously discussed,⁸³⁵ were reflected in other cases of targeted economic sanctions. Despite the short period during which UNSC sanctions against Haiti were in place, it has been suggested that they, together with the sanctions taken by the Organisation of American States over a more extended period (from October 1991), were responsible for humanitarian problems in that state. The most tangible impact of UNSC targeted economic sanctions against Haiti came as a result of the petroleum embargo, which was imposed in October 1993.⁸³⁶ As oil became more scarce its price, and thus the price of transportation, was driven up.⁸³⁷ This had the effect of driving up the price of food,⁸³⁸ medicines and other humanitarian items. The difficulties experienced as a result of these increased prices were compounded by a drop in Haiti's manufacturing industry as states prevented Haitian made products from being imported to their territory thus resulting in job losses.⁸³⁹

Whereas previously Haiti had been given development assistance, as sanctions progressed humanitarian assistance became a necessity.⁸⁴⁰ Whilst humanitarian assistance was provided for under the resolutions, the interpretation of what constituted humanitarian assistance was left open to states to interpret⁸⁴¹ with the result that it was narrowly defined by some states. For example, as outlined in the *Nicaragua* case, the US had previously accepted that the provision of humanitarian assistance would include 'the provision of food, clothing, medicine, and other humanitarian assistance',⁸⁴² whereas in the case of Haiti the US's provision of humanitarian assistance was limited to 'medicines and medical supplies, as authorized by the Secretary of the Treasury, and rice, beans, sugar, wheat flour, cooking oil, corn, corn flour, milk, and edible tallow'.⁸⁴³ The resulting impact on the population was widespread malnourishment,⁸⁴⁴ with half of the children in Haiti suffering to some extent from malnourishment by

⁸³⁴ Craven (n 669), 48.

⁸³⁵ Udombana (n 780); Cortright and Lopez, *The Sanctions Decade* (n 72) 175.

⁸³⁶ UNSC Res 873 (13 October 1993) UN Doc S/RES/873.

⁸³⁷ Gibbons (n 86), 12.

⁸³⁸ Haiti: USAID Monitoring Report, May 1994, 6.

⁸³⁹ Gibbons (n 86), 11.

⁸⁴⁰ Felicia Swindells, 'U.N. Sanctions in Haiti: A Contradiction Under Articles 41 and 55 of the U.N. Charter' (1997) 20 *Fordham Int'l LJ* 1878.

⁸⁴¹ UNSC Resolution 917 (n 89).

⁸⁴² *Case Concerning Military and Paramilitary Activities and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 at 125 ('*The Nicaragua Case*')

⁸⁴³ For example, by the US in Executive Order No. 12917 of 21 May 1994, Prohibiting Certain Transactions with Respect to Haiti Federal Register Vol. 59 No. 26925, 21 May 1994, 1(d)(ii).

⁸⁴⁴ Emergency Economic Recovery Program, United Nations International Report, Vol. 1, no. A1 (3 April 1995).

the end of 1994,⁸⁴⁵ increased mortality rates, including one of the highest rates of maternal mortality in the world,⁸⁴⁶ and the outbreak of epidemics of ordinarily controllable diseases such as measles, meningitis and rabies.⁸⁴⁷

Targeted sanctions against the former Yugoslavia also caused significant humanitarian suffering amongst the population. As previously noted, the arms embargo maintained an unequal distribution of weapons across the parties involved.⁸⁴⁸ This inequality resulted in the Serb army of 80,000 troops capturing 70 per cent of Bosnian territory, which was defended by a potential 200,000 troops because the Serb army was heavily armed whereas only two thirds of the Bosnians were.⁸⁴⁹ Bosnians citizens were then left with a choice of fleeing or risk being raped and murdered by the Serb army.⁸⁵⁰

Additionally, Yugoslavia experienced a period of hyperinflation, which led to the collapse of the dinar.⁸⁵¹ As a result, similar to Haiti, prices of commodities rose significantly with the cost of staples like bread doubling in price in a matter of days.⁸⁵² Unemployment also rose, with estimations as early as September 1992 that between 50 and 80 per cent of the working population would be without work within three months.⁸⁵³ And the cost of staples like bread doubled in price in a matter of days. These effects of sanctions were not, however, being felt by the elites, who were in fact said to be profiting from sanctions, but rather by the ordinary people. It was said that 'their practical effect has been to devastate the middle class'.⁸⁵⁴

It can be seen, therefore, that Craven's fear⁸⁵⁵ that simply targeting economic sanctions would not address the humanitarian difficulties that had been seen during economic sanctions against Iraq. As such, modifications to targeted sanctions were required to address this situation and the other problems previously outlined. The next section of this chapter will consider the potential routes that the development of targeted economic sanctions could have taken.

⁸⁴⁵ Gibbons (n 86), 23.

⁸⁴⁶ Emergency Economic Recovery Program, United Nations International Report. Vol. 1, no. A1 (3 April 1995).

⁸⁴⁷ 'Haiti: USAID Monitoring Report' (n 838).

⁸⁴⁸ Cortright and Lopez, *The Sanctions Decade* (n 72) 63-65.

⁸⁴⁹ Robert W McGee, 'Legal Ethics, Business Ethics and International Trade: Some Neglected Issues' (2002) 10 *Cardozo Journal of International & Comparative Law* 109.

⁸⁵⁰ *ibid.*

⁸⁵¹ Cortright and Lopez, *The Sanctions Decade* (n 72) 73.

⁸⁵² Stephen Kinzer, 'Sanctions Driving Yugoslav Economy into Deep Decline' *The New York Times* (New York 31 August 1992).

⁸⁵³ Roger Cohen, 'Yugoslav Sanctions Taking High Toll' *The New York Times* (New York 6 September 1992).

⁸⁵⁴ M Jennifer MacKay, 'Economic Sanctions: Are they Actually Enforcing International Law in Serbia-Montenegro?' (1995) 3 *Tulane Journal of International & Comparative Law* 203.

⁸⁵⁵ Craven (n 669), 48.

4.2 Potential Modifications to the Targeted Sanctions Framework

In August 1998, Kofi Annan, in his report as Secretary-General, succinctly described the problem being faced by the UN and its Member States with regard to targeted economic sanctions: '[t]he international community should be under no illusion:... humanitarian and human rights policy goals cannot easily be reconciled with those of a sanctions regime. It cannot be too strongly emphasized that sanctions are a tool of enforcement and, like other methods of enforcement, they will do harm. This should be borne in mind when the decision to impose them is taken, and when the results are subsequently evaluated.'⁸⁵⁶

This section looks at three ways in which the UN could have attempted to reconcile these two goals. Firstly, it looks at the possibility of economic sanctions working within the legal framework of the law of armed conflict. Secondly, it looks at largely maintaining the *status quo* but providing increased humanitarian aid where necessary. Finally, it looks at the possibility of regulatory intervention.

4.2.1 Economic Sanctions as Part of the Law of Armed Conflict

The possibility that when economic sanctions regimes are taken in armed conflict that the rules applicable to armed conflict should also applied to the sanctions was mooted by both Reisman and Stevick⁸⁵⁷ and Anna Segall⁸⁵⁸ in the late 1990s. Segall was motivated by her belief that 'any regime of sanctions which is capable of affecting the civilian population, must provide for humanitarian exceptions'. She suggested that adherence to the rules of armed conflict would mean ensuring that economic sanctions regimes complied with: the prohibition on starvation of the civilian population; the right to humanitarian assistance; the provision of access to relief supplies in naval blockades; and the provision of relief supplies for occupied territories.⁸⁵⁹ Reisman and Stevick stated that the commonly accepted criteria that any use of force should be 'demonstrably necessary, proportional to the necessity, and capable of discriminating between combatants and non-combatants' could be applied to the use of economic sanctions by the UN.⁸⁶⁰

⁸⁵⁶ Annual Report of the Secretary-General on the work of the Organization (27 August 1998) A/53/1, para 64.

⁸⁵⁷ Reisman and Stevick (n 56), 86.

⁸⁵⁸ Segall (n 664).

⁸⁵⁹ *ibid.*

⁸⁶⁰ Reisman and Stevick (n 56), 86.

There would have been certain advantages for the UN in adopting this approach for its treatment of economic sanction. Primarily, because these criteria are so well established with regard to the law of armed conflict, their application to economic sanctions would have been relatively straightforward. The law of armed conflict, unlike the application of economic sanctions, accepts that sanctions cause damage, including collateral damage. This is why it is required that any military sanctions imposed are both necessary and proportionate. The consideration of economic sanctions on those terms would force states and the UN to consider and seek to reduce any potential damage.

Furthermore, despite the Charter not treating them as such, there is often a distinction made in practice between military and economic sanctions taken under Chapter VII of the UN Charter with the latter being more readily adopted than the former, as can be seen in the initial stages of economic sanctions against Iraq.⁸⁶¹ However, the humanitarian problems seen as a result of economic sanctions have demonstrated that collateral damage is not limited to military sanctions. By treating the invocation of economic sanctions as akin to military sanctions some of these issues could be resolved. Firstly, all sanctions taken by the UNSC under Chapter VII would be treated similarly. This would clarify that economic sanctions are not to be taken lightly, or somehow seen as a lesser measure than military sanctions. Secondly, it would require that any possible damage caused by economic sanctions would be evaluated prior to sanctions being invoked.

O'Connell, however, criticises the suggestion that the law of armed conflict can be applied to economic sanctions.⁸⁶² She notes particularly that if the proportionality as applied to economic sanctions was to be considered through the lens of the law of armed conflict that it would create unintended consequences. She further notes that, in the context of the law of armed conflict, the principle of proportionality allows force to escalate if the military aim sought cannot be achieved with less force.⁸⁶³ In terms of economic sanctions, this would allow economic sanctions to be increased in circumstances where their use is already causing significant humanitarian suffering. As such, the application of the laws of armed conflict to economic sanctions might not ameliorate the humanitarian situation.

⁸⁶¹ See views of the UK and Malaysia with respect to the first economic sanctions resolutions against Iraq in section 3.3.1.

⁸⁶² O'Connell (n 638), 74-75.

⁸⁶³ Ibid, 75.

4.2.2 Maintenance of the *Status quo* whilst Providing for Supplementary Humanitarian Aid

Rather than using the law of armed conflict to pre-plan the invocation of sanctions the UNSC could have sought to address humanitarian problems in the application of economic sanctions in a wholly reactive manner. It may have been the case that the main problem was not that economic sanctions were causing significant humanitarian problems but that those problems were not being rectified adequately. Based on that premise, the deficiencies could be addressed by improving upon the humanitarian aid given to states during and after the imposition of sanctions. The predominant advantage to this type of action would be that it would have no impact on the effectiveness of sanctions because it would not interfere with sanctions until they had already been implemented.

In any case this position is more reflective of the measures that were being invoked by the UNSC. Sanctions against FRY saw developments in both the provision of humanitarian aid and the monitoring of the implementation of economic sanctions that could form the basis of future developments in this area.

The committee established in UNSC Resolution 724 ('the 724 Committee') with respect to sanctions against FRY was established less than three months after the implementation of UNSC economic sanctions.⁸⁶⁴ The 724 Committee was sent in the region of 140,000 applications for the shipment of exempted goods.⁸⁶⁵ It was criticised for delays in processing these applications, which resulted in delays to the resolution of humanitarian problems in the region.⁸⁶⁶ This has, however, been perceived as a turning point for the provision of humanitarian aid during sanctions.⁸⁶⁷ The most significant advancements were the development of institution-specific sanctions exemptions to major UN humanitarian organisations and the automatic approval of designated humanitarian items.⁸⁶⁸ As well as the exemptions granted to organisations such as the ICRC and the UNHCR, the 724 Committee fast-tracked the applications of other recognised humanitarian organisations. This eliminated the backlog of applications and allowed humanitarian aid to get through to those who needed it in a timely fashion.

⁸⁶⁴ UNSC Res 724 (15 December 1991) UN Doc S/RES/724.

⁸⁶⁵ UNSC, Letter dated 15 November 1996 from the Chairman of the Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia Addressed to the President of the Security Council, 15 November 1996, S/1996/946.

⁸⁶⁶ Claude Bruderlein, Special Advisor, OCHA New York, *Coping with the Humanitarian Impact of Sanctions: An OCHA Perspective*, 5.

⁸⁶⁷ Bruderlein, 5.

⁸⁶⁸ S/1996/946 (n 865).

Perhaps more important than the advances in the provision of humanitarian aid was the improvement in the monitoring of economic sanctions which came about as a result of the cooperation between regional organisations in implementing sanctions. Alongside the UN, organisations such as the OSCE, the EU, the WEU, NATO and the ICFY cooperated at an unprecedented level in order to assist states in their observance of the sanctions.⁸⁶⁹ Initially the OSCE and EU formed a sanctions liaison group. This group dispatched customs officials to the states in close proximity to FRY, which became known as SAMs.⁸⁷⁰ SAMCOMM was established in Brussels, funded by the European Commission and began operating on 5 October 1992.⁸⁷¹ SAMCOMM communicated between the SAMs and the national authorities of the host countries, to ensure that suspected breaches of economic sanctions were followed up and established evaluation reports for the attention of the UN, the EU and the OSCE.⁸⁷² A computerised satellite communications system was established and maintained by the US and linked the SAMCOMM headquarters with the UN in New York allowing for information to pass between the UN and customs officials based at the SAMs and facilitating verification of possible breaches.⁸⁷³

Meanwhile, NATO and the WEU, supported by fourteen states, established a combined operation to check all vessels in the Adriatic Sea, inspecting their cargo and documents where necessary.⁸⁷⁴ Whilst this system was praised as being 'the first time in history, major regional organizations stepped in to assist the United Nations in providing staff and financial resources for the implementation of UN sanctions', it is also noted that the 'requisite resources for establishing such arrangements, however, are likely to be available only in cases where the interests of the wealthiest states are at stake.'⁸⁷⁵ What is, however, clear is that the developments brought about in the monitoring of economic sanctions could be replicated in the provision of humanitarian aid if the same level of cooperation between regional organisations, the UN and those monitoring sanctions on the ground could be achieved.

⁸⁶⁹ Report of the Copenhagen Round Table on United Nations Sanctions in the Case of the Former Yugoslavia, held at Copenhagen on 24 and 25 June 1996 annexed to Letter dated 24 September 1996 from the Chairman of the Security Council Committee established Pursuant to Resolution 724 (1991) Concerning Yugoslavia addressed to the President of the Security Council, 24 September 1996, S/1996/776.

⁸⁷⁰ Cortright and Lopez, *The Sanctions Decade* (n 72) 69.

⁸⁷¹ S/1996/776 (n 869), para 33-34.

⁸⁷² *ibid.*, para 36.

⁸⁷³ Cortright and Lopez, *The Sanctions Decade* (n 72) 69.

⁸⁷⁴ S/1996/776 (n 869), para 49.

⁸⁷⁵ Cortright and Lopez, *The Sanctions Decade* (n 72) 69-70.

4.2.3 Regulatory Intervention

The third way in which targeted economic sanctions could have been modified was through regulatory intervention. Regulatory intervention would involve both the establishment of some framework legislation in relation to implementation, which could be used by all states, and also the drafting of sanctions resolutions that could, with minor modifications, be used for all instances of economic sanctions. In this way regulatory intervention would ensure consistency both between the various resolutions and during the implementation of economic sanctions.

Regulatory intervention would be something of a compromise position between the two other suggestions of dealing with economic sanctions as part of the law of armed conflict or maintaining the *status quo* whilst providing for supplementary humanitarian aid. It would require significant forward planning in order to draft the initial legislation. However, once the basic framework has been developed, each economic sanction regime would only require slight modification. Equally, in terms of implementing and monitoring sanctions it would share characteristics with the humanitarian aid approach as suggested above. It could also allow for safeguards to be built into the framework itself thus reducing the reliance on action during and following sanctions.

4.3 Towards a Regulatory Intervention Framework

During his position paper on the fiftieth anniversary of the UN former Secretary-General, Javier Pérez de Cuéllar, acknowledged that sanctions were somewhat of a 'blunt' instrument and identified some of the problems that were inherent in their application.⁸⁷⁶ He said that the UNSC should, when instigating sanctions, define objective criteria by which their effectiveness could be assessed, that experience was being gained with respect to monitoring the implementation of sanctions although difficulties remained and that humanitarian agencies in targeted states should be offered support, as should applications made under Article 50⁸⁷⁷ of the Charter.⁸⁷⁸

Two years later the UNGA adopted Resolution 51/242.⁸⁷⁹ This resolution emphasised coordination between the UN, Member States, regional organisations and non-governmental

⁸⁷⁶ Report of the Secretary General on the Work of the Organisation, 'Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations' (3 January 1995) A/50/60 – S/1995/1, para 70.

⁸⁷⁷ Article 50 of the UN Charter provides that Member States that suffer hardship as a result of UNSC enforcement action taken against another state may consult the UNSC for the purpose of resolving the hardship.

⁸⁷⁸ *ibid.*, para 68-69, 72-73

⁸⁷⁹ UNGA Res 51/242 (26 September 1997) UN Doc A/RES/51/242.

organisations as a means of progressing economic sanctions in the UN framework.⁸⁸⁰ It also made a number of recommendations with regard to how sanctions should be established and implemented. Key issues noted included the consideration of both the short-term and long-term effects of economic sanctions, the minimisation of side effects on the civilian population of a target, especially with regard to the humanitarian situation and the uniform application of sanctions by all states.⁸⁸¹ Emphasis was placed on the development of humanitarian assistance, with it being noted that: it should be ‘provided in an impartial and expeditious manner’; the assistance of concerned parties should be sought in assessing humanitarian needs; guidelines for formulating exemptions and a list of exempted goods should be developed; and that the concept of ‘humanitarian limits of sanctions’ should be researched further.⁸⁸² The resolution also sought standardisation of the approach to be followed by the sanctions committees.⁸⁸³

4.3.1 The European Conferences and Suggestions for Reform

The European Conferences were developed, by concerned governments, in direct response to these issues. They provided a forum in which various parties concerned with the implementation of economic sanctions could discuss how they should develop going forward. The first hosted by the Government of Switzerland (Interlaken, 1998-1999) focused broadly on targeted economic sanctions, the second hosted by the German Government (Bonn-Berlin, 1999-2000) focused on arms embargoes and travel sanctions and the third hosted by the Government of Sweden (Stockholm, 2002) focused on how implementation might be strengthened. What emerged out of these talks was the suggestion for a regulatory framework.

The Conferences took place over a five-year period and made numerous recommendations. At the outset of the Interlaken Conference proceedings the Chairman of the conference, Rolf Jeker, identified two problems with UN sanctions that had motivated that conference as being the ‘humanitarian effects on the civilian population in the target country’ and ‘economic effects on third countries.’⁸⁸⁴ However, whilst they may have motivated the establishment of the Conferences they

⁸⁸⁰ *ibid.* Annex II.

⁸⁸¹ *ibid.* Annex II, para 1, 4, 9, 14.

⁸⁸² *ibid.* Annex II, para 20.

⁸⁸³ *ibid.* Annex II, para 27.

⁸⁸⁴ ‘Chairman’s Report’ in Swiss Federal Office for Foreign Economic Affairs, Department of Economy, Expert Seminar on Targeting UN Financial Sanctions, Interlaken, Switzerland (March 17-19 1998) 29 [available at <http://www.seco.admin.ch/themen/00513/00620/00639/00641/index.html?lang=en>; last accessed 1 December 2009]. (‘Chairman’s Report, 1st Interlaken Conference’).

were not considered in detail in any of the Conferences. Instead, the Conferences focused on the creation of a regulatory framework and over the course of the Conferences four innovative categories of recommendations became apparent: the creation of standardised UNSC resolutions; the development of model domestic sanctions legislation; the expansion of support mechanisms for implementation; and a focus on greater communication. Each category will be considered individually in this section.

4.3.1.1 The Creation of Standardised UNSC Resolutions

UNSC resolutions are unique. They create binding obligations for Member States that were not involved in their drafting or negotiation.⁸⁸⁵ These obligations have significant repercussions for those states and individuals targeted by sanctions as well as for those states that are implementing them. As such, the resolutions must be clear as to the precise ambit of the measures being put in place.

As Wood has stated about UNSC resolutions: '[i]n an ideal world, each resolution would be internally consistent, consistent with earlier Council action on the same matter, and consistent with Council action on other matters. Each resolution would be concise, and avoid superfluous or repetitive material.'⁸⁸⁶ The tendency has been, however, to draft UNSC resolutions on a case-by-case basis with varying degrees of reliance on previous resolutions dealing with the same issue. This is because there is no standard procedure for drafting UNSC resolutions and there is generally no input from the UN Secretariat, which includes the Office of the Legal Counsel.⁸⁸⁷

Instead, the drafting of resolutions is a political process with draft documents circulated amongst various states for comment, revision and re-circulation. Furthermore, as Boyle and Chinkin state, the UNSC is 'a seriously deficient vehicle' for the creation of binding resolutions, which they perceive as being akin to legislation, because it lacks accountability, transparency and procedural fairness and because a limited number of states participate in its decision-making.⁸⁸⁸ The result is that the various UNSC resolutions do not have the consistency or conciseness that Wood suggests is desirable.

⁸⁸⁵ See section 6.5.1 for a discussion of the UNSC's expansion of power into the legislative field.

⁸⁸⁶ Michael C Wood, 'The Interpretation of Security Council Resolutions' (1998) 2 Max Plank Yearbook of United Nations Law 80.

⁸⁸⁷ *ibid.* 82.

⁸⁸⁸ Boyle and Chinkin (n 124), 115.

The seminal decision on the interpretation of UNSC resolutions was given by the ICJ in the *Namibia Advisory Opinion*.⁸⁸⁹ It dealt specifically with whether a resolution could be said to have binding effect and held that, in order to ascertain whether that was the case, the language of the resolution, the discussions leading to the resolution, the UN Charter provisions invoked in its implementation and any other circumstances that might assist should be considered.⁸⁹⁰ When, however, resolutions dealing with economic sanctions are under analysis this process may be less useful. This is because not only does much of the discussion leading to sanctions resolutions take place in private but also because sanctions resolutions, by their nature, have to be applied quickly by states, which may not leave time for the type of analysis suggested by the ICJ.

The introductory paper at the first Interlaken Conference considered that '[m]ore standardized wording of resolutions is a possible first step to facilitate implementation into national law.'⁸⁹¹ This, it suggested, would address the difficulties in interpretation of economic sanctions, namely the ambiguity of language, which arises as a result of a lack of definitions and of common terminology. This difficulty is compounded when dealing with targeted economic sanctions as the persons or entities to be targeted are also listed in the resolution, or in a related instrument, with the result that they too are unclear.

The second working group at the first Interlaken Conference was charged with considering the wording of resolutions. It stated that 'uniformity of interpretation and enforcement of sanctions resolutions is a precondition to avoid the exploitation of ambiguities in the implementation.'⁸⁹² The Chairman's Report of the same meeting concluded that this issue should be addressed through the use, in sanctions resolutions, of plain standard language, of defined technical terms consistent throughout resolutions and of building blocks of language that could be used in all resolutions.⁸⁹³

The second Interlaken Conference built on these suggestions and developed both building blocks of language dealing with the financial aspects of sanctions in UNSC resolutions and a set of

⁸⁸⁹ *The Namibia Case* (n 36) 16.

⁸⁹⁰ Higgins (n 120).

⁸⁹¹ Jurg Burri, 'Introductory Paper for the Expert Seminar on Targeting United Nations Sanctions' Expert Seminar on Targeting UN Financial Sanctions, March 17-19, 1998, Interlaken, Switzerland [available at <http://www.seco.admin.ch/themen/00513/00620/00639/00641/index.html?lang=en>; last accessed 1 December 2009].

⁸⁹² 'Report Working Group 2: Development of Sanction Regimes', Expert Seminar on Targeting UN Financial Sanctions, March 17-19, 1998, Interlaken, Switzerland [available at <http://www.seco.admin.ch/themen/00513/00620/00639/00641/index.html?lang=en>; last accessed 1 December 2009].

⁸⁹³ Chairman's Report, 1st Interlaken Conference (n 884).

definitions as used in the building blocks.⁸⁹⁴ Whilst the prohibitions and exemptions contained in the text were extensive it was not intended that the building blocks be treated as a draft resolution, rather that different blocks could be chosen, as necessary, to form the basis of UNSC sanctions resolutions. The building blocks dealt with: asset freezing; the provision of financial services; calling on international organisations to take measures where they could; reporting by states; assessment and support by the Sanctions Committee and Secretariat; and non-liability for compliance with sanctions. For both asset freezing and the provision of financial services, options were given as to what could be prohibited under sanctions resolutions and also what could be exempted from those prohibitions.

None of the provisions in the building blocks were particularly innovative of themselves and they reflected the language used in previous resolutions, but as a whole, the concept of the building blocks was progressive. They were stated in clear language and were comprehensive. They could easily be adapted as necessary but would ensure broad consistency between the various sanctions resolutions. If UNSC economic sanctions resolutions were consistent it would be hoped that the implementation of economic sanctions by Member States would also be consistent. The inclusion of a definitions section was, on the other hand, novel. In domestic legislation it would be common to have a definitions section to explain key terms. This sadly has not been a feature of UNSC resolutions with interpretation being left in the hands of states and thus considerable inconsistency in interpretation. The proposed definitions were not exhaustive since they only included: assets; assets freeze; funds or other financial resources; and assets owned or controlled, directly or indirectly. They also were very broad and so did not cover a situation where, for example, an arms embargo or sanctions against a specified product was to be put in place. However, they were a starting point, which presumably could be amended should it be necessary to do so.

The concept of model resolutions was further explored at the Bonn-Berlin Conference with respect to arms embargoes and travel/aviation sanctions.⁸⁹⁵ Three model UNSC resolutions were proposed for arms embargoes, travel sanctions and aviation sanctions respectively. These resolutions were more comprehensive than the building blocks previously proposed at the Interlaken Conferences.

⁸⁹⁴ 'Working Group 3: Building Blocks and Definitions', 2nd Interlaken Seminar on Targeting United Nations Financial Sanctions, 29-31 March, 1999 [available at <http://www.seco.admin.ch/themen/00513/00620/00639/00641/index.html?lang=en>; last accessed 4 December 2009]. ('Report of Working Group 3, 2nd Interlaken Conference')

⁸⁹⁵ Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions Results of the 'Bonn-Berlin Process' (Bonn International Center for Conversion, 2001), available at: http://www.watsoninstitute.org/tfs/CD/booklet_sanctions.pdf [last accessed 4 December 2009] ('Report of the Bonn-Berlin Conference')

The three resolutions shared some common clauses, for example, a preamble setting out the legal basis for sanctions and stating that the behaviour of the target constitutes a threat to international peace and security, and provisions relating to the role of the sanctions committee. Each resolution also had some clauses unique to the specific type of sanction it related to. So, for example, in relation to travel sanctions the option of either returning a person subject to a travel ban to their home state or detaining such a person was given. Once more it should be noted that the resolutions broadly reflected previous resolutions.

The Bonn-Berlin Conference took the opportunity to rectify some of the deficiencies of language that had previously been seen with similar resolutions but largely it was an exercise in consolidating the best aspects of previous resolutions. A useful innovation was, however, that the resolutions came with commentary. Wood notes that, whilst they are not treaties, UNSC resolutions should be interpreted in light of their objects and purposes, as the Vienna Convention requires for the interpretation of treaties.⁸⁹⁶ Commentary could be a source of such information and should therefore be included in economic sanctions regimes going forward.

Either the building block model proposed at the Interlaken Conference or the more comprehensive model resolutions suggested during the Bonn-Berlin process would have been a welcome innovation with respect to UNSC economic sanctions resolutions. Economic sanctions should be implemented quickly once they have been decided upon, which gives less opportunity to consider their drafting than is desirable. The drafting of such standardised language would therefore give the drafters the opportunity to carefully consider what is to be included in UNSC resolutions thus ensuring the use of language that is both clear and comprehensive.

The use of common language across all sanctions resolutions would provide consistency and facilitate in the interpretation of sanctions. Furthermore, the addition of either definitions for key terms, or commentary as an aid to interpretation, would offer less opportunity for states to interpret UNSC economic sanctions resolutions as they see fit, thus ensuring consistency in interpretation across Member States.

⁸⁹⁶ Wood (n 886), 90

4.3.1.2 The Development of Model Domestic Sanctions Legislation

Aligned to the difficulties that resulted from inconsistencies between UNSC resolutions were the problems caused by states implementing sanctions resolutions by the use of their own domestic legislation. The application of economic sanctions against a given state, person or entity both in terms of the transfer of assets and the punishment for those who breached sanctions is wholly reliant on the state administering sanctions in a given situation. For example, as discussed earlier in this chapter, the US has tended to take a hard-line approach to the implementation of economic sanctions particularly with respect to granting exemptions from sanctions. Other states, such as Zambia, which was a neighbouring state in the Southern Rhodesian sanctions situation, found itself forced to take a more lenient approach toward the implementation of sanctions.⁸⁹⁷ However, sometimes states simply have insufficient domestic legislation in place to deal with the implementation of UNSC sanctions resolutions. The difficulties that result from insufficient legislation are compounded by the speed at which states are required to implement sanctions resolutions.

As the Chairman at the first Interlaken Conference stated: '[a]ll States should have in place a law from which resolutions imposing financial sanctions can be implemented without delay. Such national laws should lead to sanctions being applied with uniform effect (when compared with other States) rather than the application of sanctions through uniform ways and means.'⁸⁹⁸ At that stage, however, a proposal for a universal model law was mooted but not universally accepted.

By the time of the second Interlaken Conference the participants had decided that a model or framework law that could be implemented by all states was necessary.⁸⁹⁹ The second working group, which dealt with the model law, stated that this was because when UNSC sanctions resolutions are put in place they often have to take immediate effect but they will not be transferred into domestic law automatically. States, therefore, have to rely on whatever legislation they already have in place to transpose the UNSC resolutions into their domestic law. Some states have specific legislation in place for this purpose but the majority do not, leading them to rely on implementing legislation originally drafted for another purpose.⁹⁰⁰

⁸⁹⁷ See section 2.4.2.1.3.

⁸⁹⁸ Chairman's Report, 1st Interlaken Conference (n 884).

⁸⁹⁹ Working Group 2 'Model Law', 2nd Interlaken Seminar on Targeting United Nations Financial Sanctions, 29-31 March, 1999 [available at <http://www.seco.admin.ch/themen/00513/00620/00639/00641/index.html?lang=en>; last accessed 4 December 2009]. ('Report of Working Group 2, 2nd Interlaken Conference').

⁹⁰⁰ See for example discussion of Sierra Leone's use of Anti-Money Laundering legislation to implement UN economic sanctions in section 5.2.1.2.

The working group felt that if every state implemented a model law, which led to the consistent application of UNSC sanctions, those targets of sanctions would be treated, and more importantly would be aware that they would be treated, equally in all states. Thus the UNSC could target sanctions more specifically. A draft model or framework law was proposed.⁹⁰¹ The law would: give a relevant authority within the implementing state the power to enact domestic measures to implement UNSC sanctions resolutions; allow for the domestic measures to be applied retroactively without liability attaching to those applying the measures; and make the domestic measures applicable within the territory and to nationals of the territory and entities incorporated within the territory. Breach of the domestic measures would be an offence punishable by a fine or imprisonment and domestic sanctions measures would have supremacy over other domestic legislation in cases of conflict.

The primary difficulty with this suggested legislation is that it gives the 'relevant authority' in each state power to enact secondary legislation without specifying what those secondary measures should be. What could in fact materialise is the maintenance of the *status quo* whereby some states have suitable domestic legislation and processes in place and others, even amongst those who do adopt this proposed model law, do not.

The need for a draft model law was reiterated during the Bonn-Berlin process.⁹⁰² The proposed model was similar to the model previously outlined at Interlaken. However, the Bonn-Berlin process provided more focus on how this model law would be translated into practice. It outlined some of the issues that states would need to resolve prior to the implementation of the model law such as, whether there were resources available for implementation of economic sanctions and to what extent there were already sufficient domestic measures in force to allow for the implementation of sanctions.

The Stockholm Conference considered the draft models produced both at Interlaken and Bonn-Berlin and produced a consolidated model law.⁹⁰³ Although the language is slightly more nuanced than previously, the consolidated model law contained the same provisions as were in the Interlaken model.

Whilst inconsistencies in domestic systems relating to the application of UNSC sanctions resolutions are problematic, the model law proposed during the European Conferences is not a viable

⁹⁰¹ Annex 1 and 2, Report of Working Group 2, 2nd Interlaken Conference (n 899).

⁹⁰² Report of the Bonn-Berlin Conference (n 895).

⁹⁰³ Making Targeted Sanctions Effective Guidelines for the Implementation of UN Policy Options. Results from the Stockholm Process on the Implementation of Targeted Sanctions (Uppsala University, 2003) available at: http://www.smartsanctions.se/stockholm_process/reports/Final%20report%20complete.pdf [last accessed 8 December 2009]. ('Report of the Stockholm Conference')

solution. It fails to address the main issue, which is how states are to actually implement UNSC sanctions resolutions in practice. Its focus instead was very much on the selection of a domestic authority that could be empowered to enact domestic measures to implement UNSC sanctions. Furthermore, despite it being acknowledged that ‘the concept of any “model” or “framework” law which appeared to be based on the practice of a handful of developed States might be dissuasive or unpalatable to some governments’,⁹⁰⁴ the proposed model because of the limited participants at the European Conferences is a construct of a small number of Western states.⁹⁰⁵ Those states that were not present at the European Conferences may not be prepared to implement the measures because they were excluded from the process. Furthermore, there are simply too many variables amongst domestic systems to imagine that any global framework legislation would work in all jurisdictions.

In order for a framework domestic law to have any impact on the implementation of UNSC sanctions resolutions it would firstly have to address the actual implementation of economic sanctions, and secondly it would require careful tailoring to each individual jurisdiction – an issue that was not adequately considered by the Conferences. This would be extremely resource intensive, but would pay dividends in the long-term as UNSC sanctions became more comprehensively implemented by all Member States.

4.3.1.3 The Expansion of Support Mechanisms for Implementation

As the use of economic sanctions by the UNSC developed some support structures, such as the sanctions committees, also developed. However, the support offered by the sanctions committees was not comprehensive and there was also a lack of central coordination of sanctions implementation at the UN level. The European Conferences also discussed the development of UN institutions to deal with the implementation of sanctions.

The idea of creating an independent ‘Sanctions Unit’ within the UN was first proposed during the Bonn-Berlin process.⁹⁰⁶ The participants noted that whilst the capacity of the sanctions committees had developed significantly in recent years they were referring questions to external experts ‘on an *ad hoc* basis’, which demonstrated the need for ‘a strengthened in-house capacity to support their work.’ This, it was felt, would be best resolved by the development of an ‘independent, operational Sanctions

⁹⁰⁴ Report of Working Group 2, 2nd Interlaken Conference (n 899).

⁹⁰⁵ See section 4.4.2 for a discussion on the participants in the European Conferences.

⁹⁰⁶ Report of the Bonn-Berlin Conference (n 895).

Unit within the UN Secretariat... to assist the Secretary-General, the various sanctions committees and the Security Council in establishing and overseeing effective targeted sanctions.’⁹⁰⁷

The Unit would develop an institutional memory, which would provide greater support than relying on a variety of external experts. It would also be objective, politically neutral and would operate independently. Whilst largely administered by the Secretary-General and reporting to either him or the sanctions committees, it was intended that the Sanctions Unit would have the freedom to report directly to the UNSC. It would also liaise with other UN entities and with states, as well as with regional organisations and non-state actors.

Generally speaking, the mandate of the Sanctions Unit would be the gathering of information, its collation and analysis and the transmission of its conclusions. It was recommended that the Sanctions Unit develop a standard questionnaire for the purpose of getting states to report and should also promote the creation of national focal points, which would be responsible for overseeing sanctions implementation nationally and regionally. Furthermore, the Sanctions Unit would be charged with establishing reporting channels and procedures for the reporting of sanctions breaches. It was intended that the Unit could deploy both monitors and full investigative teams where necessary. The Unit would set up a central depository to store both the information it gathered and also the information that states forwarded to it. It was also intended that the Sanctions Unit would provide expert technical advice where necessary so, for example, it would be in a position to advise on keeping new weapons out of conflict zones.

The Sanctions Unit would be staffed by a core staff, supplemented by experts, and it was suggested that a roster of experts, who would be available at short notice, should be maintained. It would minimally need expertise in customs, transport, police and intelligence, finance, weapons, weapons flow and military assistance and ‘diamonds, petroleum and other commodities and resources that provide the revenue to sustain fighting.’⁹⁰⁸ It was recommended that the Sanctions Unit be funded largely from the regular budget of the UN with the possibility of recourse to additional financing for extraordinary activities where necessary.

The Stockholm Process refocused the consideration of support mechanisms to the consideration of the existing UN structures.⁹⁰⁹ It stated that ‘the goal of enhancing implementation of

⁹⁰⁷ *ibid.*, 115.

⁹⁰⁸ *ibid.*, 119.

⁹⁰⁹ Report of the Stockholm Conference (n 903)).

UN targeted sanctions should proceed, wherever possible, by rationalizing and upgrading current capacities and working methods, rather than by the creation of a new and elaborate institutional apparatus.⁹¹⁰ Measures for reinforcing the roles of the sanctions committees, the UN Secretariat and the expert panels with respect to the implementation of UNSC sanctions resolutions were recommended.

The participants identified sanctions committees as having the primary responsibility for the monitoring and implementation of UNSC sanctions resolutions. However, it was also noted that because the sanctions committees did not have an institutional support system they struggled to deal with some of their remit such as broad coordination of sanctions regimes and the dissemination of information. The suggested solution was the development of a standard framework with respect to the work of sanctions committees, which would apply to all such committees, supported by individually drafted mandates to deal with specific economic sanctions committees.

Coordination between the sanctions committees and other actors within the sanctions framework was also considered to be sporadic with the result that some entities, particularly non-UNSC states, felt excluded from the sanctions process. This could be addressed by increased communication from the sanctions committees indicating at a minimum: the reason for sanctions in a given case; the role of states in their implementation; the difficulties of implementing targeted sanctions; attempts by the UNSC to reduce the humanitarian and economic impacts of sanctions; and breaches of sanctions. The CTC⁹¹¹ was held out as a good example, for other sanctions committees to follow, particularly in the areas of reporting requirements, assistance to states, engagement with other organisations and technical expertise.

The sanctions committees could also follow through on recommendations made by the expert panels. It was acknowledged that pre-sanctions assessments might not always be appropriate and it was, therefore, recommended that the sanctions committees should be engaged in ongoing assessments of the collateral effects of economic sanctions. The final recommendation was that the periodic monitoring visits to states by the sanctions committees were insufficient and should be reconsidered by the UNSC and Secretariat.

With respect to the role of expert panels it was noted that there had been a recent streamlining of the selection process for panel members with the establishment of a roster of possible members. Due

⁹¹⁰ *ibid.* 14.

⁹¹¹ UNSC Resolution 1373 (n 164).

to insufficient information sharing between the various expert panels, work was needlessly replicated. As a result, it was recommended that common procedural guidelines be established together with a depository for information where expert panels could share information. Expert panels could receive information from a variety of sources and for that reason the participants recommended that a universal system of categorising the information by source reliability and validity of information be put in place.

Finally, the role of the UN Secretariat in sanctions implementation was discussed. It was recommended that the Secretariat focus its attention on the creation of a retrievable database for the storage of information, which could in future be made available to relevant parties through the use of a password protected web-portal. The Secretariat could, if its human and economic capacity was strengthened, provide institutional support to the Expert Panels and Monitoring Mechanisms.

The Bonn-Berlin and Stockholm processes took divergent approaches as to how the support mechanisms for the implementation of sanctions should be developed. In one sense, the approach suggested at Stockholm, whereby existing systems would be strengthened, was a more sensible approach. It could take immediate effect and was relatively cost effective. However, in the long-term the implementation of UNSC sanctions needs to be supported by an appropriate centralised institution, in the same way that the implementation of peacekeeping missions are supported by the Department of Peacekeeping Operations. This is to prevent the needless replication of material, the use of divergent methodologies between various different implementing bodies and the comprehensive collation and dissemination of information. Whilst the establishment of a Sanctions Unit, such as that proposed during the Bonn-Berlin Process, would be costly and would require significant administrative organisation it may ultimately be necessary to ensure consistent and comprehensive implementation of UNSC sanctions resolutions.

4.3.1.4 A Focus on Greater Communication

The implementation of UNSC economic sanctions involves a large number of interested parties that need to coordinate their action in order to ensure that there is effective implementation of sanctions. This coordination requires communication between the various parties. As sanctions have become more targeted, this is even more relevant. Targets have to be clearly identified by the UNSC and communicated to states and to the targets themselves. Equally, when states actually implement sanctions against a target they need to communicate this with other states and with the UN.

Historically, however, the implementation of sanctions has been characterised by insufficient communication between the various actors. As has been mentioned previously the decision to take sanctions is part of an opaque process within the UN, the results of which are not generally publicly available.⁹¹² Equally, it has been noted that states are not fully reporting, or in some cases not reporting at all, on their implementation of economic sanctions to the UN.⁹¹³ The European Conferences sought to address this issue and encourage actors within the UN sanctions system to communicate with each other.

The variance in reporting by states was criticised at the first Interlaken Conference.⁹¹⁴ It stated that at a minimum three elements were necessary in relation to reporting by states. Firstly, states need to make clear what domestic provisions are being used to implement sanctions. Secondly, the authorities within a state responsible for ensuring compliance should be identified. Thirdly, states should report on the effect of sanctions on their territory. Whilst these suggestions are an improvement on the reporting up to that point, which was extremely uneven across states, they do not go far enough because they fail to suggest how to deal with states that do not report. The working group stated that ‘steps should be taken to make the reporting requirements of member States to the Secretariat more meaningful’ but failed to address either exactly what that meant or how it could be achieved.⁹¹⁵

The role of states in reporting their implementation of sanctions was also a focus during the Stockholm Process.⁹¹⁶ The creation of a focal point in each state, which would communicate with the UN in New York and coordinate the sanctions implementation of the state, was recommended. It was also recommended that states should make information about relevant sanctions publicly available.

The initial suggestion that reporting by states should take the form of a questionnaire was made during the Bonn-Berlin Process.⁹¹⁷ This idea was further developed during the Stockholm Process.⁹¹⁸ A draft form for reporting on implementation was created. It took the form of a list of questions covering all targeted sanctions, arms sanctions, financial sanctions, travel bans, targeted trade sanctions and additional measures. The questions mooted would, if answered accurately, provide a

⁹¹² Wood (n 886), 82.

⁹¹³ See discussion of reporting to the 864 Committee in section 3.4.2.2.

⁹¹⁴ *Report Working Group 1: Preconditions for Successful Implementation*, Expert Seminar on Targeting UN Financial Sanctions, March 17-19, 1998, Interlaken, Switzerland [available at <http://www.seco.admin.ch/themen/00513/00620/00639/00641/index.html?lang=en>; last accessed 1 December 2009].

⁹¹⁵ *ibid.* para 9.

⁹¹⁶ Report of the Stockholm Conference (n 903).

⁹¹⁷ Report of the Bonn-Berlin Conference (n 895).

⁹¹⁸ Report of the Stockholm Conference (n 903).

comprehensive insight into the implementation of sanctions in a given state. The questions covered such areas as the legislative and administrative measures that have been taken by states, the penalties for breaches of sanctions and reporting on sanctions breaches. It is also provided that states should not limit themselves to the questions asked but should report as fully as possible.

The second Interlaken Conference discussed how information should be gathered with respect to sanctions' targets.⁹¹⁹ At a minimum, information should be obtained about 'traditional trading partners of the target, principle correspondent banks and other banks relationships', typical exports, and the names of members of the elite to be targeted.'⁹²⁰ This information could be gathered by Member States and held centrally by the UN.

The participants of the Bonn-Berlin process discussed the need for both intra and inter government information sharing, particularly among customs officials, with respect to arms embargos.⁹²¹ Information sharing may be limited for some legitimate reasons, such as protection of sources and commercial sensitivity, but the 'effective enforcement of embargoes relies to a great degree on information.'⁹²² A filter system could be used whereby high-level information was only shared between selected states, some information was shared broadly and some information was shared only on the basis of bilateral agreements. States could also be encouraged to make information on arms embargoes available to the public. The creation of an international list of arms dealers and brokers, a sanctions website and a register of experts were also mooted.

The Bonn-Berlin process also identified a number of external organisations that could facilitate the implementation of arms embargos such as the International Civilian Aviation Organization, the World Customs Organization, the EU and the OAS. At that time, it was envisaged that information gathering and sharing would take place within the framework of the Sanctions Unit, which could be used to gather confidential information and could be responsible for centralizing and storing all of the information gathered about sanctions.

Finally, the participants noted that information sharing was important not only for the purpose of implementing sanctions but also for the purpose of punishing those who failed to implement sanctions. The publication of reports of missions, especially where breaches of economic sanctions had

⁹¹⁹ *Working Group 1: The Targeting of Financial Sanctions*, 2nd Interlaken Seminar on Targeting United Nations Financial Sanctions, 29-31 March, 1999 [available at <http://www.seco.admin.ch/themen/00513/00620/00639/00641/index.html?lang=en>; last accessed 4 December 2009].

⁹²⁰ *ibid.* 17.

⁹²¹ Report of the Bonn-Berlin Conference (n 895).

⁹²² *ibid.* 101.

taken place, and lists of those involved in sanctions busting would be useful for the purpose of naming and shaming those involved in sanctions violations.

A number of recommendations with respect to communication between the various UNSC sanctions actors were made during the Stockholm Process.⁹²³ The sanctions committees were considered responsible for keeping states informed of the reasons for sanctions and their role in the implementation of sanctions. They could also assure the targets of sanctions that their due process rights would be protected. Coordination between the UN and other actors was seen as a key issue with suggestions that more communication with regional and sub-regional organisations, non-government organisations and private sector actors would be desirable. It was further suggested that relations with the media should be strengthened in order to increase sanctions implementation, promote transparency and communicate information on sanctions implementation to the public. The Stockholm participants also recommended the creation of two centralised information depositories. One for information sharing by Expert Panels and another to be operated by the UN Secretariat and to take the form of a security protected web-portal, which could be accessed by other actors.

In order that sanctions be implemented more effectively communication between the key actors is important. The recommendations made at the European Conferences go some way to improving communication. Reporting by states is an important issue and the recommended creation of a sanctions questionnaire is to be welcomed in this regard. The questionnaire provides states with an indication of the type of information they should be providing to the UN and allows for comparisons both in terms of reporting and in terms of implementation to be drawn between states.

The concept of a centralised database should also be welcomed. As it stands, information with respect to sanctions is being held in a variety of places, which results in both the duplication of some material and the absence of other material. This makes sanctions implementation more difficult, if only because of the difficulty in obtain comprehensive information about sanctions. Whilst information sharing, between the various actors and particularly with the public, is desirable, the Stockholm Conference failed to address how this could be achieved choosing instead to simply identify the importance of communication and the fact that should involve the various actors. Nor, were the potential security issues that could arise with such systems, which could make states reluctant to share information in this form, adequately considered.

⁹²³ Report of the Stockholm Conference (n 903).

4.4 Difficulties with the Methodology of the European Conferences

The purpose of the European Conferences was to seek solutions to some of the problems that had manifested themselves with respect to UNSC economic sanctions. However, there were deficiencies in the methodology and this next section discusses the main ones.

4.4.1 Theoretical Approach

The approach taken to UNSC sanctions by each of the Conferences was theoretical rather than practical. This manifested itself in two ways. Firstly, aside from the issue of providing funds, little consideration was given to the practicalities of the recommendations made. Secondly, the Conferences did not take time to reflect on any economic sanctions regime with the result that some of the most important issues arising in sanctions were not addressed by the Conferences.

From the outset of UNSC sanctions, the utility of the abstract analysis of economic sanctions has been called into question. In the initial case of sanctions against Southern Rhodesia, it was estimated that Southern Rhodesia was the 'perfect' target for economic sanctions,⁹²⁴ whereas, in reality, sanctions remained in place for more than a decade and were not wholly effective in behaviour modification. Why then was it assumed that a theoretical approach would work in this instance? In fact, what materialised was that some of the more practical elements of implementing the recommendations made at the Conferences were not considered. For example, in relation to the implementation of a model law, minor changes were suggested based on whether a state had a civil or common law legal system,⁹²⁵ but no one questioned whether all states did, in fact, have a legal system capable of enacting this type of legislation. If states did not have the capacity to implement the suggested model law the Conferences should have considered how best to build that capacity rather than concentrating solely on the development of a model law, which could not be implemented by states.

Similarly, with respect to the creation of focal points in each state,⁹²⁶ it was assumed that all states implementing UNSC economic sanctions were structured in such a fashion as to make it feasible to have a sole administrative body for the implementation of economic sanctions within their territory. It was also assumed that states would have the capacity to establish focal points without consideration

⁹²⁴ See section 2.1.3.

⁹²⁵ Report of the Stockholm Conference (n 903).

⁹²⁶ *ibid.*

of how they would develop the personnel skills necessary to operate such an organisation. If a state like Iraq, which is still being rebuilt following the 2003 invasion, had been considered it should have been clear to participants that the creation of a focal point in that territory is currently an unrealistic expectation. Furthermore, in some areas the Conferences addressed problems in relation to sanctions but failed to offer workable solutions to those problems. This was particularly true of the recommendation that the various actors within the sanctions system should communicate more with each other.

By not focusing on a specific sanctions regime the European Conferences offered a way to develop UN economic sanctions in a less reactive fashion. However, in practice, rather than benefiting the Conferences, this lack of focus resulted in a failure to discuss some of the most significant issues that had arisen with sanctions. Despite the chairman of the first Interlaken Conference identifying 'humanitarian effects on the civilian population in the target country' and 'economic effects on third countries' as the key difficulties with economic sanctions and stating that the Conference had developed out of the desire to make sanctions a less blunt instrument,⁹²⁷ there was little focus on the humanitarian issues that had plagued Iraq and subsequent sanctions regimes. Although of considerable concern, to states and to the UN itself, humanitarian issues were only considered during the drafting of the model resolutions.⁹²⁸ And, during those parts of the Conferences, the focus was on the language of the building blocks rather than on the humanitarian issues themselves. If however, the Conferences had looked to some of the UNSC sanctions that had been put in place they would have provided more focus on the humanitarian crises that had ensued.

4.4.2 Exclusion of Previously Targeted States from the Conferences

Despite the participation of almost fifty states in at least one of the Conferences, South Africa aside, there was a notable absence of participants that had been subjected to sanctions.⁹²⁹ This has two

⁹²⁷ Chairman's Report, 1st Interlaken Conference (n 884).

⁹²⁸ Annex 1 and 2, Report of Working Group 3 'Building Blocks and Definitions', 2nd Interlaken Conference (n 894); Report of the Bonn-Berlin Conference (n 895).

⁹²⁹ The states that were represented at the first Interlaken Conference were: Argentina, Australia, Bahrain, Belgium, Brazil, Canada, Egypt, France, Germany, India, Japan, Netherlands, Portugal, Russia, Singapore, South Africa, Sweden, Switzerland, United Kingdom, United States of America; The states that were represented at the second Interlaken Conference were: Bahrain, Belgium, China, Cyprus, Egypt, France, Germany, Namibia, Netherlands, Portugal, Russia, Singapore, South Africa, Switzerland, United Kingdom, United States of America; The states that were represented at the Bonn-Berlin process were: Brazil, Canada, China, Colombia, Denmark, France, Gambia, Germany, Ireland, Jamaica, Japan, Malaysia, Mali, Mauritius, Namibia, Norway, Pakistan, Portugal, Russia, South Africa, Sweden, Switzerland, Togo, Tunisia, Ukraine, United Kingdom, United States of America; The states that were represented at the Stockholm Process were: Argentina, Brazil, Bulgaria, Cameroon,

impacts on the development of a framework for regulating targeted economic sanctions. Firstly, it reinforces the idea espoused by some of the targets of UNSC sanctions that sanctions are a colonialist construct and that they are an unlawful breach of sovereignty.⁹³⁰ This is not only relevant to states that were former colonies (for example Southern Rhodesia) but also those states that have desirable resources (for example Iraq's oil reserves). Ultimately this encourages the rally-round-the-flag effect, which was most prevalent during sanctions against Southern Rhodesia and Yugoslavia.⁹³¹ As such, sanctions are less likely to be implemented effectively than might otherwise have been the case. As sanctions are a tool of the UN all Member States should feel engaged in the development of policy in that area.

Secondly, the failure to include states that had been subject to sanctions in the Conferences meant that the benefit of the experience of those states was not brought to the Conferences. If states that had suffered the consequences of economic sanctions (either as targeted states or indeed as neighbouring states) had been engaged with at the Conferences key issues, such as the humanitarian effects of economic sanctions, were more likely to have been discussed.

It should also be noted that few of what are termed 'failed states' or 'failing states' participated in the Conferences.⁹³² Failed states are states that share three characteristics: they are experiencing 'the internal collapse of law and order'; there is no functioning government that can represent the state internationally or which will be influenced by other states; and these problems are being created by internal rather than external forces.⁹³³ Thürer states that '[f]rom a legal point of view, it could be said that the "failed State" is one which, though retaining legal capacity, has for all practical purposes lost the ability to exercise it. A key element in this respect is the fact that there is no body which can commit the State in an effective and legally binding way, for example, by concluding an agreement.'⁹³⁴ Failed and failing states are precisely the states that will lack capacity to implement economic sanctions given their reliance on other states for 'nation-building'.⁹³⁵ Their inclusion might

Canada, China, Colombia, Costa Rica, Egypt, Finland, France, Germany, India, Ireland, Jordan, Kenya, Korea, Kuwait, Malaysia, Mauritius, Mexico, Namibia, Netherlands, Nigeria, Norway, Philippines, Russia, Singapore, South Africa, Sweden, Switzerland, Syria, Tunisia, Ukraine, United Kingdom, United States of America.

⁹³⁰ See comments made by representative of Zimbabwe to the UNSC as outlined in section 1.3.3.3.

⁹³¹ See section 2.4.2.2.1.

⁹³² For the 2010 Failed States Index see: http://www.foreignpolicy.com/articles/2010/06/21/2010_failed_states_index_interactive_map_and_rankings [last accessed 26 January 2011].

⁹³³ Daniel Thürer, 'The "failed State" and international law' (1999) *International Review of the Red Cross* 836.

⁹³⁴ *ibid.*

⁹³⁵ Fareed Zaharia, 'The failed-state conundrum' *The Washington Post* (Washington DC 19 July 2010).

therefore have prompted the discussion of how best to build state capacity where it is necessary for the implementation of economic sanctions.

4.4.3 An Opaque System of Analysis

One of the difficulties with the establishment of UNSC sanctions systems to date has been that much of the decision making process has taken place in private, amongst selected states. This is also true of the Conferences. Whilst reports of the Conferences have been published, commentary as to why certain decisions were reached has not. This means that the reasoning behind decisions such as the move from the development of a Sanctions Unit, as mooted during the Bonn-Berlin Process, to the use of existing UN structures by the time of the Stockholm Process remains unclear. There may be valid reasons why states felt that such decisions were necessary, or they could have been made as part of a political agenda. And, as such, the decision-making process should be revealed. Furthermore, it is clear that the participants in the Conferences also met in individual sessions and yet the reports of those meetings have not been made available. Such reports could provide a valuable insight into the decisions taken by states.

The Conferences could have been a valuable opportunity to encourage more transparency in the area of UNSC sanctions. By failing to address this issue they remained entrenched in the opaque decision-making processes of the past.

4.5 The Role of the Conferences

The European Conferences provided the opportunity for a less reactive response to how economic sanctions should develop within the UN framework. They were, of course, still a reactive measure in that they were instigated as a result of, and attempted to deal with, problems that were apparent in UN economic sanctions regimes. However, they allowed participants the chance to discuss potential developments without the pressure of those changes being implemented immediately. This made the Conferences less reactive than previous *ad hoc* changes to sanctions regimes, which had proceeded to that point without any extended discussion of their benefits and disadvantages.

The European Conferences were not the only development of this type at that time. The UN itself established a working group on sanctions.⁹³⁶ The purpose of the UN working group was to

⁹³⁶ Please see: <http://www.un.org/Docs/sc/committees/sanctions/> [last accessed: 30 December 2009].

‘develop general recommendations on how to improve the effectiveness of United Nations sanctions... through open and informal dialogue with interested Member States, as well as international, regional, intergovernmental and other relevant organizations’.⁹³⁷ In that regard it produced a number of reports, as well as collating the material from other sources including from the European Conferences, which it published on its website.

As such, it is clear that the UN, its Member States and other interested parties were taking a more reflective approach to economic sanctions. The reason why the European Conferences, as opposed to the UN working group, were selected for discussion in this thesis is that they sought to come up with comprehensive recommendations for sanctions. The model resolutions and domestic legislation suggested by the Conferences reflected an innovative approach to UN economic sanctions and the Conferences were comprehensive in that they took place over an extended period of time and covered all aspects of UN targeted sanctions.

However, despite their innovative approach and the practical suggestions made at the European Conferences their recommendations were not implemented by the UN. As such, they suffered from the same deficiencies as the UN monitoring bodies that have been created alongside economic sanctions regime, which will be discussed in chapter 5.⁹³⁸ They have, at some expense, fully considered targeted economic sanctions and their deficiencies and made recommendations, which have not been implemented. If targeted economic sanctions within the UN framework are to progress the UN must take cognisance of the recommendations of groups established to make recommendations.

⁹³⁷ ‘Note by the President of the Security Council’ (29 December 2005) S/2005/841.

⁹³⁸ Section 5.1.2.2.1.1.

Targeted Economic Sanctions Within the UN Framework

As previously outlined, there have been a number of systems of UN economic sanctions which have encompassed some level of targeted sanctions.⁹³⁹ However, since 1999 the UNSC has developed two systems of wholly targeted economic sanctions, firstly, in relation to Afghanistan and secondly, following the attacks on the World Trade Center.⁹⁴⁰ This chapter outlines the innovations to UN economic sanctions that occurred as a result of those systems and considers the problems that became prevalent with targeted economic sanctions as they progressed.

5.1 UNSC Systems of Wholly Targeted Economic Sanctions

The two sanctions regimes being discussed in this chapter emanated from the heightened global concern of terrorist activity during the late 1990's and early 2000's. Economic sanctions had been used as a counter-terrorism measure in the early 1990's against Libya.⁹⁴¹ However, the true value of targeted economic sanctions in the fight against terrorism became clear as that decade progressed with the realisation that targeted economic sanctions, which were traditionally employed against persons associated with states, for example government or opposition personnel or rebel forces, could be employed against actors who were not linked to a particular state.

The importance of this disconnect can be seen in the two regimes being discussed here. Firstly, in relation to the 1267 Regime targeting the Taliban and Al-Qaida,⁹⁴² the use of targeted economic sanctions allowed sanctions to be put in place against behaviour that the UNSC considered threatened international peace and security without designating Afghanistan as a state-sponsor of terrorism,⁹⁴³ amidst fears that such designation would constitute a de facto recognition of the Taliban as the legitimate government of Afghanistan.⁹⁴⁴ Secondly, following 9/11, the world was faced with an

⁹³⁹ See Chapter 4.

⁹⁴⁰ UNSC Resolution 1267 (n 164) and UNSC Resolution 1373 (n 164).

⁹⁴¹ UNSC Resolution 748 (n 41). See section 4.1.3.

⁹⁴² UNSC Resolution 1267 (n 164).

⁹⁴³ In the case of Libya states were willing to consider Libya as a state-sponsor of terrorism and thus attribute the acts ultimately to the state and the US had previously designated it as such in the Export Administration Act, 29 December 1979.

⁹⁴⁴ Mary Pat Flaherty, David B Ottaway and James V Grimaldi, 'How Afghanistan Went Unlisted as Terrorist Sponsor' *The Washington Post* (Washington DC 2 November 2001).

enemy that Ignatieff described as having ‘no face and no name’.⁹⁴⁵ This conceptualisation of the enemy as a person rather than as a state illustrates the difficulty with terrorism since the turn of the new millennium – the actions of the perpetrators of terrorism are not easily aligned with a particular state. The sanctions regime that followed 9/11 addressed this difficulty by targeting economic sanctions specifically at those involved or suspected of being involved in terrorist activities.⁹⁴⁶

This section gives a brief overview of the form that targeted economic sanctions initially took and then examines the changes to economic sanctions that came about in resolutions relating to the first two UN wholly targeted sanctions regimes.

5.1.1 Overview of UN Targeted Sanctions Regimes

This section briefly outlines the main UNSC resolutions provisions with respect to the two regimes under discussion although it is not intended to be a comprehensive guide to all of the provisions of the resolutions.

5.1.1.1 The 1267 Regime

According to the preamble of UNSC Resolution 1267, economic sanctions were initially instigated against the Taliban for three reasons.⁹⁴⁷ Firstly, the Taliban had used areas of Afghanistan under its control to harbour and train terrorists. Secondly, there were concerns over the humanitarian situation, breaches of international law, discrimination against women and children and the production of illicit opium in that territory. Thirdly, the Taliban was offering safe harbour to Usama bin Laden and his associates who had been indicted by the US, and whose surrender for trial had been requested,⁹⁴⁸ for their involvement in the bombings of two US embassies in August 1998 and for conspiring to kill US nationals outside of the US. The UNSC demanded that the Taliban cease providing sanctuary and training to terrorists and turn over Usama bin Laden to appropriate authorities, in a country in which he had been indicted.⁹⁴⁹ The resolution provided that sanctions would terminate once Usama bin Laden was turned over.⁹⁵⁰

⁹⁴⁵ Michael Ignatieff, ‘Paying for Security with Liberty’ *Financial Times* (13 September 2001).

⁹⁴⁶ UNSC Resolution 1373 (n 164).

⁹⁴⁷ UNSC Resolution 1267 (n 164).

⁹⁴⁸ Letter dated 1 October 1999 from the Deputy Permanent Representative of the United States of America to the United Nations addressed to the Secretary General (4 October 1999) S/1999/1021.

⁹⁴⁹ UNSC Resolution 1267 (n 164), 1-2.

⁹⁵⁰ *ibid.* 14.

The actual sanctions put in place took the form of a flight ban on aircraft owned or operated by or on behalf of the Taliban and the freezing of funds and other financial resources of the Taliban, including the assets of entities owned or operated by the Taliban as designated by the committee established in the resolution ('the 1267 Committee').⁹⁵¹ The 1267 Committee was given similar responsibilities to sanctions committees established under previous sanctions regimes. It was required to seek information with respect to states' implementation of sanctions, to consider information on violations of sanctions, to consider requests for humanitarian exemptions and to report to the UNSC on the implementation, humanitarian impact and violations of sanctions.⁹⁵² Similarly, akin to previous sanctions regimes, the 1267 Committee was also made responsible for designating aircraft and assets owned or controlled, directly or indirectly, by the Taliban to be frozen under the sanctions regime. However, as the targets of the 1267 Regime were expanded,⁹⁵³ to include those associated with the Taliban and Al Qaida, this power of designation also expanded because these targets were not an easily identifiable homogenous group. Moreover, by deciding what assets were to be targeted, the 1267 Committee was also deciding who should be subject to sanctions. Furthermore, by leaving the designation process in the hands of the 1267 Committee, there would be no consideration or public debate of those individuals and entities that could find themselves subject to sanctions under this regime.

States had reporting obligations under the 1267 Regime and were also called upon to bring proceedings against those who violated the sanctions provisions.⁹⁵⁴ The Taliban was given until 14 November 1999 to hand over Usama bin Laden before sanctions would be imposed.⁹⁵⁵ The Taliban did not comply with this deadline and sanctions came into force.⁹⁵⁶

Further sanctions were put in place the following year.⁹⁵⁷ They contained an arms embargo on the territory of Afghanistan under Taliban control and a prohibition on training, advising or assisting Taliban-controlled armed personnel.⁹⁵⁸ The UNSC extended the flight ban and ordered the closure of Taliban and Ariana Afghan Airlines offices and also extended the asset freeze to Usama bin Laden and

⁹⁵¹ *ibid.* 4.

⁹⁵² *ibid.* 6.

⁹⁵³ UNSC Resolution 1333 (n 710), 8-11.

⁹⁵⁴ UNSC Resolution 1267 (n 164), 7, 10.

⁹⁵⁵ *ibid.* 3.

⁹⁵⁶ UNSC Press Release, 'Security Council Announces Measures Against Taliban for Failure to Hand Over Usama bin Laden' (15 November 1999) SC/6756; Pamela Constable, 'U.N. Imposes Air, Economic Sanctions on Afghanistan; Taliban still Refuses to Hand Over Bin Laden' *The Washington Post* (Washington D.C. 14 November 1999).

⁹⁵⁷ UNSC Resolution 1333 (n 710).

⁹⁵⁸ *ibid.* 5.

individuals and entities associated with him as designated by the 1267 Committee.⁹⁵⁹ With respect to the freezing of the assets of Usama bin Laden and his associates the 1267 Committee was required to maintain a list of such persons ('the Consolidated List'), which will be discussed later in this chapter. The production of opium in Taliban-controlled regions was also addressed. The Taliban was required to work towards the elimination of the cultivation of opium and a ban was put in place on the exportation of the chemical acetic anhydride (which is used in the processing of opium) to the Taliban controlled territory of Afghanistan.⁹⁶⁰

Despite some minor relaxation of economic sanctions, such as the 2002 lifting of sanctions against Ariana Afghan Airlines,⁹⁶¹ the 1267 Regime remains in place to this day.⁹⁶² It is due to be reviewed by 17 June 2011.⁹⁶³

5.1.1.2 The Counter-Terrorism Regime

In the immediate aftermath of 9/11 the UNSC adopted UNSC Resolution 1373, which contained broad anti-terrorism economic sanctions.⁹⁶⁴ The Counter-Terrorism Regime required states to prevent and criminalise the funding of terrorist acts and actors and to freeze the direct or indirect funds, assets and resources of those involved in terrorist activity.⁹⁶⁵ States were also required to refrain from offering support or safe haven to those involved in terrorist activity and to subject such persons to criminal sanctions. Whilst a travel ban was not put in place, states were required to maintain effective border controls, issue identity papers and travel documents and put in place measures preventing the counterfeiting of same.⁹⁶⁶

UNSC Resolution 1373 also established the CTC to monitor implementation of the resolution.⁹⁶⁷ The CTC was later requested to consult with international, regional and sub-regional organisations, as well as with UN bodies, to develop a set of best practices to assist states in

⁹⁵⁹ *ibid.* 8, 11.

⁹⁶⁰ *ibid.* 9-10.

⁹⁶¹ UNSC Res 1388 (15 January 2002) UN Doc S/RES/1388.

⁹⁶² UNSC Res 1455 (17 January 2003) UN Doc S/RES/1455 ('UNSC Resolution 1455'); UNSC Res 1526 (30 January 2004) UN Doc S/RES/1526 ('UNSC Resolution 1526'); UNSC Res 1617 (29 July 2005) UN Doc S/RES/1617 ('UNSC Resolution 1617'); UNSC Res 1735 (22 December 2006) UN Doc S/RES/1735 ('UNSC Resolution 1735'); UNSC Res 1822 (30 June 2008) UN Doc S/RES/1822 ('UNSC Resolution 1822'); UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904 ('UNSC Resolution 1904').

⁹⁶³ UNSC Resolution 1904 (n 962), 47.

⁹⁶⁴ UNSC Resolution 1373 (n 164).

⁹⁶⁵ *ibid.* 1.

⁹⁶⁶ *ibid.* 2.

⁹⁶⁷ *ibid.* 6.

implementing the provisions of UNSC Resolution 1373.⁹⁶⁸ It was also directed, when necessary, to visit states, when states agreed and in cooperation with any relevant organisations, for the purpose of monitoring the implementation of UNSC Resolution 1373.⁹⁶⁹ However, in a notable departure from the 1267 Regime, the CTC was not responsible for the identification of those who should be subjected to targeted economic sanctions. This, instead, was left in the hands of the states themselves.

Sanctions were later expanded, in UNSC Resolution 1540, to encompass the prohibition on the provision of any form of support to non-state actors that attempt to ‘develop, acquire manufacture, possess, transport, transfer or use chemical or biological weapons and their means of delivery’.⁹⁷⁰ A committee (‘the 1540 Committee’) was established to monitor the implementation of those provisions.

5.1.2 Developments in UN Economic Sanctions

The development of the 1267 and Counter-Terrorism regimes caused some changes in the UNSC sanctions framework. This section considers two areas that have developed since the instigation of these regimes and the significance of those changes.

5.1.2.1 Time Limits

There are two ways in which time limits are now being applied to UNSC sanctions regimes, by way of sunset clauses⁹⁷¹ and by means of allowing the target a period of time to fulfil its obligations under an adopted resolution before the sanctions provisions contained therein become effective.

When the UNSC first adopted binding economic sanctions resolutions against Southern Rhodesia, in 1966,⁹⁷² there was no requirement that the sanctions provisions be reviewed by the UNSC. They could have remained in place indefinitely and did, in fact, remain in place for more than a decade, until they were terminated in UNSC Resolution 460, when their stated aim was achieved and the sanctioned regime had made a commitment to change leading to majority rule.⁹⁷³ In the absence of sanctions being subject to time limits sanctions could not be lifted if even one P-5 member objected. This caused significant problems during economic sanctions against Iraq, when, in 1998, France, the

⁹⁶⁸ UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566, 7 (‘UNSC Resolution 1566’).

⁹⁶⁹ *ibid.* 8.

⁹⁷⁰ UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540, 1.

⁹⁷¹ A sunset clause is a stipulation that a regulatory or legislative regime be disbanded or terminated at the end of a fixed period unless it is formally renewed.

⁹⁷² UNSC Resolution 232 (n 123).

⁹⁷³ UNSC Resolution 460 (n 174).

Russian Federation and China found themselves unable to ease or lift sanctions because of the unwillingness of the UK and the US.⁹⁷⁴ This had two repercussions.⁹⁷⁵ Firstly, the UNSC could have used the easing of economic sanctions as an incentive for the Iraqi government to comply more fully with economic sanctions. Secondly, it also weakened the commitment of those states that believed that economic sanctions should be eased or lifted to implement sanctions against Iraq.

Sunset clauses with respect to economic sanctions were not seen until mid-2000 during the arms embargo against Ethiopia and Eritrea,⁹⁷⁶ reference to which was made in the last chapter. The purpose of a sunset clause with respect to economic sanctions is to ensure that the UNSC remains seized of the matter. As such, they allow for sanctions to be lifted after twelve months unless the UNSC, having reviewed the sanctions, considers that they should remain in place. France, Russia and other UNSC members had pressed for the inclusion of this type of time limit in economic sanctions resolutions.⁹⁷⁷

As UN targeted sanctions developed the inclusion of this sort of time limit and of limits in relation to other aspects of sanctions within resolutions has become commonplace. The inclusion of a sunset clause in UNSC Resolution 1333,⁹⁷⁸ which was adopted for the purpose of strengthening the 1267 Regime, was praised during UNSC discussions prior to its adoption.⁹⁷⁹ The use of sunset clauses in sanctions regimes, by ensuring that such regimes are reviewed regularly by the UNSC, results in sanctions being more adaptive. They ensure that if economic sanctions against a particular target are to continue beyond the review date they only do so if a majority of the UNSC agree that they should, which in turn ensures that the majority of UNSC members support economic sanctions in the form that they are in thus increasing their legitimacy.⁹⁸⁰ Whilst such reviews have allowed economic sanctions under the 1267 Regime to '[increase] their strength over time',⁹⁸¹ they may in the future be used to reduce or refocus, rather than increase, economic sanctions. Their use should result in UN economic sanctions becoming more focused measures that are more suitable for achieving the aim being pursued.

⁹⁷⁴ Lutz Oette, 'A Decade of Sanctions against Iraq: Never Again! The End of Unlimited Sanctions in the Recent Practice of the UN Security Council' (2002) 13 EJIL 93 at 95.

⁹⁷⁵ Fassbender (n 415), 282.

⁹⁷⁶ UNSC Resolution 1298 (n 740).

⁹⁷⁷ Barbara Crossette, 'Arms Embargo Ordered for Eritrea and Ethiopia' *The New York Times* (New York 19 May 2000).

⁹⁷⁸ UNSC Resolution 1333 (n 710), 23.

⁹⁷⁹ See the comments of France, Malaysia, the Ukraine and the Russian Federation in UNSC Verbatim Record (19 December 2000) UN Doc S/PV/4251.

⁹⁸⁰ Oette (n 974), 100.

⁹⁸¹ Jane Boulden, 'The Council and Terrorism' in Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum (eds), *The United Nations Security Council and War* (Oxford University Press 2008) 611.

Oette notes that there was concern when sunset clauses were first introduced that they might impact on the effectiveness of economic sanctions as targets might feel that they could simply wait until the sanctions were reviewed and hope that that review would result in the lifting of sanctions rather than actively seeking to amend their behaviour.⁹⁸² However, he notes that one of the purposes of time limits was to encourage members of the UNSC to support economic sanctions in circumstances where, without such time limits, they would not otherwise have been prepared to agree to economic sanctions.⁹⁸³ Secondly, he argues that, in any event, the effectiveness of economic sanctions seems to lessen with the passing of time.⁹⁸⁴ Despite this potentially difficulty, therefore, sunset clauses should be seen as a welcome progression of economic sanctions.

The second category of time limit being imposed in targeted sanctions regimes, has been the decision not to impose economic sanctions until a set period of time, typically a month, has elapsed after the adoption of the relevant resolution.⁹⁸⁵ The reason for such a decision is that the use of that type of time limit gives the targets of economic sanctions the opportunity to rectify whatever behaviour has caused the invocation of sanctions before they are actually imposed.

The difficulty with such pre-emptive time limits is that they afford the targets of sanctions regimes the opportunity to modify their behaviour in such a manner as to defeat the purpose of economic sanctions. To return to the example of Southern Rhodesia, the initial sanctions in that case, adopted in 1965, were not binding⁹⁸⁶ and when binding sanctions were adopted the following year they were not comprehensive.⁹⁸⁷ It was not until 1968 that fully comprehensive sanctions were adopted.⁹⁸⁸ As previously stated, this enabled the government to switch its production and to stockpile certain commodities thus diminishing the effect of economic sanctions on that state.⁹⁸⁹ Whilst the time periods being allowed for in targeted economic sanctions are undoubtedly shorter than those that occurred during sanctions against South Rhodesia, the targets too are smaller. In the case of individuals, money and other assets can easily be transferred to jurisdictions or converted to forms that impede their being frozen. For that reason, targeted economic sanctions need to be implemented entirely without warning in order to be effective.

⁹⁸² Oette (n 974), 101.

⁹⁸³ *ibid.*, 102.

⁹⁸⁴ *ibid.*

⁹⁸⁵ UNSC Resolution 1267 (n 164), 3; UNSC Resolution 1333 (n 710) 22.

⁹⁸⁶ UNSC Resolution 217 (n 43).

⁹⁸⁷ UNSC Resolution 232 (n 123).

⁹⁸⁸ UNSC Resolution 253 (n 314).

⁹⁸⁹ See section 2.4.2.2.

5.1.2.2 The Devolution of Power from the UNSC

The most significant change in the UN economic sanctions system caused by the regimes under discussion in this chapter was the devolution of power with respect to economic sanctions away from the UNSC and towards other UN institutions and to the states themselves. This occurred in two ways. Firstly, through the creation of institutions and, secondly, through the delegation of powers relating to who is selected to be subject to sanctions.

5.1.2.2.1 The Creation of Institutions

The two regimes discussed in this chapter have resulted in the proliferation of UN institutions that support the implementation of economic sanctions and the increase in powers given to such institutions. These regimes will be discussed under two headings: Monitoring Groups and the Focal Point.

5.1.2.2.1.1 Monitoring Groups

As outlined above, both regimes had sanctions committees attached to them in the form of the 1267 Committee and the CTC. Such committees are typical of all sanctions regimes⁹⁹⁰ and are usually entrusted with the same basic functions. They are responsible for monitoring the implementation of economic sanctions, collating and investigating information provided by states, reporting to the Secretary-General or UNSC, reviewing requests for humanitarian exemptions and, where necessary, selecting targets or assets to be frozen.⁹⁹¹ The members of these committees are not, however, experts in the field of economic sanctions or related matters but diplomats, who do not devote themselves to the committees on a full-time basis.⁹⁹² It may be for this reason that institutions, led by experts, have been created at UN level, which broadly perform the same functions as the committees.

For example, under UNSC Resolution 1363 a monitoring mechanism ('the 1363 Monitoring Group') was established 'to monitor the implementation of measures imposed by resolutions' 1267 and 1333, to assist states bordering the Taliban-controlled territory of Afghanistan and to 'collate, assess,

⁹⁹⁰ For example, with respect to sanctions against Sierra Leone a sanctions committee was established pursuant to UNSC Resolution 1132 (n 711).

⁹⁹¹ UNSC Resolution 1267 (n 164), 6; UNSC Resolution 1132 (n 711), 10; UNSC Resolution 1373 (n 164), 6; UNSC Resolution 1566 (n 968), 7-8.

⁹⁹² Eric Rosand, 'Current Development: The Security Council's Efforts to Monitor the Implementation of Al-Qaeda/Taliban Sanctions' 98 AJIL 748, 753.

verify wherever possible, report and make recommendations on information regarding violations' of economic sanctions.⁹⁹³ The 1363 Monitoring Group was to remain in existence, with a mandate to monitor the implementation of sanctions under the 1267 Regime,⁹⁹⁴ until January 2004.⁹⁹⁵ The 1363 Monitoring Group was immediately replaced by a new Analytical Support and Sanctions Monitoring Team established under UNSC Resolution 1526 ('the 1526 Monitoring Group').⁹⁹⁶ The establishment of the 1526 Monitoring Group was in part due to criticisms that had been levelled at the 1363 Monitoring Group that it had no clear mandate and failed to communicate and seek approval for its actions, which some states believed were outside of its powers.⁹⁹⁷ For that reason, UNSC Resolution 1526 included an annex containing a clear mandate for the group and more precise reporting requirements in the hopes of addressing those criticisms.⁹⁹⁸ However, ultimately, in all material respects, the mandate of the 1526 Monitoring Group was identical to that of the 1363 Monitoring Group in that it was required to monitor the implementation of economic sanctions under the 1267 Regime, consult with states and report to the 1267 Committee.⁹⁹⁹

Equally under the Counter-terrorism Regime, alongside the CTC, the 1540 Committee was established with responsibility for monitoring sanctions in place against nuclear, chemical and biological weapons. A working group was also established, in 2004, to consider and submit recommendations to the UNSC on practical measures to be imposed upon individuals and entities involved in or associated with terrorist activities other than those designated by the 1267 Committee.¹⁰⁰⁰ This was to include the freezing of their assets, more effective procedures for prosecution, preventing movement through territory and preventing the supply of arms.

On an intuitive level, there appears to be significant value in the provision of support for diplomat-led sanctions committees through the use of expert-run monitoring bodies. However, in practice, the proliferation of UN institutions charged with monitoring the implementation of economic sanctions is problematic. Four predominant difficulties arise in this respect.

Firstly, there is a risk of a significant duplication of work. Monitoring bodies and sanctions committees, both within specific regimes and across sanctions regimes generally, are being given over-

⁹⁹³ UNSC Res 1363 (30 July 2001) UN Doc S/RES/1363 ('UNSC Resolution 1363'), 3.

⁹⁹⁴ UNSC Res 1390 (28 January 2002) UN Doc S/RES/1390, 9.

⁹⁹⁵ UNSC Resolution 1455 (n 962), 8.

⁹⁹⁶ UNSC Resolution 1526 (n 962), 6.

⁹⁹⁷ Rosand (n 992), 753-755.

⁹⁹⁸ UNSC Resolution 1526 (n 962), Annex.

⁹⁹⁹ *ibid.* Annex.

¹⁰⁰⁰ UNSC Resolution 1566 (n 968), 9.

lapping or complementary mandates. As the location and collation of information will generally be labour intensive and include visits to different states, the duplication of this work comes at a significant economic cost to the UN and reduces any potential synergy that could be achieved if information was shared across institutions. It also contributes to the confusion and fatigue experienced by states as a result of the 'seemingly endless reporting' requirements.¹⁰⁰¹ Furthermore, once collated such information is then scattered amongst various committees and monitoring bodies throughout the UN.

Secondly, the proliferation of UN monitoring institutions, by creating another layer of monitoring responsibility, has shifted accountability a step further from both the states and the UNSC. As power is spread throughout the UN each entity views its own remit in a more limited, narrow fashion and does not feel obliged to take responsibility for difficulties that arise with economic sanctions. An example of the problems caused by the lack of accountability can be seen in AWB's contravention of the Oil-for-Food Programme. AWB had paid kick-backs to Saddam Hussein's regime in exchange for contracts to export wheat to Iraq. The Australian government claimed that it was not responsible for ensuring the accuracy of information provided to it by AWB with respect to wheat exports to Iraq because AWB was a private company outside of its control and other monitoring bodies within the UN framework were obliged to verify the information.¹⁰⁰² In making this claim, Australia was refusing to take any responsibility for the implementation of sanctions within its territory. However, ultimately when the breaches came to light it was Australia itself and not the UN that investigated them.¹⁰⁰³ This also goes to Australia's accountability for the breaches because it removed the possibility of Australia being censured. A 2006 report of the Informal Working Group on Economic Sanctions has also indicated that the integrity of the reports produced by the monitoring groups needs to improve, as does the implementation of the recommendations made by those groups.¹⁰⁰⁴

Thirdly, the monitoring bodies are not endowed with sufficient powers to amend sanctions regimes, they only have powers to monitor and make recommendations. Even powers with respect to listing and de-listing remain vested in the sanctions committees. This means that often necessary recommendations are not implemented by the UNSC in later regimes and the monitoring bodies repeatedly make the same recommendations. This will be demonstrated later in this chapter.

¹⁰⁰¹ Comments of Ms Loj (representative of Denmark at the 5601st meeting of the UNSC. UNSC Verbatim Record (20 December 2006) UN Doc S/PV/5601.

¹⁰⁰² Stewart (n 616), 313.

¹⁰⁰³ Cole Report (n 617).

¹⁰⁰⁴ 'Report of the Informal Working Group of the Security Council on General Issues of Sanctions' (22 December 2006) S/2006/977, 7.

Lastly, these new monitoring bodies are not facilitating the development of an institutional memory with respect to the monitoring of economic sanctions as they are being developed on an *ad hoc* basis. The working group on economic sanctions has stated that they were developed ‘through a system of trial and error’.¹⁰⁰⁵ Even at the level of the sanctions committees themselves, information is not being shared inter-committee.¹⁰⁰⁶ The development of numerous separate monitoring groups, without clear guidelines for the sharing of information between them, inhibits the benefits that could accrue from the sharing of expertise learnt through the monitoring of economic sanctions. Aznar-Gomez has commented that having multiple sanctions committees upsets ‘the uniform interpretation of the sanctions regimes as required by a normally uniform wording of sanctions in the Council’s resolutions.’¹⁰⁰⁷ It also demonstrates that the recommendations made by the European Conferences, held in relation to the development and refinement of UN targeted economic sanctions,¹⁰⁰⁸ have not been adopted at UN level.

The ideal solution to these problems would be the creation of the Sanctions Unit proposed during the Bonn-Berlin process, the benefits of which will be discussed in chapter 7.¹⁰⁰⁹ However, if that proposal is not implemented an alternative would be the cessation of the creation of new monitoring bodies. There is no reason why sanctions committees, which in any case receive administrative support from the Secretariat, should not be entitled to seek the support of experts in the performance of their mandate. This would mean that, at a minimum, each sanctions committee would have full control of any information with respect to the implementation of its specific sanctions regime. These newly strengthened sanctions committees should then be encouraged to cooperate with each other in the sharing of information and of institutional memory so that work is not being duplicated and any new sanctions committees formed have the benefit of previous sanctions committees’ experience. Furthermore, the UNSC must begin to incorporate the recommendations made by the monitoring bodies and sanctions committees.

¹⁰⁰⁵ *ibid.*, para 9.

¹⁰⁰⁶ See Rosand (n 992), page 762 commenting that, despite the obvious value in the 1267 Committee and the CTC sharing information and their being located in the same building, little formal or informal cooperation occurs between the two.

¹⁰⁰⁷ Mariano J Aznar-Gomez, ‘A Decade of Human Rights Protection by the UN Security Council: A Sketch of Deregulation?’ (2002) 13 EJIL 223 at 230.

¹⁰⁰⁸ Section 4.3.

¹⁰⁰⁹ Section 7.2.

5.1.2.2.1.2 The Focal Point

The Focal Point was developed, in UNSC Resolution 1730, within the UN Secretariat for the purpose of dealing with applications for de-listing from the lists maintained under various economics sanctions regimes.¹⁰¹⁰ Whereas previously those subject to economic sanctions could only apply through their state of citizenship or residency to the relevant sanctions committee, the Focal Point can receive requests for de-listing directly from a target.¹⁰¹¹

UNSC Resolution 1730 put in place a delisting process. A person subjected to sanctions applies to the Focal Point, which then communicates its procedures to the applicant and forwards the request to the governments of designation, residency and citizenship.¹⁰¹² The states of residency and citizenship are encouraged to communicate with the designating state but this only occurs if the latter concedes to allow it.¹⁰¹³ If any of the governments recommend de-listing they are required to forward their recommendation and their reasoning either through the Focal Point or to the relevant sanctions committee, and it is then put on to the committee's agenda.¹⁰¹⁴ If any of the governments oppose de-listing this too is forwarded to the relevant sanctions committee.¹⁰¹⁵ Other governments are encouraged to engage in the de-listing process and share information that they might possess in support of a request for de-listing.¹⁰¹⁶ If, after three months, none of the consulted governments comment or request further time for consideration the Focal Point notifies the relevant committee, any member of which can, following consultation with the designating government(s), recommend de-listing.¹⁰¹⁷ If within one month no committee member recommends de-listing then the request is deemed to have been rejected.¹⁰¹⁸ The Focal Point is required to inform the applicant of the outcome of the process.¹⁰¹⁹

Given that until the creation of the Focal Point there was no means for a person subjected to economic sanctions to make a direct application to be de-listed there was a clear need for such a de-listing process to be established. However, the Focal Point does little to advance such a person's opportunity for actually being de-listed and serves only to add an extraneous administrative institution to the de-listing process. The Focal Point process encourages maintaining the *status quo* because one of

¹⁰¹⁰ UNSC Res 1730 (19 December 2006) UN Doc S/RES/1730 ('UNSC Resolution 1730').

¹⁰¹¹ *ibid.*, 1.

¹⁰¹² *ibid.*, 4-5.

¹⁰¹³ *ibid.*, 5.

¹⁰¹⁴ *ibid.*, 6(a).

¹⁰¹⁵ *ibid.*, 6(b).

¹⁰¹⁶ *ibid.*, 6(b).

¹⁰¹⁷ *ibid.*, 6(c).

¹⁰¹⁸ *ibid.*, 6(c).

¹⁰¹⁹ *ibid.*, 8.

the sanctions committee members has to actively request that a person be de-listed or such a person will remain subject to economic sanctions. It also allows the designating state to become a judge in its own case given its significant role in the review of a person's designation. The Focal Point is not substantively involved in the de-listing process but rather provides administrative support for the sanctions committees. The result is that the process becomes quite disjointed as parties communicate through the Focal Point, which then communicates with the sanctions committee, rather than with each other.

The UNSC is clearly aware of the Focal Point's deficiencies because, following its establishment, the 1267 Committee was directed to continue its work considering applications for de-listing and to conduct an annual review of individuals on the Consolidated List who were reported to be deceased.¹⁰²⁰ The Focal Point's role could be performed in a more efficient manner by allowing those subject to sanctions to appeal directly to the relevant sanctions committee. The sanctions committee is in possession of knowledge as to why a person was sanctioned and when it receives appeals each member should be required to assess whether an individual should remain subject to sanctions and to internally circulate their decision and the reasoning behind that decision. The silence of sanctions committee members should not equate to a person remaining subject to economic sanctions indefinitely. This issue will be discussed further in the next chapter when the possibility of creating a new institution to deal with de-listing requests on an active rather than administrative level will be outlined.

It should be noted that provision has been made for the creation of an independent and impartial Office of the Ombudsperson to assist with the consideration of de-listing requests with respect to the Consolidated List.¹⁰²¹ The first Ombudsperson, Kimberley Prost, a former Canadian judge, took office on 12 July 2010. She is to be responsible for presenting a comprehensive report to the 1267 Committee laying out the principal arguments, in light of the information available to her, and her observations with respect to any request for de-listing presented to her.¹⁰²² In order to achieve this she will undertake information gathering and enter into dialogue with the person seeking de-listing and with the relevant states. She is to be facilitated by the Monitoring Team in performing her role.

¹⁰²⁰ UNSC Resolution 1822 (n 962). 21-22.

¹⁰²¹ UNSC Resolution 1904 (n 962). 20.

¹⁰²² UNSC Press Release 'Al-Qaida and Taliban Sanctions Committee Welcomes Appointment of Judge Kimberley Prost to Serve as Ombudsperson' (7 June 2010) SC/9947.

Kimberly Prost made her first report on 21 January 2011, which was disseminated by the UNSC on 24 January 2011.¹⁰²³ To date she has focused on meeting with various parties involved with UN economic sanctions, including sanctions committees, states, intergovernmental organisations, UN bodies and NGOs as well as publicising her office and engaging in outreach programmes.¹⁰²⁴ In the six months since she took office she has received seven requests for de-listing, six of which she accepted and has been working on developing methods and standards to ensure fairness and clarity in sanctions.¹⁰²⁵ She has noted in her report that states have cooperated in providing information where requested.¹⁰²⁶ She criticises, however, the fact the sanctions committees are not mandated to provide factual reasons for a de-listing and that designating states may keep their anonymity.¹⁰²⁷

Although it remains too early to assess the impact of the Ombudsperson on the 1267 Regime, in light of the creation of institutions discussed in this section it would seem that a consolidation rather than a diversification of power is necessary. Of particular note is that the Ombudsperson is only entitled to make recommendations but not decisions with respect to de-listing. At a minimum, if UN sanctions institutions are going to continue to proliferate such proliferation should not occur without new institutions being given responsibility as opposed to merely fulfilling an advisory role. The Ombudsperson's report, limited as it was to her first six months in office, confirmed this.

5.1.2.2.2 The Selection of the Targets of Economic Sanctions

The targets of economic sanctions against states are known and discussed when the relevant UNSC sanctions resolutions are being adopted. Targeted economic sanctions operate in a different manner. Firstly, UNSC resolutions are adopted against a category of persons and entities. Then, typically, the sanctions committee attached to each regime has responsibility for deciding who should be considered as coming within that category.¹⁰²⁸ In so doing the UNSC's power is reduced with respect to targeted economic sanctions and the process by which the targets are selected becomes more opaque. This devolution of power is even more pronounced in the case of the two regimes under discussion in this chapter because neither the UNSC nor the sanctions committees are responsible for target selection.

¹⁰²³ Report of the Office of the Ombudsperson pursuant to Security Council resolution 1904 (2009) S/2011/29.

¹⁰²⁴ *ibid.*

¹⁰²⁵ *ibid.*, para 20-21.

¹⁰²⁶ *ibid.*, para 47.

¹⁰²⁷ *ibid.*, para 50-52.

¹⁰²⁸ For example see: UNSC Resolution 1132 (n 711), 10(f) with respect to Sierra Leone and UNSC Resolution 1343 (n 710), 14(e) with respect to Liberia.

With respect to the 1267 Regime, the 1267 Committee was initially requested to designate territory that should be subject to travel sanctions and assets that should be frozen.¹⁰²⁹ This was later followed by a request that the 1267 Committee ‘maintain an updated list, based on the information provided by states and regional organizations, of the individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organization.’¹⁰³⁰ This puts the responsibility for the selection of those to be subjected to economic sanctions in the hands of individual Member States. Whilst the 1267 Committee does consider the suggestions of states prior to a person’s designation it has been stated that the time frame between notification of a proposal and the actual designation, being only 48 hours, is too short to allow even those states with vast intelligence communities to properly consider such suggestions.¹⁰³¹ This has two potential impacts on targeted economic sanctions.

Firstly, it risks a person being designated in the absence of sufficient information or where there is information to the contrary available but not accessible within such a short timeframe. Secondly, it risks certain states using the designation process excessively or in a spurious manner. In light of the number of entries on the Consolidated List compared with the number of people arrested or detained by various countries on the basis of links to Al-Qaeda, there is evidence that some states are reluctant to nominate persons and entities for inclusion on the list.¹⁰³² Cameron has also stated that in light of the covert nature of organisations like the Taliban and Al-Qaeda some states may lack the necessary resources to identify those persons or entities that are associated with them and should therefore be added to the Consolidated List.¹⁰³³

As the 1267 Regime has developed some amendments to the listing procedures have been made. UNSC Resolution 1617 outlined what would constitute association with the Al-Qaida, Usama Bin Laden or the Taliban.¹⁰³⁴ It stated that: ‘participating in the financing, planning, facilitating, preparing or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of; supplying, selling or transferring arms and related material to; recruiting for; or otherwise acts or activities of; Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter

¹⁰²⁹ UNSC Resolution 1267 (n 164), 4.

¹⁰³⁰ UNSC Resolution 1333 (n 710), 8(c).

¹⁰³¹ Iain Cameron, *Targeted Sanctions and Legal Safeguards, Report to the Swedish Foreign Office* (2002) 9-10 (‘Report to the Swedish Foreign Office’) available at: <http://resources.jur.uu.se/repository/5/Pdf/staff/sanctions.pdf> [last accessed 1 August 2010].

¹⁰³² Rosand (n 992), 751.

¹⁰³³ Cameron, Report to the Swedish Foreign Office (n 1031), 10-11.

¹⁰³⁴ UNSC Resolution 1617 (n 962), 2

group or derivative thereof' would constitute association.¹⁰³⁵ It also required that states seeking to add names to the Consolidated List, submit a statement of case to the 1267 Committee indicating their reasons for the addition.¹⁰³⁶ This was further elaborated in UNSC Resolution 1735, which indicated that states should provide specific information as to why a person meets the requirements for designation¹⁰³⁷ and also contained a cover sheet for Member State submissions outlining the information required in relation to a proposed designee in annex 1.¹⁰³⁸ UNSC Resolution 1822 requested that states provide sufficient information to allow for the positive identification of persons.¹⁰³⁹

States that do decide to seek to have a person or entity added to the Consolidated List are protected from revealing their own identity and from making public the reasons why such a designation is being sought.¹⁰⁴⁰ Although they can, of course, opt to make public their rationale, the evidence is that they are choosing not to do so.¹⁰⁴¹

Difficulties with the process by which those to be designated under the 1267 Regime are selected are even more significant with respect to the Counter-Terrorism Regime where there is no central list created of those to be sanctioned. Instead, each state must subject those who come within the criteria set out in UNSC Resolution 1373 to economic sanctions.

Ideally all those subject to sanction would be evaluated by the UNSC. This is because that would allow for proper consideration as to whether sanctions are suitable in a given instance. This discussion would be, as has been the practice with respect to sanctions invoked against states, open not only to UNSC members but also to other interested states. However, it is accepted that such a process is not feasible given the number of people and entities subject to economic sanctions, the need to sanction people urgently and the length of time such consideration would take. It is therefore imperative that the 1267 Committee and the CTC provide clear guidance and assistance to states in relation to the identification and selection of those who should be subject to economic sanctions.

This section has discussed the devolution of power with respect to economic sanctions away from the UNSC and towards other entities or institutions. The proliferation of institutions and the heavy reliance on states for the operation of sanctions regimes has not been accompanied by an

¹⁰³⁵ *ibid.*, 2

¹⁰³⁶ *ibid.*, 4.

¹⁰³⁷ UNSC Resolution 1735 (n 962), 5.

¹⁰³⁸ *ibid.*, Annex 1.

¹⁰³⁹ UNSC Resolution 1822 (n 962), 14.

¹⁰⁴⁰ UNSC Resolution 1822 (n 962), 12.

¹⁰⁴¹ <http://www.un.org/sc/committees/1267/narrative.shtml> [last accessed: 26 April 2010].

acceptance on their part that responsibility, rather than simply the monitoring of the implementation of economic sanctions and the selection of those to be subjected to them, must attach to these institutions and states.

5.2 Problems with UN Targeted Economic Sanctions

The previous sections in this chapter have outlined the 1267 and Counter-Terrorism Regimes and discussed the impact that they have had on economic sanctions within the UN framework. This section moves on to discuss some of the difficulties that have emerged with respect to UNSC targeted economic sanctions. It discusses three broad categories of difficulty experienced with UN targeted economic sanctions namely: implementation, assets and human rights.

5.2.1 Implementation

As outlined previously in relation to economic sanctions against states, the policies of third party states (that is to say states that are not targets of the sanction system in place) and the way in which they choose to implement the sanctions in their domestic systems impacts on the effectiveness of sanctions.¹⁰⁴² This is also true of UN targeted economic sanctions.

It has been commented that '[m]any states do not implement targeted sanctions properly, or implement them at all'.¹⁰⁴³ There are a variety of reasons why such breaches occur. To take the previous example of the breach of sanctions against Iraq by AWB and therefore by Australia, the state in which it was based, it is worth mentioning three of the reasons given by Australia as to why sanctions were breached in that case. Firstly, AWB did not keep Australia fully apprised of its activities.¹⁰⁴⁴ Secondly, when Australia did seek a legal opinion from its Department of Foreign Affairs and Trade on aspects of the exportation of wheat it was assured that such action did not contravene international law.¹⁰⁴⁵ Thirdly, Australia argued that, in any case, the relevant monitoring group should have undertaken the verification of the information provided to it by AWB rather than Australia itself. The purpose of this example is to show that sanctions may be breached simply because of the manner in which states interpret their obligations, in a situation where the state itself would not believe that it

¹⁰⁴² See section 2.4.2.1.

¹⁰⁴³ Cameron, Report to the Swedish Foreign Office (n 1031), 14.

¹⁰⁴⁴ Cole Report (n 617), Volume 4, Findings, 30.241.

¹⁰⁴⁵ Stephen Tully, 'International legal advisers and transnational corporations: Untangling roles and responsibilities for sanctions compliance' in Jeremy Farrall and Kim Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press 2009).

was breaching economic sanctions. However, it also raises the question to what extent states are breaching sanctions, as they were when sanctions were taken against Southern Rhodesia.¹⁰⁴⁶ By choosing not to monitor AWB, when it was aware that it was engaging in contracts with a sanctioned regime, it could be said that Australia was complicit in the breach of sanctions. Furthermore, when these breaches came to light, the Australian government itself, rather than a UN entity, took responsibility for the investigations that ensued.

There are, however, two aspects of targeted economic sanctions that make full implementation by states and its verification by the UNSC or the relevant sanctions committees or monitoring groups difficult. Firstly, the identification of those to be subjected to targeted economic sanctions, because the targets involved are individuals and entities rather than states, may prove difficult. Secondly, particularly in light of the heavy reliance placed on banks and financial institutions to freeze the assets of the targets of sanctions, states may lack the capacity to implement sanctions effectively.

5.2.1.1 The Identification of Individuals

One of the key issues in ensuring that targeted economic sanctions are effective is that those subjected to such measures need to be easily and accurately identifiable by states. The 1526 Monitoring Group has succinctly described the difficulties inherent in having insufficient information with respect to the targets of economic sanctions. It stated: ‘inadequate entries [on the Consolidated List] serve no useful purpose: sanctions cannot properly be applied against them, unintended members of the public with similar names suffer real consequences, the private sector and officials at borders and elsewhere waste valuable time and effort trying to identify matches which can never be confirmed, and the sanctions regime as a whole loses support.’¹⁰⁴⁷ Despite this rhetoric there is evidence of significant deficiencies with respect to the information available on the Consolidated List.

The reports of the 1363 and 1526 Monitoring Groups are instructive as regards to the significance of this problem. In its second report the 1363 Monitoring Group, in stating that the Consolidated List is ‘only as strong as its weakest link’, acknowledged that the ‘predominant shortcoming of the list continues to be insufficient identifiers, which actually deters States from posting

¹⁰⁴⁶ See section 2.4.2.1.

¹⁰⁴⁷ Tenth report of the Analytical Support and Sanctions Implementation Monitoring Team submitted pursuant to resolution 1822 (2008) concerning Al-Qaida and the Taliban and associated individuals and entities, 2 October 2009, S/2009/502, para 13 (‘10th Report of the 1363/1526 Monitoring Team’).

listed individuals on their watch lists.’¹⁰⁴⁸ The report outlined some of the difficulties being experienced by states. A number of states commented in broad terms that more detailed and precise information was required.¹⁰⁴⁹ Liechtenstein indicated that it would require birth dates in order to freeze a person’s bank accounts and that there was confusion in relation to aliases. Portugal had found in one instance that a name on the sanctions list was identical to those of in the region of 50 individuals who held assets in a particular financial institution. There were also complaints that the transliteration from Arabic to English was proving problematic as names could be spelt in a variety of ways upon translation to roman characters.¹⁰⁵⁰ A newspaper report at that time gave the example of the name ‘Mohammed’ which, despite having only one spelling in Arabic, could be spelled over 200 ways in English.¹⁰⁵¹ Therefore, if a person with that name is to be sanctioned successfully all variants will have to be searched.

Subsequent Monitoring Group reports showed little by way of improvement with respect to the information available regarding individuals on the Consolidated List. Complaints included: the fact that there were 34 individuals on the Consolidated Listed identified by only a single name;¹⁰⁵² the absence of a full address in 51 per cent of entries on the Consolidated List by mid-2005;¹⁰⁵³ and the lack of distinction between family names and forenames.¹⁰⁵⁴ By 2008, there were 57 individuals listed without a full name and date of birth, 5 with only a full name and date of birth and 26 with only a name, date and place of birth.¹⁰⁵⁵ Such entries are lacking other key identifiers such as nationality, address and country of residence.

In mid-2009 the Chairman of the 1267 Committee, Thomas Mayr-Harting, Permanent Representative of Austria to the UN, indicated that there was insufficient information with respect to

¹⁰⁴⁸ Second Report of the Monitoring Group established pursuant to resolution 1363 (2001) and extended by resolutions 1390 (2002) and 1455 (2003), on sanctions against Al-Qaida, the Taliban and individuals and entities associated with them, 2 December 2003, S/2003/1070, Annex V, 30 (‘Second Report of the 1363 Committee’).

¹⁰⁴⁹ See comments of Serbia and Montenegro, Portugal and Pakistan, *ibid.*, Annex V, para 31.

¹⁰⁵⁰ *ibid.*, Annex V, para 32.

¹⁰⁵¹ Sarah Milstein, ‘Taming the Task of Checking for Terrorists’ Names’ *The New York Times*, (New York 30 December 2002).

¹⁰⁵² Report of the Monitoring Group established pursuant to Security Council resolution 1363 (2001) and extended by resolutions 1390 (2002) and 1455 (2003), 8 July 2003, S/2003/669, para 74.

¹⁰⁵³ Third Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to resolution 1526 (2004) concerning Al-Qaida and the Taliban and associated individuals and entities, 9 September 2005, S/2005/572, para 65 (‘Third Report of the 1526 Committee’).

¹⁰⁵⁴ Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities, 29 November 2007, S/2007/677, para 30.

¹⁰⁵⁵ Report of the Analytical Support and Sanctions Monitoring Team pursuant to resolution 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities, 2 April 2008, S/2008/324, para 24.

approximately one third of the entries on the Consolidated List at that time.¹⁰⁵⁶ He stated that the 1267 Committee was reviewing all entries on the list and in the process of doing so was requesting further information from states with respect to those listed. He also noted that the requirement for ‘narrative summaries’ to be included on the Consolidated List’s website setting out the reasons for the listing was an improvement.¹⁰⁵⁷ But, he argued, that there was ultimately only two possible solutions to these difficulties – either the information was improved or the entry was removed from the list as, in any case, those listed on entries with insufficient information were not being subjected to sanctions.

Following this press release the 1526 Monitoring Group released its tenth report.¹⁰⁵⁸ It indicated that the requests for further information from states had received support but had not achieved much by way of data gathering, which it suggested might be due to a lack of further information on official files or a lack of resources.¹⁰⁵⁹ It also acknowledged that the Consolidated List included the names of 27 individuals who were known or believed to be dead, which it accepted impacted on the credibility of the list. The 1526 Monitoring Group set its target as being that ‘a new listing with inadequate identifiers [becomes] virtually unthinkable.’¹⁰⁶⁰ In order to achieve this, it recommended that it and the 1267 Committee should develop guidelines for minimum listing information, that those current entries that do not meet the standard are identified, that the states of designation, residency and citizenship are informed and that they are given three months to provide sufficient information or those entries will be removed from the Consolidated List.¹⁰⁶¹

The collation of inadequate information with respect to those who are to be subjected to targeted economic sanctions is problematic not only because it obviously impacts on the efficacy of the sanctions themselves but also because of the signal it sends out to implementing states. The inclusion of entries that have insufficient information for the implementation of targeted economic sanctions, as well as, the inclusion of persons who are known, or presumed, to be dead calls into question the integrity of all of the information contained on the Consolidated List. The suggestion of the 1526 Monitoring Group that, in a situation where insufficient information is currently held, states be forced to justify the entry on the Consolidated List is a welcome move towards states taking accountability for their actions with respect to targeted economic sanctions. However, such a recommendation, almost

¹⁰⁵⁶ Press Conference on Activities of the Al-Qaida and Taliban Sanctions Committee, 14 July 2009.

¹⁰⁵⁷ UNSC Resolution 1822 (n 962), 13.

¹⁰⁵⁸ 10th Report of the 1363/1526 Monitoring Team (n 1047).

¹⁰⁵⁹ *ibid.* 13.

¹⁰⁶⁰ *ibid.* 14.

¹⁰⁶¹ *ibid.* 14.

exactly a decade after the adoption of UNSC Resolution 1267 and following repeated reports identifying the issue, should also serve as a harsh reminder of the deficiencies of the current monitoring process, whereby the recommendations of the monitoring groups have no binding force and are not being implemented by the UNSC.

5.2.1.2 State Capacity

Targeted economic sanctions rely heavily on the ability of states, and institutions within those states, to implement them. Unfortunately, as will be examined in this section, not all states are endowed with the same capacity to do so.

Firstly, in order for UNSC sanctions resolutions to be implemented fully domestically states must have adequate legislation in place. In reality, states are implementing measures using a variety of methods some of which are not sufficient.¹⁰⁶² For example, some states such as Andorra and Sierra Leone, rely on their anti-money laundering provisions for the purpose of sanctioning individuals.¹⁰⁶³ However, 'the peculiarity of terrorism financing is that it often takes place not so much *via* criminal activities but rather by the misuse of non-profit and charitable associations as well as by means of alternative money remittance agencies or informal banking systems such as hawala.'¹⁰⁶⁴ As such, these legislative provisions are not sufficient for the implementation of UN economic sanctions.

Sierra Leone, for example, defines the offence of money laundering by reference to 'property that is the proceeds of a crime'.¹⁰⁶⁵ It is questionable whether such a definition would encompass money that is being transferred with the intention of it being used for terrorist activity but which has not been used for that purpose to date. The legislation also concentrates on identifying money laundering by reference to the transfer of unusually large cash transactions. This may not be a suitable means of locating assets being used for terrorist financing, which could be transferred in small amounts or through informal channels. Finally, the legislation makes no reference to UN sanctions.

¹⁰⁶² Andrea Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion' (2006) 17 EJIL 881, 893-894.

¹⁰⁶³ Report of the Principality of Andorra pursuant to paragraphs 6 and 12 of Security Council resolution 1455 (2003), 3 May 2004, S/AC.37/2004/(1455)/35; Report of the Czech Republic in fulfilment of United Nations Security Council resolution 1455 (2003), 15 July 2003, S/AC.37/2003/(1455)/59; Report of the Republic of Sierra Leone pursuant to paragraphs 6 and 12 of Security Council resolution 1455 (2003) concerning Al-Qaida and the Taliban, 29 September 2005, S/AC.37/2005/(1455)/11.

¹⁰⁶⁴ Bianchi (n 1062), 896. Hawala is an informal means of transmitting money between two parties that will be discussed further in section 5.2.2.2.

¹⁰⁶⁵ Section 2. The Anti-Money Laundering Act, 2005, Being an Act to suppress money laundering and to provide for other related matters, Sierra Leone, 21 July 2005.

It should be noted that this difficulty was addressed during the European Conferences and recommendations for the implementation of consistent and sufficient legislation were made. Again this points to a disconnect between the reports being made by bodies established for the purpose of making recommendations and the willingness of the UNSC to implement such recommendations. It calls into question the purpose of making resources available to such groups if their recommendations will not ultimately be implemented.

Secondly, even where it has adequate domestic legislation, a state may not have the necessary infrastructure to implement targeted economic sanctions sufficiently. States, such as Samoa, have indicated that they lack capacity to even honour their reporting obligations,¹⁰⁶⁶ let alone to actually implement sanctions. The 1526 Committee has acknowledged that the issue of capacity is significantly increased when the role of banks and financial institutions in the implementation of targeted economic sanctions is considered.¹⁰⁶⁷ Since UNSC resolutions require that all of a target's assets are frozen, the actual administration of such measures is undertaken by the banks and financial institutions that block access to those assets. This requires that such institutions are sophisticated enough to be able to locate the relevant assets.

In some states the majority of the population do not even have bank accounts, which makes the freezing of their assets extremely difficult. For example, in Afghanistan only three per cent of the population have bank accounts.¹⁰⁶⁸ Other states, such as Somalia, are listed as the state of residency of entrants on the Consolidated List but have neither a central authority capable of implementing economic sanctions, nor a banking system able to freeze assets.¹⁰⁶⁹ Even states, such as the US, which have sophisticated systems of banking and financial services struggle when analysis of the monetary amounts involved in financing terrorism is considered.¹⁰⁷⁰ With respect to the 9/11 attacks, \$200,000 had been transferred to fund the attacks over the course of several months using the New York InterBank system. This figure needs to be compared to the 200,000 payments totalling \$1.1 trillion transferred through that system every day in order to understand the difficulties inherent in tracing and freezing such assets.¹⁰⁷¹ A further point is that some states that do have the means to freeze bank

¹⁰⁶⁶ Bianchi (n 1062), 897.

¹⁰⁶⁷ S/2007/677 (n 994), para 66.

¹⁰⁶⁸ Christina Lamb, 'In Love and War,' *The Sunday Times Magazine* (London 2 July 2010), 16, 22.

¹⁰⁶⁹ Third Report of the 1526 Committee (n 1053), para 65.

¹⁰⁷⁰ Cameron, Report to the Swedish Foreign Office (n 1031), 21.

¹⁰⁷¹ *ibid.*

accounts have indicated that they do not have the capacity or authority to freeze other business or tangible assets associated with the target.¹⁰⁷²

The ultimate aim of UNSC resolutions dealing with economic sanctions should be consistent implementation at the highest level by all states. The repercussions of the absence of such consistent implementation are significant because, as the UKSC has stated, ‘terrorists may... choose to live or operate in states which are too weak to take effective action against them.’¹⁰⁷³ This compromises the efficacy of economic sanctions. The difficulties of state capacity outlined above, will therefore, need to be addressed at UNSC level so that targeted economic sanctions can be implemented in a consistent and effective manner.

5.2.2 Assets

Targeted economic sanctions impact on the assets of those subjected to them in two ways. Firstly, they freeze the assets of those sanctioned. Secondly, they prohibit the transfer of certain types of asset to those sanctioned. This section will only deal with the former situation. This is because the latter, which relates to states or entities breaching sanctions by providing items to those sanctioned that are prohibited by the resolutions, do not change depending on whether the sanctions are against a state or against an individual.

The functionality of UN targeted sanctions relies on the premise that the assets of those subjected to them can be frozen. This relates to how and where the asset is held rather than the capabilities of the formal banking system within states, which has been discussed in the previous section. As targeted UN sanctions have progressed this assumption has been called into question. Terrorism, and therefore terrorists, requires and receives significant financial resources in order to survive.¹⁰⁷⁴ The basic assumption with respect to terrorism is that ‘the key is to break the capacity of the economy to sustain the war.’¹⁰⁷⁵ Targeted economic sanctions attempt to break this capacity but, in doing so they assume that assets will be held in a way that makes them easily locatable. When dealing with sanctions against states this may have been a reasonable assumption as the financing of one state

¹⁰⁷² Second Report of the 1363 Committee (n 1048), para 82.

¹⁰⁷³ *A. K. M v HM Treasury (No 1)* (n 26).

¹⁰⁷⁴ For a discussion of the various ways in which terrorist activity is financed see, Loretta Napoleoni, *Terror Inc Tracing the Money Behind Global Terrorism* (Penguin 2003).

¹⁰⁷⁵ Joaquin Villalobos, *The War in El Salvador, Current Situation and Outlook for the Future* (Solidarity Publications 1990) 17.

is generally intertwined with those of other states and the monetary value of the assets in question is high.

However, when targeted economic sanctions are put in place against individuals and entities which may not hold significant assets and which may not hold assets in a manner that makes them easy to locate the situation may be different. Furthermore, if those persons and entities are aware that there is a possibility that they will be subjected to sanctions they may transfer any assets that they are *holding prior to sanctions being put in place.*¹⁰⁷⁶ This section discusses three means of holding and transferring assets that impact on the implementation of UN targeted economic sanctions.

5.2.2.1 Offshore Banking

Different states have different laws in relation to banking. These range from what might be considered unregulated systems, for example Afghanistan, to heavily regulated countries like the US. Within that range there are also what are known as ‘offshore’ jurisdictions. These jurisdictions have varying levels of regulation however their commonality is that the banks and financial institutions within them are not required to reveal information about their customers. These jurisdictions have always been used for illicit purposes ranging from tax evasion to money laundering.¹⁰⁷⁷ And now they provide a perfect opportunity for those involved in terrorist activity to secrete their monetary assets and thus avoid the effects of economic sanctions.

The traditional example of an offshore jurisdiction was Switzerland, which, by virtue of the Swiss Banking Law of 1934, guaranteed absolute secrecy to its banking customers. However, the IMF now lists more than 20 jurisdictions as offshore financial centres.¹⁰⁷⁸ There is great variance as to how offshore jurisdictions operate. For example, Nauru’s offshore banking sector arose in an attempt to resolve the state’s near bankruptcy in the mid-1990s and, despite at one point having in excess of 400 non-resident banks, it has been stated that ‘if there ever were any legitimate offshore banks in Nauru – a big if – they could be counted on one hand.’¹⁰⁷⁹ This can be contrasted with the position in the Cayman Islands, which, despite being listed as an offshore financial centre by the IMF, is the fifth

¹⁰⁷⁶ It should be noted that whilst, as previously discussed in relation to UNSC Resolution 1267 (n 164), in the initial stages of targeted sanctions there was a period between resolutions being adopted and sanctions being implemented, now with the 1267 Committee taking responsibility for adding those to be sanctioned to the Consolidated List there is less opportunity for prior knowledge that sanctions will be implemented.

¹⁰⁷⁷ Jeffrey Robinson, *The Sink, How Banks, Lawyers and Accountants Finance Terrorism and Crime – And Why Governments Can’t Stop Them* (Constable & Robinson Ltd 2003) 151.

¹⁰⁷⁸ List available at: <http://www.imf.org/external/np/ofca/ofca.asp> [last accessed 5 May 2010].

¹⁰⁷⁹ Robinson (n 1077), 151.

largest financial centre in the world and is home to 47 of the 50 top banks in the world.¹⁰⁸⁰ What is clear, however, is that these offshore jurisdictions tend to be small in terms of population with the financial sector being the primary industry.

Prior to 9/11 the emphasis in addressing offshore banking was rooted in attempts to combat money laundering and tax evasion whereas it is now acknowledged that it is also necessary for the purpose of addressing terrorism financing.¹⁰⁸¹ The FATF has established 25 criteria that identify rules and practices that impede international cooperation in the global fight against money laundering. These include such points as the operation of financial institutions without authorisation or registration and the existence of anonymous accounts or accounts in obviously fictitious names.¹⁰⁸² These elements also clearly impede attempts to combat terrorist financing. The 1363 Monitoring Group has acknowledged that the holding of assets in offshore jurisdictions, particularly through the use of shell companies and offshore trusts, is a difficult problem to resolve in the context of identifying assets that should be subject to sanctions.¹⁰⁸³ However, the secrecy that underpins offshore banking means that it is difficult to establish the precise role offshore financial centres have played in the financing of terrorist activity.

What is clear is that the eradication of offshore jurisdictions would provide a safeguard against them being used for such purposes. This would likely prove impossible in practice. However, there has been movement towards tightening control over these jurisdictions. The naming and criticising of states that are considered to fall within the category of offshore jurisdictions, has led to some progress being made towards the tightening of regulations in those jurisdictions.¹⁰⁸⁴ However, in order for controls to be tightened more significantly in offshore financial centres further measures will need to be taken.

The difficulty, of course, with attempts to restrict offshore jurisdictions is that there is little incentive for the jurisdictions themselves to concede to any external restrictions that would impede their economies. The matter is further confused by the attempts of states, such as the UK, to restrict

¹⁰⁸⁰ Allison S Bachus, 'From Drugs to Terrorism: The Focus Shifts in the International Fight Against Money Laundering After September 11, 2001' (2004) 21 *Arizona Journal of International & Comparative Law* 835.

¹⁰⁸¹ *ibid.*

¹⁰⁸² Financial Action Task Force, *Annual Review of Non-Cooperative Countries and Territories 2006-2007: Eighth NCCT Review* (12 October 2007).

¹⁰⁸³ Second Report of the 1363 Committee (n 1048), para 67.

¹⁰⁸⁴ David Jolly, '2 Nations Agree to Ease Bank Secrecy Rules' *The New York Times* (New York 13 March 2009); S/2002/1070, para 67; The FAFT also recognises that progress has been made by states with respect to the implementation of anti-money laundering legislation, see http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236992_1_1_1_1_1,00.html [last accessed 6 August 2010].

their own citizens from using offshore banking centres for the purpose of tax avoidance.¹⁰⁸⁵ For this reason, it is recommended that states put in place legislation that focuses on the use of offshore jurisdictions for money laundering and terrorist financing. An example of the possible measures that could be taken is demonstrated by the US Patriot Act, which allows for the imposition of sanctions on foreign jurisdictions and financial institutions that are of 'primary money laundering concern'.¹⁰⁸⁶ The use of such measures by other states may provide further incentive for states subjected to them to introduce suitable legislation to restrict the possibility of their territory being used for illicit purposes.

5.2.2.2 Informal Banking

Aside from banking off-shore those involved in terrorist activity may also choose to bank using another opaque method of banking knowing variously as chitty banking, hundi, chop, fai chen but most commonly, under in its Muslim name, as hawala.¹⁰⁸⁷ Hawala is an informal method of transmitting funds between two parties. A person approaches a hawalader in one country with cash that they request to be transferred to a person in another state. This money (minus fees and commission) is dispensed to the intended recipient by a hawaladar in the other state.¹⁰⁸⁸ The middle transaction – i.e. between the two hawaladers – does not involve the physical movement of money and relies on the two parties trusting that the other will settle his debts. This settlement of debts is done periodically and may be done by cash, cheque or wire transfer.¹⁰⁸⁹ In some instances, however, it may take place through what is known as under-invoicing, whereby one party sends goods to the other, for which he either over or undercharges for, the difference being the amount owed.¹⁰⁹⁰

Hawala does have legitimate uses and is most typically used by immigrants to transfer money to their home states.¹⁰⁹¹ It allows for money to be transferred from and to people who do not have access to western banking systems. This is important in states, like Afghanistan, where a low

¹⁰⁸⁵ Nick Mathiason, 'Penalties doubled in crackdown on offshore tax havens' *Guardian Online* (9 December 2009) available at: <http://www.guardian.co.uk/money/2009/dec/09/tax-haven-penalty-doubles> [last accessed 2 October 2010].

¹⁰⁸⁶ Uniting and Strengthening American by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 § 106, 50 U.S.C. § 170 (2001), section 311.

¹⁰⁸⁷ Alan Lambert, 'Underground Banking and Financing of Terrorism' in Fletcher N Baldwin, Jr, 'Organized Crime, Terrorism, and Money Laundering in the Americas' (2002) 15 *Florida Journal of International Law* 3.

¹⁰⁸⁸ John DG Waszak, 'The Obstacles to Suppressing Radical Islamic Terrorist Financing' (2005) 37 *Case Western Reserve Journal of International Law* 673.

¹⁰⁸⁹ R Colgate Selden, 'The Executive Protection: Freezing the Assets of Alleged Terrorists, the Constitution, and Foreign Participation in U.S. Financial Markets' 8 *Fordham Journal of Corporate & Financial Law* 491.

¹⁰⁹⁰ Charles B Bowers, 'Hawala, Money Laundering and Terrorism Finance: Micro-Lending as an End to Illicit Remittance' (2009) 37 *Denver Journal International Law & Policy* 379.

¹⁰⁹¹ Waszak (n 1088).

percentage of citizens hold bank accounts.¹⁰⁹² Hawala has also proven useful in the transmission of money to a state for humanitarian purposes and has been used by both international organisations and by NGOs for that purpose.¹⁰⁹³

Despite these benefits, Hawala is a system that has been described as having six advantages over wire transfers: cost, speed of transaction, trust, availability, less bureaucracy and the absence of a detailed paper trail.¹⁰⁹⁴ Some of these features, specifically the trust, absence of bureaucracy and lack of a detailed paper trail make Hawala the ideal method of transferring money that has been obtained through illegitimate channels. It is impossible to exactly quantify the amount of money contained in hawala systems worldwide. It has, however, been estimated that in 1998 India's hawala system contained \$680 billion, approximately 40 per cent of GDP.¹⁰⁹⁵ In Pakistan estimates range from \$2-5 billion per annum.¹⁰⁹⁶ Again the secrecy involved in the transfer of money using hawala makes an accurate assessment of how much money is transferred through it by targets of UN economic sanctions regimes impossible. The freezing of one such Somali hawala, Al Barakaat, from 2001¹⁰⁹⁷ to 2009¹⁰⁹⁸ proves, however, the belief of states that such organisations are used to transfer money for terrorist purposes. The 1363 Committee also confirmed its belief that Al-Qaida and those associated with it frequently moved assets using informal remittance systems such as hawala.¹⁰⁹⁹

In order to address this problem some states, such as France, India, the Islamic Republic of Iran, Malaysia, Portugal, Spain, Venezuela and Sierra Leone,¹¹⁰⁰ have made alternative remittance systems illegal and others, such as Canada, Germany, the Netherlands, Paraguay, Qatar, the Republic of Korea, Singapore, Sweden, the Syrian Arab Republic, the UK and the US, have subjected them to regulatory control.¹¹⁰¹ However, it is agreed by commentators that these restrictions have little, if any, impact on the amount of money actually contained within or transferred via such systems.¹¹⁰² This

¹⁰⁹² Lamb (n 1068), 22.

¹⁰⁹³ Samuel Munzele Maimbo, *The Money Exchange Dealers of Kabul A Study of the Hawala System in Afghanistan* (The World Bank 2003) 11-13.

¹⁰⁹⁴ Joseph Wheatley, 'Ancient Banking, Modern Crimes: How Hawala Secretly Transfers the Finances of Criminals and Thwarts Existing Laws' (2005) 26 University of Pennsylvania Journal of International Economic Law 347.

¹⁰⁹⁵ *ibid.*

¹⁰⁹⁶ *ibid.*

¹⁰⁹⁷ 'Security Council Established Pursuant to Resolution 1267 (1999) Concerning Afghanistan Issues a New Consolidated List', 26 November 2001, AFG/169 SC/7222.

¹⁰⁹⁸ 'Security Council Al-Qaida and Taliban Sanctions Committee Removes Names of Four Entities from Consolidated List', 22 October 2009, SC/9773.

¹⁰⁹⁹ Second Report of the 1363 Committee (n 1048), para 85.

¹¹⁰⁰ See Second Report of the 1363 Committee (n 1048), para 87; The Anti-Money Laundering Act, 2005. Being an Act to suppress money laundering and to provide for other related matters, Sierra Leone, 21 July 2005.

¹¹⁰¹ See Second Report of the 1363 Committee (n 1048).

¹¹⁰² Bowers (n 1090); Lambert (n 1087); Wheatley (n 1094).

again returns to the fact that such systems are by their very nature shrouded in secrecy. Banning or regulating such a system requires knowledge that it exists, which may not be apparent in all situations. Additionally it should be noted that the total prohibition on such systems may also have the consequence of preventing money needed for basic expenses getting to those who need it either from their own families living and working abroad or from the relief agencies that are currently using these systems.¹¹⁰³

5.2.2.3 Non-Cash Assets

As mentioned earlier, a key assumption of targeted economic sanctions is that the individuals and entities subjected to them will hold their assets in a manner that allows them to be easily frozen. It has already been noted that states have difficulty freezing non-cash assets. Of further concern are the assets held by targets in illegal forms. It is clear that terrorists launder money through gold, diamonds and other commodities and obtain it in the first place through the sale of drugs and weapons.¹¹⁰⁴

Afghanistan, which, as discussed previously, has had some of its citizens subjected to UN targeted economic sanctions, is a producer of heroin. It has been suggested, by the US Drug Enforcement Authority, that Usama bin Laden financed his terrorist activities through the heroin trade in Afghanistan.¹¹⁰⁵ And, it has also been argued that the Taliban financed their terrorist activities through a tax on opium production.¹¹⁰⁶ This caused difficulties from the outset of economic sanctions.¹¹⁰⁷

Afghanistan's heroin production was addressed in UNSC resolutions in relation to the Taliban. The UNSC demanded that the Taliban work to eliminate the cultivation of opium and that states prevent the sale, supply or transfer of the chemical acetic anhydride (which is used in the processing of opium) to the Taliban-controlled territory of Afghanistan.¹¹⁰⁸ UNSC Resolution 1373

¹¹⁰³ For example the Staff Report to the National Commission on Terrorist Attacks Upon the United States has stated that the freezing of Al Barakaat is estimated to have cut remittances to Somalia in half and all of the money held by the organisation was frozen which represented for many Somalis 'their life savings and an economic lifeline to an impoverished country.' J Roth, D Greenburg, S Wille, Staff Report, National Commission on Terrorist Attacks Upon the United States, Monograph on Terrorist Financing 81-82. Available at http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf [last accessed: 7 August 2010].

¹¹⁰⁴ Robinson (n 1077), 297.

¹¹⁰⁵ Don Barnard, 'Narco-Terrorism Realities: The Connection Between Drugs and Terror' (2003) 9 *Journal of Counterterrorism & Homeland Security International* 31.

¹¹⁰⁶ John Alan Cohan, 'Formulation of a State's Response to Terrorism and State-Sponsored Terrorism' (2002) 14 *Pace International Law Review* 77.

¹¹⁰⁷ Tim Golden, 'The World: A War on Terror Meets a War on Drugs' *The New York Times* (New York 25 November 2001).

¹¹⁰⁸ UNSC Resolution 1333 (n 710), 9-10.

noted with concern the connection between ‘international terrorism... and illicit drugs...’¹¹⁰⁹, which was followed by UNSC Resolution 1363 creating a monitoring group to include an expert group versed in drug-trafficking.¹¹¹⁰ Despite these resolutions and attempts to curb production,¹¹¹¹ Afghanistan continues to produce heroin. It was estimated as recently as 2008 that, despite efforts by troops to curb production, 90 per cent of heroin on UK streets originated in Afghanistan and that it was the state’s biggest export.¹¹¹²

The problem for both the UN and states in dealing with assets in the manner and form discussed in this chapter is that they are incredibly difficult to locate and freeze. Whilst recommendations can be made to minimise the opportunities for targets of sanctions to hold their assets in these means, it must be accepted they may be an inherent difficulty with targeted economic sanctions as it is entirely legitimate for individuals and entities to hold assets in a myriad of ways and there are also legitimate uses of both offshore jurisdictions and informal banking systems such that it would be impossible to entirely eradicate them. The result is that, despite the best efforts of states, targets of economic sanctions have ample opportunity to hide their assets and thus avoid the consequences of economic sanctions regimes.

5.2.3 Human Rights

This section discusses the impact of targeted economic sanctions on those subject to them. As outlined in chapter 1 Member States of the UN are obliged to implement economic sanctions,¹¹¹³ a fact which underpins much of the discussion of economic sanctions throughout this thesis. When a binding sanctions resolution is adopted by the UNSC, Member States must enforce the measures it outlines. This obligation is not changed by any other obligation on the state and applies irrespective of the impact of sanctions on the target. As such, if economic sanctions are to offer any protection to a target’s rights the UNSC itself must incorporate this protection when the resolution is being drafted. For this reason, before considering the impact of targeted economic sanctions on individuals and entities, this section considers whether the UNSC is in any way bound by human rights considerations in adopting resolutions.

¹¹⁰⁹ UNSC Resolution 1373 (n 164).

¹¹¹⁰ UNSC Resolution 1363 (n 993), 4.

¹¹¹¹ James Risen, ‘Poppy Fields Are Now a Front Line in Afghan War’ *The New York Times* (New York 16 May 2007).

¹¹¹² Tulip Mazumdar, ‘Inside Afghanistan’s Heroin Fields’ *BBC News Online* (1 May 2008) available at http://news.bbc.co.uk/newsbeat/hi/newsbeat/newsid_7376000/7376269.stm [last accessed 7 May 2010].

¹¹¹³ See section 1.5.1.

5.2.3.1 Is the UNSC Bound by Human Rights in taking its Decisions?

The extent to which the UNSC is required to adhere to human rights norms in adopting its resolutions is contentious. The UN is not, to date, a party to any treaties under which it could be obliged to consider human rights norms in its actions. The CESCR has argued that the UNSC can indirectly be bound to adhere to the obligations placed on its members and on other UN Member States in international conventions, specifically the ICESCR.¹¹¹⁴ It states that ‘the [UN] has an obligation “to take steps, individually and through international assistance and cooperation, especially economic and technical” in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.’¹¹¹⁵

The rationale behind this suggestion is that states have undertaken to comply with the provisions of the ICESCR and this obligation is not lifted simply because they are sitting as part of the UNSC.¹¹¹⁶ If this argument had validity it would have significant repercussions for UN economic sanctions. To consider an analogous convention, if the UNSC was bound to comply with the provisions of the Convention on the Rights of the Child,¹¹¹⁷ which is the most ratified human rights treaty albeit it with significant reservations,¹¹¹⁸ the humanitarian situation with respect to children in Iraq would have treated considerably different. For example, it is clear that during economic sanctions against Iraq certain obligations of states parties in articles 6, in relation to the right to life of the child, 24(2), in relation to ensuring the implementation of the right to life, including the provision of medical assistance, and 27, in relation to the provision of an adequate standard of living, were breached.¹¹¹⁹ However, the UN is not a state party to the Convention of the Rights of the Child or to any other treaty or convention. Furthermore, the UN itself has legal personality separate from its Member States.¹¹²⁰ As an organ of the UN the acts of the UNSC are those of the UN and not of the individual Member States that comprise the UNSC. Its obligations are therefore separate from the obligations of its individual Member States. This is clear when you consider that often some but not all of the UNSC Member States will have signed or ratified a convention or treaty as is the case with both the ICESCR and the

¹¹¹⁴ CESCR, General comment 8 (n 656), para 7

¹¹¹⁵ *ibid.* para 8.

¹¹¹⁶ *ibid.*

¹¹¹⁷ CESCR, General Comment 8 (n 656), para 8.

¹¹¹⁸ William Schabas, ‘Reservations to the Convention on the Rights of the Child’ (1996) 18 Human Rights Quarterly, 472.

¹¹¹⁹ See section 3.5.3.

¹¹²⁰ *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Rep. 1949, 174 at 179 (‘*The Reparations Case*’).

Convention on the Rights of the Child. In that circumstance, if Member States were required to comply with their treaty obligations whilst acting in the UNSC, Member States may find that their obligations are in conflict with each other with no certainty as to which state's obligations should prevail.

There does, however, seem to be a growing consensus amongst commentators that the UNSC cannot be considered as completely unbound by human rights in its decision-making process but, as yet, there is no agreement on the precise ambit of the human rights by which it may be bound, with some focusing on the application of *jus cogens* norms¹¹²¹ and some extending the obligation further. For example, de Wet argues that subsidiary organs of the UNSC have to adhere to basic principles of procedural justice,¹¹²² Geiss comments that the UNSC must be required to adhere to the rule of law¹¹²³ and Segall has gone even further and stated that 'it is evident and generally accepted that the Security Council is bound to observe the principles of human rights law and international humanitarian law when designing, monitoring and reviewing sanctions regimes.'¹¹²⁴ It is also unlike where, in the absence of a requirement that the UN adhere to conventions and treaties that it is not a party to, this obligations emanate from.

This section focuses on three possible sources of an obligation on the UNSC to adhere to human rights in taking decisions.

5.2.3.1.1 The UN Charter

The UNSC derives its powers from the UN Charter and, as such, for the purpose of ascertaining whether it is obliged to act in accordance with human rights or other international norms a review of its obligations under the Charter is necessary.

Under Article 24 of the UN Charter the UNSC is required to discharge its duties under the Charter in accordance with the purposes and principles of the UN.¹¹²⁵ The seminal text on the UN Charter edited by Bruno Simma suggests that the purposes contained in Article 1 of the Charter,¹¹²⁶ which include 'promoting and encouraging respect for human rights',¹¹²⁷ were intended as a loose and

¹¹²¹ Bianchi (n 1062); Reinisch (n 40), 851.

¹¹²² De Wet (n 124) 143.

¹¹²³ Geiss, (n 175) 173.

¹¹²⁴ Segall (n 664).

¹¹²⁵ Article 24(2), UN Charter.

¹¹²⁶ Together with the principles contained in article 2.

¹¹²⁷ Article 1(3), UN Charter.

flexible guide for the conduct of the UN organs, which would include the UNSC.¹¹²⁸ He notes, however, that it is not clear whether it was intended that these purposes would be legally binding, although the US delegation expressed a belief that they were,¹¹²⁹ nor how any conflict between the different purposes should be resolved. The latter point is of particular relevance in the context of targeted economic sanctions in light of another purpose of UN – the maintenance of international peace and security.¹¹³⁰ Targeted economic sanctions have the potential to bring those two purposes into direct conflict.

Other commentators on the creation of the UN offer unsympathetic explanations for the inclusion of human rights in the Charter. Schlesinger indicates that the inclusion of references to human rights was a result, not of a desire on the part of any of the major powers but, of the suggestion of some of the forty-two consultants recognised by the US, who attended the San Francisco Conference.¹¹³¹ This statement contradicts the report of the US Secretary of State that indicates that the inclusion of human rights was at the proposal of the four Sponsoring Powers and was reflective of the desires of people both within the US and throughout the world.¹¹³² It may be seen, perhaps, as a proposal of the consultants that was judged by the Sponsoring Powers to be a popular and politically savvy suggestion and thus adopted by them. However, the origins of the suggestion cast a shadow as to whether human rights were perceived at that time to be anything other than peripheral to the other concepts contained in the Charter that had been suggested by and discussed by the major powers. This is born out by Claude's suggestion that the pressures to endow the UN with competence in the field of human rights were met with multiple references to human rights in the Charter rather than 'by providing clear authority and effective means for the development of an international guarantee of the rights of man.'¹¹³³ He also proposes that the inclusion of the respect for human rights in the Charter was a reaction to World War II and 'the view that the danger of war emanates from totalitarian governments, that war is caused by the diabolical plots of ruthless dictators who are contemptuous of human rights.'¹¹³⁴

¹¹²⁸ Rüdiger Wolfrum, 'Chapter I. Purposes and Principles' in Bruno Simma (ed), *The Charter of the United Nations: a commentary* (2nd edn, Oxford University Press 2002) 40.

¹¹²⁹ 'Charter of the United Nations', Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation The Secretary of State, June 26, 1945, 36.

¹¹³⁰ Article I(1), UN Charter.

¹¹³¹ Schlesinger (n 147), 125-126.

¹¹³² Charter of the United Nations, Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation The Secretary of State, June 26, 1945, 38.

¹¹³³ Claude (n 151), 64.

¹¹³⁴ *ibid.*, 78

It is difficult from this analysis to distil any obligation on the UNSC to act in accordance with human rights norms in taking decisions for the purpose of maintaining peace and security. It should also be noted that discussions on the development of a comprehensive human rights document, which ultimately led to the UDHR,¹¹³⁵ were postponed to be considered at a latter point by the UNGA. Furthermore, the possibility that the promotion and encouragement of the respect for human rights could be seen as binding on the UNSC is also called into question by some of the literature in the early years of the UN, which suggests that there was no widespread belief in the existence of human rights in a concrete rather than aspirational form.

In contrast to contemporary texts on international law, the fourth edition of Brierly's text *The Law of Nations*, published in 1949, does not refer to human rights at all although it does give consideration to what he terms 'the Law of Nature'.¹¹³⁶ Additionally, in his 1950 address to the Grotius Society, the Rt Hon Lord Radcliffe referred to the UDHR as endowing man with extensive rights, which he hoped would be taken up by individuals 'in due time' but which he considered to be ineffective at that point in time.¹¹³⁷ In a reply to this address, it was argued that there could be no human rights, as rights could only be enjoyed by societies and there was no world society of individuals and that, therefore, human rights should be conceived of as duties of governments towards the individuals that they govern.¹¹³⁸ Six years later, it was commented that the UDHR was not a source of law but was tending towards becoming such a source.¹¹³⁹ Furthermore, at that time it was argued that there were significant differences of opinions between states with little or no common ground on common and fundamental rights recognised by all states.¹¹⁴⁰

In order to consider that the UN Charter intended to place an obligation on the UNSC to adhere to human rights in its actions there must have been a coherent, identifiable, applicable or binding concept of human rights at that time. It is clear from the comments of Sauer, the discussions at the Grotius Society and Brierly's work that no such concept existed when the Charter was being drafted, or for a number of years following its adoption. It must be considered that the absence of such

¹¹³⁵ Universal Declaration of Human Rights (1948) UNGA Res 217A (III) (10 December 1948).

¹¹³⁶ J.L. Brierly, *The Law of Nations* (4th edn, Clarendon Press 1949).

¹¹³⁷ Rt Hon Lord Radcliffe, 'The Rights of Man' (1950) 36 Transactions of the Grotius Society for the Year 1950 7-8.

¹¹³⁸ Reply of Mr. F.N. Keen.

¹¹³⁹ E. Sauer, 'Universal Principles in International Law' (1956) 42 Transactions of the Grotius Society for the Year 1956, 189.

¹¹⁴⁰ *ibid.* 191.

a concept, albeit that such a concept was developing, excludes the possibility that the references to human rights in the Charter were intended to be binding upon the UNSC in its actions.

However, the UN is an evolving institution and the next two sections discuss occurrences since the founding of the UN that may give credence to the idea that the UNSC is obliged to adhere to human rights norms.

5.2.3.1.2 Rulings of the ICJ

The ICJ has, in some of its rulings, commented on various aspects of the UN, these comments will be analysed for the purpose of ascertaining how the ICJ views the UNSC and its obligations.

There appears to be no definitive acceptance by the ICJ of the exact responsibilities on the UNSC to act within any legal framework. However, it seems clear that to varying degrees there is a belief that the UNSC is not free to act with total disregard for international law. A conservative example of this belief may be seen in the statement that ‘when the [UN] takes actions which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the [UN].’¹¹⁴¹ Although this was an advisory opinion referring specifically to the practice of the UNGA, on the assumption that it would equally apply to the UNSC, because the UNSC is an organ of the UN that ‘takes actions’, this decision shows some support for the proposition that the UNSC may not act completely unbound by law because it offers the possibility that the UNSC may, in some circumstances, act *ultra vires* the UN Charter. This implies that the UNSC, when it takes action, is subject to some restriction in order that it ensures that it acts *intra vires* the UN Charter. However, it must be emphasised that in this analysis the presumption is that the UNSC is when it takes action acting *intra vires* the Charter.

The ICJ has also ruled that the UN ‘is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.’¹¹⁴² It has been argued that if the UN is accepted to have rights and claims then it must also

¹¹⁴¹ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 168.

¹¹⁴² *The Reparations Case* (n 1120).

have duties.¹¹⁴³ Whilst this conclusion is logical, it is of limited value in that it is accepted that the exact delineation of those duties remains unclear.¹¹⁴⁴

Sir Elihu Lauterpacht offered some clear limitation on the ambit of UNSC power with respect to the drafting of resolutions in the *Bosnia Case*.¹¹⁴⁵ Bosnia argued before the ICJ that to construe UNSC Resolution 713¹¹⁴⁶ as imposing an arms embargo on Bosnia would serve to assist the commission of genocide in Bosnia. Lauterpacht did not ultimately rule on that specific issue stating that ‘as between the Applicant and the Respondent, the continuing validity of the embargo in its bearing on the Applicant has become a matter of doubt requiring further consideration by the Security Council’. However, he did state that *jus cogens* norms are superior to both customary international law and treaty law in the hierarchy of norms and that, as such, Article 103 has no relevance in a conflict between UNSC decisions and *jus cogens* norms because the latter will prevail. He underlined that statement by indicating that one only has to look at the opposing position – that a UNSC resolution may require participation in genocide – for its unacceptability to be apparent.¹¹⁴⁷ Although this clearly demonstrates the belief that the UNSC is constrained in some respects by human rights it is a very limited judgment in the sense that it limits the human rights obligations of the UNSC to adherence with *jus cogens* norms. *Jus cogens* norms, being those norms from which there is no possible derogation,¹¹⁴⁸ stretch only to certain norms, such as, the prohibition against torture, genocide and apartheid. Requiring that the UNSC adhere only to *jus cogens* norms leaves it free to violate other human rights, such as those rights that form part of customary international law but do not rise to the level of *jus cogens*, in adopting its resolutions.

The pronouncements of the ICJ indicate that the UNSC may not act completely without adherence to human rights norms. However, where it has chosen to delineate those norms it has done so in such a limited manner as to be almost meaningless. Further ICJ consideration of the limits that should be placed on the UNSC is needed to clarify this issue.

¹¹⁴³ Andrew Clapham, ‘Sanctions and Economic, Social and Cultural Rights’ in Vera Gowlland Debbas (ed) *United Nations Sanctions and International Law* (Kluwer Law International 2001) 133.

¹¹⁴⁴ *ibid.*

¹¹⁴⁵ *Case Concerning the Application of the Genocide Convention (Bosnia and Herzegovina v Yugoslavia)* [1993] ICJ Rep 3, at 440 (‘*The Bosnia Case*’).

¹¹⁴⁶ UNSC Resolution 713 (n 85).

¹¹⁴⁷ *The Bosnia Case* (n 1145).

¹¹⁴⁸ Article 53, Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331.

5.2.3.1.3 UN Practice

The final reason why it is submitted that the UNSC may be obliged to adhere to human rights norms in adopting resolutions is the practice of the UNSC itself. The traditional stance of the UN was that it saw itself as a benevolent promoter of human rights at a distance from the responsibility for human rights protection, which was seen as an obligation of states.¹¹⁴⁹ However, the UN is an evolving institution and there is a strong argument that by attempting to address human rights concerns in its actions and by engaging in action traditionally undertaken by states it has become obligated to act in accordance with human rights.

Michael Byers espouses a doctrine of legitimate expectation, which he states forms part of all rules of international law.¹¹⁵⁰ He explains the doctrine as the belief of states that other states will behave in a particular way, for example by abiding by their treaty obligations. He says that such an expectation 'may be considered as legitimate – i.e., legally justifiable – because States usually behave accordingly *and* regard their behaviour as having legal relevance.'¹¹⁵¹ He further states that the doctrine 'should also be relevant to international regimes and institutions more generally, and in particular to how those regimes and institutions are developed, maintained and changed.'¹¹⁵²

It is suggested here that the actions of the UNSC with respect to economic sanctions have created a legitimate expectation that the UNSC will not ignore human rights in adopting its resolutions. Firstly, the UNSC has taken it upon itself to adhere, in some circumstances for the benefit of individuals, with human rights norms. For example, with respect to the humanitarian crisis in Somalia the UNSC authorised the use of all necessary means to 'establish a secure environment for humanitarian relief measures'.¹¹⁵³ Furthermore, with respect to economic sanctions against Iraq, where it became clear that sanctions were causing difficulties for the general population of Iraq the UNSC moved to modify the sanctions regime to limit such difficulties. The proposition is that the UNSC may not back away from this obligation, which it has itself adopted, to adhere to human rights norms, as far as it can, simply because it may prove more difficult to implement those norms with respect to targeted economic sanctions.

¹¹⁴⁹ Frederic Megret and Florian Hoffman, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibility' (2003) 25 Human Rights Quarterly 315.

¹¹⁵⁰ Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 1999) 107.

¹¹⁵¹ *ibid.*

¹¹⁵² *ibid.* 107-108.

¹¹⁵³ UNSC Res 794 (3 December 1992) UN Doc S/RES/794, 10.

Secondly, the UNSC has acted beyond its remit to the extent that human rights protection is a necessary implication of its action. For example, typically human rights are owed by those who control a territory and in some instances, such as East Timor and Kosovo, the UN has taken control of a territory and, therefore, it has submitted to a higher kind of human rights obligations, traditionally associated with states.¹¹⁵⁴ The UNSC having taken control of these territories, without specifically exempting itself from adherence to human rights norms cannot, at a later stage, preclude such adherence based on the fact that the UN itself is not a state as there is a legitimate expectation that such rights will be protected by whatever entity controls the territory.

The development of UNSC practice with respect to economic sanctions, which serves to strengthen the suggestion that the UNSC has taken action that requires that it now be considered subject to human rights, is discussed in more detail in the next section. It should be noted that this view does not require the exact norms to which the UNSC must adhere to be specified. Absolute adherence to human rights may not always be possible, as reflected in the past action of the UNSC,¹¹⁵⁵ but regard to rights in excess of the baseline *jus cogens* norms has been attempted in the past and therefore this practice must continue in the future.

5.2.3.2 The Impact of Targeted Economic Sanctions on an Individual

Given that it has been established that the UNSC is obliged, based on its past actions, to take economic sanctions in a manner that attempts to protect the human rights of those sanctioned, this section now focuses on the implication of this premise for targeted economic sanctions. Firstly, it outlines what it actually means to be subject to targeted economic sanctions. Secondly, it considers how targeted economic sanctions may potentially breach due process rights. Thirdly, it discusses the amendments to targeted economic sanctions and how they demonstrate the UNSC focus on human rights in taking targeted economic sanctions.

¹¹⁵⁴ Megret and Hoffman (n 1149); Ralph Wilde, *International Territorial Administration, How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press 2008) 144-146, 178-188.

¹¹⁵⁵ To take again the example of Iraq, despite the actions of the UNSC in allowing for humanitarian exemptions to economic sanctions and in instigating the Oil-for-Food Programme there was still humanitarian suffering and breaches of human rights however the UNSC continued to attempt to resolve the issue and ultimately moved to targeted sanctions to do so.

5.2.3.2.1 Day-to-Day Life

Targeted economic sanctions are intended to restrict a person or entity's access to their assets in order that they not be in a position to engage in action that the UNSC has decided is undesirable, like the financing of terrorist activity. This section discusses how such measures actually impact those subjected to them.

UN targeted economic sanctions preclude their targets from receiving money from any source. In one UK case a person received food, accommodation and clothing from his wife who was receiving welfare benefits subject to a Financial Sanctions Basic Expenses Licence granted by the Treasury. Under that licence she was required to account for all expenditure and provide receipts on a monthly basis. Breach of the licence, including failure to report expenditure, was a criminal offence as was the provision of money to the targeted person without permission of either Treasury or the 1267 Committee. These effects were described, by the English High Court, as draconian.¹¹⁵⁶

In another example, three sanctioned individuals were required to provide full details of their assets, which was to include details of their wives' assets and employment status. Following the freezing of their assets, licences were granted to allow them to receive social security although in only one case was that money paid directly to the target. In the other two cases the money was paid to the wife of the target who could only provide food and accommodation and no more than £10 a week in cash to the target, all of which had to be accounted for to Treasury.¹¹⁵⁷

It has been commented that it is very difficult for members of the family of a target to know when a licence is needed, which led in once instance to Treasury receiving in excess of 50 separate applications for licences to provide economic resources to a target.¹¹⁵⁸ In that case, Mr Justice Collins described as absurd an application made with respect to allowing a target to borrow a car to go to the supermarket and get the family's groceries, although he noted that Treasury had, having obtained ministerial consideration, decided that a licence was needed because a car 'was an economic resource and could be used to obtain or deliver goods or services.'¹¹⁵⁹

The UK House of Lords has indicated the reasoning behind the tight control of the assets of the spouse of a target.¹¹⁶⁰ It stated that Treasury takes the view that 'money spent by [the target's

¹¹⁵⁶ *Hay v HM Treasury* [2009] EWHC 1677 (Admin), para 6.

¹¹⁵⁷ *A. K. M. Q & G v HM Treasury* [2008] EWCA Civ 1187 para 27.

¹¹⁵⁸ *A. K. M. Q & G v HM Treasury* [2008] EWHC 869 (Admin), para 42.

¹¹⁵⁹ *ibid*, para 42.

¹¹⁶⁰ *R(M) v HM Treasury (Note)* [2008] UKHL 26.

spouse] on the running of the family household will be “for the benefit” of [the target]... So, for example, if she buys food for a communal meal in which he participates, the money will have been expended for his benefit.’ In order to ensure that she did not benefit him beyond the permitted levels, which would include basic expenses such as food and shelter, the spouse was required to have her benefits paid into a bank account, she had to use a debit card to make payments out of the account save for the withdrawal of £10 in cash for each member of her household. As with the earlier case she was required to send a monthly account to Treasury, enclosing a copy of her bank statement, a detailed account of expenditure and receipts for goods purchased. This issue was, however, sent to the ECJ for a preliminary hearing. The ECJ held that social welfare payments, being the minimum on which the state has decided a person can sustain himself, do not come within the assets that must be frozen in order to attain the objective of the economic sanctions because it is difficult to ‘imagine how those funds could be turned into means that could be used to support terrorist activities’ given that they are fixed at such a low level.¹¹⁶¹ The full implications of this decision, and how it is likely to be implemented in the UK is not yet clear.

One of the more severe restrictions on the movement of persons who are subjected to sanction was seen in the case of *Nada v State Secretariat for Economic Affairs*.¹¹⁶² In that case the claimant, Nada, was a resident of Campione d’Italia, which is a small Italian enclave, half a square mile in size surrounded by Swiss territory. Following his addition to the Consolidated List, as well as having his assets frozen, Nada was prohibited from entering Swiss territory and was thus confined wholly to Campione d’Italia, a situation which the court described as being close to house arrest.

From the above cases, it is clear that economic sanctions cause severe restrictions to the lives of those subjected to them. Such persons have their bank accounts and other assets frozen or, in the case of non-liquid assets, made inaccessible by them. Their only source of income is social welfare payments and those are limited to covering the basic cost of living. This position is ameliorated by the loosening of the regime, within the EU, with respect to social welfare payments. Cameron, considering economic sanctions through the lens of the European Convention on Human Rights, further suggests

¹¹⁶¹ Case C-340/08, *Reference for a preliminary ruling under Article 234 EC from the House of Lords (United Kingdom), The Queen, on the application of: M and Others v Her Majesty’s Treasury*, 30 April 2008.

¹¹⁶² Bundesgericht [BGer] [Federal Court] November 14, 2007, 133 Entscheidungen des Schweizerischen Bundesgerichts [BGE] II 450 (Switz) as discussed in Johannes Reich, ‘Recent Development: Due Process and Sanctions Targeted Against Individuals Pursuant to U.N. Resolution 1267 (1999)’ 33 *Yale Journal of International Law* 505.

that targeted economic sanctions can also infringe on other rights such as: freedom of movement; family life; reputation and access to court; and privacy.¹¹⁶³

The range of rights that can be breached by economic sanctions that it could be argued the UNSC is obliged to consider in adopting economic sanctions is considerable. However, UNSC targeted economic sanctions are taken in circumstances where fundamental breaches of international law are at stake. It is, therefore, suggested that the legal standard that should be applied to targeted economic sanctions is, like economic sanctions against states, proportionality.¹¹⁶⁴ In those circumstances, the rights of the individual cannot be considered absolute and it may be necessary for his assets to be frozen. As such, the main criticism of economic sanctions with respect to their impact on human rights is not that they cause hardship on the individual that is being sanctioned, although they do, but that they are taken in a manner that breaches due process rights. A balance must, therefore, be struck between taking efficient action and safeguarding the rights of those against whom such action is being taken. This could be accomplished by ensuring that the due process rights of those sanctioned are adhered to. Due process rights and how economic sanctions impact upon them are discussed in the next section.

5.2.3.2.2 Potential Breaches of Due Process Rights

Due process rights are a class of rights that apply to those subject to criminal charges as well as to the determination of rights and obligations in civil proceedings. Although, there is no requirement that those subject to targeted economic sanctions be also subject to criminal measures, it has been noted that the sanctions themselves ‘practically amount to criminal sanctions.’¹¹⁶⁵ It is reasonable that economic sanctions, given the severity of their effects, be treated as akin to criminal sanctions, and thus necessitate those sanctioned being given comparable rights to those subjected to criminal sanctions. Furthermore, assuring the protection of the due process rights of those subject to sanctions would strike a balance between the implementation of economic sanctions and the human rights of those sanctioned and thus fulfil any obligation on the part of the UNSC to adhere to human rights in adopting resolutions. This section considers the extent to which targeted economic sanctions breach due process norms.

¹¹⁶³ Cameron, ‘UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights’ (n 129).

¹¹⁶⁴ See section 3.7.

¹¹⁶⁵ Johannes Reich, ‘Recent Development: Due Process and Sanctions Targeted Against Individuals Pursuant to U.N. Resolution 1267 (1999)’ 33 *Yale Journal of International Law* 505.

Due process rights are discussed in this chapter through the lens of the obligations on states contained in the ICCPR. This framework has been chosen for two reasons. Firstly, the ICCPR contains comprehensive due process rights, which allow for a number of points of contrast with the current economic sanctions regime. Secondly, the human rights committee has stated that the ‘fundamental requirements of fair trial’ protected by the ICCPR must not be derogated from by states in a state of emergency.¹¹⁶⁶ This underlines the binding nature of such obligations. It should be noted that the Human Rights Committee, in *Sayadi v Belgium* has considered the application of the provisions of the ICCPR to an individual subjected to UN targeted economic sanctions holding that the sanctioning did not breach due process rights as set out in article 14 of the ICCPR.¹¹⁶⁷ However, this decision can be distinguished from the consideration of the ICCPR in this thesis. The Human Rights Committee considered the application of the ICCPR to targeted economic sanctions in a domestic context. The individuals who made the application (the authors) were resident in Belgium and took their application against it. They had already applied to the domestic courts in relation to their sanctioning where the Court of First Instance had held that Belgium was required to make an application to have them removed from the Consolidated List due to lack of evidence against them.¹¹⁶⁸ Belgium had complied with that judgment. The Human Rights Committee, in its consideration of whether article 14(1) had been breached, was therefore satisfied that ‘the authors did have an effective remedy, within the limits of the jurisdiction of the State party, which guaranteed effective follow-up by submitting two requests for de-listing.’¹¹⁶⁹ It is consistent to consider that Belgium complied with its obligations under article 14(1), as far as it could given the restrictions placed on states with respect to their obligations to implement UN economic sanctions, whilst also stating that UN economic sanctions themselves do not adhere to due process norms. As such, the decision does not preclude the consideration of the UN economic sanctions through the lens of ICCPR due process rights.

Under the ICCPR provisions it is clear that due process rights are not currently being protected under the UN economic sanctions provisions. Article 14 of the ICCPR states that ‘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

¹¹⁶⁶ General Comment No. 29, CCPR/C/21/Rev.1/Add.11, para 16

¹¹⁶⁷ *Nabil Sayadi and Patricia Vinck v Belgium* Communication No 1472/2006 – CCPR/C/94/D/1472/2006 (Decision of 22 October 2008).

¹¹⁶⁸ *Sayadi v Belgium* (n 1167), para 4.3.

¹¹⁶⁹ *ibid.* para 10.9

tribunal established by law’¹¹⁷⁰ and that ‘everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.’¹¹⁷¹ Currently economic sanctions measures do not adhere to these requirements as, once listed, a person’s assets are automatically frozen without there being a prior right of hearing.¹¹⁷² Furthermore, there is no provision in any of the resolutions for consideration of the implementation of economic sanctions against an individual by any tribunal either domestic or international. The method of appealing against the imposition of economic sanctions is through application to the Focal Point. However, once such an application is made, the state that initially requests the listing becomes a judge in its own case and is given responsibility for reviewing the decision to subject the individual to economic sanctions.

Article 14 also sets out the rights that a person has in determining any criminal charge against him. It states that a person has the right to ‘be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.’¹¹⁷³ It might be posited that the provision that requires states to inform people placed on the list within a reasonable time after their notification by the Secretariat¹¹⁷⁴ constitutes prompt notification. However, the current limitation on the requirement that states provide information to the 1267 Committee as to why a person is being listed,¹¹⁷⁵ which allows the state to limit the publication of that information,¹¹⁷⁶ surely falls foul of the requirement that a person be in a position to understand the nature and cause of the charge against him.

A person is also entitled, under the provisions of the ICCPR, to legal counsel of his choosing for the preparation of his defence without payment in circumstances where an individual cannot afford to pay for counsel and ‘where the interests of justice so require’.¹¹⁷⁷ When economic sanctions are put in place and an individual’s assets are frozen they will be unable to finance legal counsel. There are no provisions in relation to the financing of applications to the Focal Point.¹¹⁷⁸ UNSC resolution 1452 does allow for the possibility of frozen funds being released in order to pay legal fees.¹¹⁷⁹ A sanctioned individual must inform the state in which their assets are frozen that they need funds to be released ‘for the payment of reasonable professional fees’ in relation to the provision of legal advice. If the state

¹¹⁷⁰ Article 14(1), ICCPR.

¹¹⁷¹ Article 14(2), ICCPR.

¹¹⁷² *J. K. M v HM Treasury (No 1)* (n 26), paras 1-3.

¹¹⁷³ Article 14(3)(a), ICCPR.

¹¹⁷⁴ UNSC Resolution 1735 (n 962), 11.

¹¹⁷⁵ *ibid.* 5.

¹¹⁷⁶ UNSC Resolution 1822 (n 962), 12.

¹¹⁷⁷ Articles 14(3)(b) and 14(3)(d), ICCPR.

¹¹⁷⁸ UNSC Resolution 1730 (n 1010).

¹¹⁷⁹ UNSC Res 1452 (20 December 2002) UN Doc S/RES/1452, 1(a) (‘UNSC Resolution 1452’).

determines that such legal advice is necessary it notifies the 1267 Committee of the intention to authorise the release of funds associated with ‘the provision of legal services’. The state then applies to the 1267 Committee and unless a negative response is received within 48 hours may release the requisite funds.¹¹⁸⁰ This means that those who can afford legal counsel may have access to it, however, it remains at the discretion of the state as to whether an application will be made for the release of funds, which limits the entitlement.

UN targeted economic sanctions also breach the provision in article 14 of the ICCPR that a person be allowed ‘to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.’ States are not required to reveal the reasons why a person is to be targeted under a UN sanctions regime. This prevents a person who is targeted from gaining any information about why they have been targeted and seeking to have the freezing order overturned in situations where it occurs on the back of misinformation.¹¹⁸¹

Finally, article 14 contains a right to be ‘tried without undue delay’.¹¹⁸² In the case of economic sanctions those targeted do not have the right to be tried at all. The freezing of assets is not a decision taken by a court but one taken by the committee to which the UNSC has delegated the responsibility or by the state itself and which is implemented by the state.

It should also be reiterated that when a person does apply to the Focal Point to be de-listed neither the states nor the UNSC have to justify the fact that the person is to remain listed.¹¹⁸³ It is only if they recommend a person to be de-listed that either entity has to reply to the Focal Point, a system which is strongly biased towards preserving the *status quo* and leaving a person on the Consolidated List based on hearsay or intelligence that the listed person has no opportunity to challenge. In October 2009 the UK Government, which sits on the 1267 Committee and is a member of the UNSC, admitted that there is still scope for the improvement of the transparency of decisions made by the 1267 Committee and with respect to the de-listing process.¹¹⁸⁴

¹¹⁸⁰ *ibid.* 1(a).

¹¹⁸¹ Article 14(3)(e), ICCPR.

¹¹⁸² Article 14(3)(c), ICCPR.

¹¹⁸³ UNSC Resolution 1730 (n 1010), 6.

¹¹⁸⁴ The Government Reply to the Nineteenth Report from the House of Lords European Union Committee Session 2008-09 HL Paper 132, ‘Money laundering and the financing of terrorism’ presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, Cm 7718, October 2009.

Clearly, therefore, due process rights are not currently adhered to with respect to the invocation of economic sanctions by the UNSC. There are of course difficulties inherent in any real attempt to apply due process rights to sanctions regimes.

Firstly, the right itself must be subject to some limitations. It would stifle the utility of economic sanctions if targets were entitled to a right of hearing prior to asset freeze provisions taking effect as it would give them the opportunity to move such assets. Furthermore, when national or international issues are at stake there is likely to be a reluctance to fully outline the reasons why an individual has been targeted. These issues have been addressed before the US courts, where it has been held that individuals and entities whose assets are frozen under domestic anti-terrorism measures are entitled to the protection of domestic due process rights.¹¹⁸⁵ However, the courts have also accepted that due process rights are not unlimited with respect to the implementation of such measures.¹¹⁸⁶ For example, it has been held that, whereas ordinarily a person must be notified before being subjected to criminal sanctions, in the case of freezing provisions notification could take place following designation.¹¹⁸⁷ Equally, the court was prepared to allow that some of the reasons as to why a particular entity was subject to such measures remain classified, and thus not available to that entity, although it expected that such information be presented *in camera* and on an *ex parte* basis to the court and that the entity designated be given access to any non-classified information immediately.¹¹⁸⁸

These modifications to the right to due process could equally be adopted with respect to UN economic sanctions. This acceptance of limited due process rights should not be seen as a belief that such rights do not apply but as a requirement that the UNSC adhere to due process norms as far as possible with respect to targeted economic sanctions whilst acknowledging that absolute adherence may not be possible. For example, the right to legal counsel should not be restricted in any manner and states should be obliged to forward all requests for the release of funds to pay legal expenses to the relevant committee.

Secondly, when discussing the protection of due process rights, in the context of economic sanctions, it is unclear what entity or institution, within the current framework would be responsible for

¹¹⁸⁵ *National Council of Resistance of Iran and National Council of Resistance of Iran, U.S. Representative Office, Petitioners v Department of State and Madeleine K Albright, Secretary of State, Respondents* 251 F.3d 192.

¹¹⁸⁶ *People's Mojahedin Organization of Iran, Petitioner, v Department of State and Colin L. Powell, Secretary of State, Respondents* 327 F.3d 1238; *National Council of Resistance of Iran, Petitioner, v Department of State and Colin L. Powell, Secretary of State, Respondents* 373 F.3d 152.

¹¹⁸⁷ *National Council of Resistance of Iran v Department of State* (n 1112), para 67.

¹¹⁸⁸ *ibid.*, para 68.

ensuring their protection. The creation of a new institution, which would take that responsibility, is discussed in the next chapter.

5.2.3.2.3 Moves Towards Conformity with Human Rights

It was observed earlier in this chapter that although the UNSC is not formally bound by human rights it has begun to adopt measures that preclude it from relying on this fact to avoid adherence to human rights in taking its decisions. This development was, as observed by Segall, visible with respect to sanctions against states.¹¹⁸⁹ She notes that during economic sanctions against Iraq supplies intended strictly for medical purposes were excluded from economic sanctions and that during economic sanctions against FRY a good working relationship developed between the ICRC and the sanctions committee such that the ICRC 'was granted a blanket exemption for all items used in its humanitarian programme.'¹¹⁹⁰ The field of targeted economic sanctions is also an area in which the UNSC has, of its own violation, moved towards conformity with human rights norms.¹¹⁹¹

At the most basic level, targeted economic sanctions themselves resulted, at least in part, from a move towards conformity with human rights in that they were an attempt to minimise the humanitarian suffering experienced by the general population of states subjected to economic sanctions.

Right from the first instance of targeted economic sanctions they demonstrated a move towards conformity with human rights. The initial phases of UNSC targeted economic sanctions¹¹⁹² did not contain humanitarian exemptions equivalent to those that had been prevalent during sanctions against states.¹¹⁹³ This was rectified in UNSC Resolution 1452, which provides that the 1267 Regime does not apply to assets or resources that the relevant states have determined are necessary for basic expenses which includes 'foodstuff, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges' as well as legal expenses and fees or charges for the holding and maintenance of frozen funds.¹¹⁹⁴ Necessary extraordinary expenses (examples of which are

¹¹⁸⁹ Anna Segall (n 664).

¹¹⁹⁰ *ibid.*

¹¹⁹¹ Geiss (n 175), 180.

¹¹⁹² UNSC Resolution 1267 (n 164); UNSC Resolution 1373 (n 164).

¹¹⁹³ UNSC Resolution 661 (n 44).

¹¹⁹⁴ UNSC Resolution 1452 (n 1179), 1(a).

not given in the resolution but might include the funeral expenses of a family member) may also be paid out of frozen accounts.¹¹⁹⁵

The UNSC has also adopted other measures in the field of targeted economic sanctions that offer protection to human rights. The creation of the Focal Point¹¹⁹⁶ has allowed for an, admittedly limited, right of appeal for those listed. The requirement that states support an application to add a person to the Consolidated List with specific information as to why that person should be sanctioned¹¹⁹⁷ can be seen as a move towards the protection of those designated. Going forward the newly appointed Ombudsperson will also investigate de-listing requests.¹¹⁹⁸

Furthermore, the UN organs have become more vocal in requesting that states adhere to human rights both in respect of the adoption of economic sanctions and in the terrorist arena. Firstly, with respect to economic sanctions, the UNGA has commented on the fact that such measures should be taken in accordance with human rights stating that it also '[calls] upon the Security Council... to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exemptions.'¹¹⁹⁹

In the realm of counter-terrorist activity, the UNSC has adopted a non-binding resolution requesting that states ensure that any measures they take to combat terrorism are taken in accordance with their obligations under international law, particularly human rights law, refugee law and humanitarian law.¹²⁰⁰ This has been interpreted as meaning that the CTC is obliged to consider whether states' counter-terror measures are compatible with human rights.¹²⁰¹ It also goes to demonstrate that the UNSC is cognisant of protecting human rights even in difficult circumstances, such as where terrorist acts may have been committed.

These developments show that the UNSC is moving towards the protection of human rights in the targeted economic sanctions field and must continue to do so. Economic sanctions are used as a weapon by the UNSC and, as such, some collateral damage, in the form of interference with the human rights of those subjected to them, may be inevitable.¹²⁰² However, this should not prevent the UNSC

¹¹⁹⁵ *ibid.* 1(b).

¹¹⁹⁶ UNSC Resolution 1730 (n 1010).

¹¹⁹⁷ UNSC Resolution 1735 (n 962), 5.

¹¹⁹⁸ UNSC Resolution 1904 (n 962), 20.

¹¹⁹⁹ World Summit Outcome Document, UNGA 60/1 (16 September 2005) UN Doc A/RES/60/1, para 109.

¹²⁰⁰ UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624, 4.

¹²⁰¹ Bianchi (n 1062), 901.

¹²⁰² Reisman and Stevick (n 56), 92.

from attempting to limit that interference as far as is possible. It has acted in accordance, as much as possible, with human rights and international law norms in the past and should do so in the future.

Jurisprudential Challenges to UN Targeted Economic

Sanctions

Given the severe consequences of UNSC targeted economic sanctions for those subjected to them, as discussed in the previous chapter,¹²⁰³ it is unsurprising that court challenges have arisen in relation to them. This chapter discusses two such cases.¹²⁰⁴ It will commence by considering why this focus has been chosen. It then offers a critical analysis of the decisions looking at what issues the courts should have considered in reaching their decisions, the consequences of those decisions and why those decisions were made. Finally, it offers a proposal for the development of a system to deal more satisfactorily with the issues raised by these jurisprudential challenges to UN targeted economic sanctions.

6.1 Why This Focus?

In the previous chapter it was submitted that any movement towards UN economic sanctions being brought into compliance with norms of international law had to occur at the level of the UN.¹²⁰⁵ This is because, one of the difficulties that arises with UN economic sanctions is that once they are adopted by a binding UNSC resolution states are obliged to implement them.¹²⁰⁶ This means that, whilst governments and regional institutions¹²⁰⁷ are willing to question the legality of economic sanctions during debates at the UNSC before any resolution is passed, once resolutions have been adopted states are constrained by their international obligations and by political considerations in any action that they can take.

The UKSC case of *A, K, M v HM Treasury (No 1)* clearly demonstrates circumstances in which a state found itself obliged to implement economic sanctions against an individual who that state did not believe should be subjected to them. One of the appellants to this case – Hani El Sayed Sabaei Youssef ('HAY') – had been added to the Consolidated List in 2005 and subjected to economic

¹²⁰³ See section 5.2.3.2.

¹²⁰⁴ *Kadi* (Decision of the ECJ) (n 26); *A, K, M v HM Treasury (No 1)* (n 26).

¹²⁰⁵ See section 5.2.3.

¹²⁰⁶ See section 1.5.1. It should be noted that since the latter stages of sanctions against Southern Rhodesia all UNSC economic sanctions resolutions have been binding (section 1.2.1).

¹²⁰⁷ See the statements of the Russian Federation and of the African Union during UNSC discussions on a proposed economic sanctions resolution against Zimbabwe: UN Doc S/PV/5933.

sanctions in the UK, where he was resident, as a result. The reasons for his inclusion on the list were not made available to him, at the behest of the designating state, but as the UK is P-5 member and, therefore, a member of the 1267 Committee, it had full access to the information that was relied upon in adding HAY to the Consolidated List.¹²⁰⁸ The UK Foreign Secretary had requested that HAY be removed from the Consolidated List on 26 June 2009 on the basis that he no longer thought that HAY's inclusion was appropriate.¹²⁰⁹ However, despite the Foreign Secretary's belief that HAY should not be subjected to targeted economic sanctions under the 1267 Regime, HAY remained subjected to sanctions for an additional six months until the UKSC decision was handed down. This illustrates Wood's comment that UNSC resolutions are political in nature.¹²¹⁰

The behaviour of the UK in this instance reflects its belief that UNSC resolutions, once taken, are binding on it irrespective of its own opinion. Therefore, despite the argument that 'the ultimate test of the legitimacy of the UNSC's action remains the level of acceptance of its practice by the UN Member States',¹²¹¹ governmental reaction with respect to targeted economic sanctions may not be revelatory of true challenges to UN sanctions. It is therefore necessary to look at the action of another organ of the state or institution – the court – in order to gain insight into the level of acceptance of UN economic sanctions.

The judicial function of a state or institution has a freedom that a state's executive may not have as it is not bound by the political framework, which restricts governments from questioning their international obligations. Furthermore, by and large and certainly in the cases being discussed here, the decision of a court is made in public. This contrasts with the criticisms being levelled at the UN economic sanctions regime that applications for delisting are considered in private without any requirement that the reasoning behind a decision be disclosed.¹²¹² It is for these reasons that it is necessary to consider judicial decisions with respect to challenges to targeted economic sanctions.

6.1.1 The Focus on These Cases

The two aforementioned cases of *Kadi* and *A, K, M v HM Treasury (No 1)* have been chosen for two reasons. Firstly, the background to the cases is similar. In both, the court was dealing with an appeal of

¹²⁰⁸ *A, K, M v HM Treasury (No 1)* (n 26), para 35.

¹²⁰⁹ *ibid.*, para 36, 82.

¹²¹⁰ Wood (n 886), 73.

¹²¹¹ Bianchi (n 1062), 887.

¹²¹² See discussion of the Focal Point, established under UNSC Resolution 1730 (n 1010), at 5.1.2.2.1.2.

a number of joined cases that had been taken by individuals or entities subject to economic sanctions. Those individuals or entities had been subjected to domestic or (in *Kadi*) regional legislation put in place for the purpose of implementing UNSC sanctions resolutions taken either under the 1267 or the 1373 regime. They challenged their subjection to such legislation on a number of grounds including, most importantly for the purpose of this thesis, that it breached their fundamental rights.¹²¹³ This allows for a comparative study as to how the two courts dealt with the issues that arose.

Secondly, there is an interesting contrast between the courts in which the two cases were taken. One of the cases, *A, K, M v HM Treasury (No 1)*, was taken in the UK courts. The UK, as a Member State of the UN, is obliged to apply UNSC resolutions. As P-5 member, it has a primary role in the drafting of UNSC resolutions and has the ability to shape sanctions resolutions.¹²¹⁴ Furthermore, as noted above, it has access to full information as to a request was made for a given person or entity be subject to economic sanctions.¹²¹⁵ This is in sharp contrast with the European Court to which the *Kadi* case was taken. The European Court deals with matters of EU law. The EU, in contrast to the UK, is not a member of the UN and is therefore not bound by UNSC resolutions. Nor, other than through its Member States, does the EU have any influence over the drafting of the resolutions or access to the material justifying a person's inclusion in a sanctions regime. The EU, unlike its Member States, has made a decision to adopt legislation to implement UNSC resolutions though it is not obliged to do so. Furthermore, the European Court followed the decision in *Kadi* in a subsequent decision so that it is becoming established as an accepted practice under EU law.¹²¹⁶ As such, this chapter allows for an insight into how two different court systems, subject to different obligations, have dealt with UN economic sanctions.

6.2 What Issues Should the Courts Have Considered?

On the basis of the issues that have been discussed throughout this thesis so far, it is submitted that there are two key matters that the courts should have considered with respect to these challenges to UNSC targeted economic sanctions. Firstly, given the binding nature of UN economic sanctions, the courts were obliged to consider whether they had the competence to decide these cases at all. Secondly, in the event that they accepted that they had such competence, the courts were obliged to consider

¹²¹³ *Kadi* (Decision of the ECJ) (n 26), para 116-117; *A, K, M v HM Treasury (No 1)* (n 26), para 40.

¹²¹⁴ Wood (n 886), 80-81.

¹²¹⁵ *A, K, M v HM Treasury (No 1)* (n 26), para 35

¹²¹⁶ Case T-318/01, *Othman v Council*, 2009 O.J. (C 180) 37.

whether the fundamental rights of the appellants had been breached by economic sanctions. This section examines how the courts dealt with those issues.

6.2.1 Competency

The issue of competency that arises with respect to these decisions is whether a court may review a binding UNSC resolution. This issue arises quite aside from the discussion in chapter 5 as to whether the UNSC is constrained by human rights in adopting resolutions.¹²¹⁷ Even if it is accepted that the UNSC must comply with human rights norms in adopting its resolutions this does not mean that any court, international or domestic, has the power to review this adoption.¹²¹⁸

There is no basis in the UN Charter for the review of UNSC action by any court, save that an organ of the UN may request the ICJ to give an advisory opinion on the legality of certain action under Article 96(1) of the UN Charter. Generally, when considering judicial review of UNSC action to date, the focus has been on the role of the ICJ in reviewing such action rather than on the role of domestic courts.¹²¹⁹ The reason for this focus is because the ICJ, unlike the domestic courts, has a horizontal relationship with the UNSC. In 1971, in his separate opinion in the *Namibia Advisory Opinion*, Judge de Castro stated that the ICJ ‘as a legal organ, cannot cooperate with a resolution which is clearly void, contrary to the rules of the Charter or contrary to the principles of law’.¹²²⁰ As a separate opinion, however, this was not binding and later cases have yet to adopt this position.

The possibility of the ICJ reviewing UNSC action has been raised in two cases before the ICJ. However, unfortunately for the purpose of achieving clarity on this issue, whether or not the ICJ is in fact entitled to review UNSC action has not been conclusively resolved.¹²²¹ In the *Lockerbie Case*, the ICJ declined Libya’s application for provisional measures, on the basis that there was a binding UNSC resolution in place, which was inconsistent with the application.¹²²² And, in the *Bosnia Case*, the ICJ was satisfied that it could not concede to Bosnia’s request to declare that a binding UNSC arms embargo could not be applied against the Bosnian government on the basis that it violated the right of

¹²¹⁷ See section 5.2.3.

¹²¹⁸ Reich (n 1165), 505.

¹²¹⁹ *The Nicaragua Case* (n 842), 435; Eckart Klein, ‘The Cuban Embargo and Human Rights: Intercultural Human Rights Law Review Annual Symposium; October 24, 2008: International Sanctions From a Human Rights Law Perspective: Some Observations on the Kadi Judgment of the European Court of Justice’ (2009) 4 Intercultural Human Rights Law Rev 111; Dapo Akande, ‘The International Court of Justice and the Security Council: Is There Room For Judicial Control of Decisions of the Political Organs of the United Nations?’ (1997) 46 ICLQ 309.

¹²²⁰ *The Namibia Case* (n 36), 180.

¹²²¹ *The Lockerbie Case* (n 118); *The Bosnia Case* (n 1145)

¹²²² *The Lockerbie Case* (n 118) at 126-127.

self-defence, for it held that to do so would go beyond the scope of article 41 of the ICJ statute.¹²²³ Neither case went to a full hearing on the merits. The position, therefore, remains uncertain as to whether even the ICJ, an institution that sits alongside the UNSC in the UN structure, can judicially review the latter's decisions.¹²²⁴

In the cases discussed in this chapter the courts are not parallel to the UNSC but, under article 103 of the UN Charter, subsidiary to it.¹²²⁵ It would, therefore, be expected that the UK and EU courts would question their competency to hear the instant cases given that the measures being contested are measures which directly implement binding UNSC resolutions. For that reason, in *Behrami*, the ECtHR held that it did not have jurisdiction to hear claims over actions that were ultimately attributable to the UN,¹²²⁶ which the court described as being 'an organisation of universal jurisdiction fulfilling its imperative collective security objective'.¹²²⁷ De Burca criticises this conclusion as being unconvincing and reflective of the ECtHR's 'desire to avoid an open conflict with the' UNSC.¹²²⁸ It is submitted here, however, that the ECtHR, following article 103 of the Charter and the obligations that UN Member States assume as members, was correct in its analysis that due to the hierarchy of international law it could not review decisions of the UNSC. In any event, neither the ECJ nor the UK Supreme Court followed the reasoning in *Behrami* in considering its competency.

The two courts approached this question in very different manners. The ECJ, as should be expected of any court in this situation, directly addressed the question of competency, whereas the UK Supreme Court side-stepped the issue and focused on the domestic nature of the measures being challenged.

At the level of the CFI, the Court held, in accordance with customary international law and article 103 of the UN Charter, that obligations of EU Member States under the UN Charter prevailed over every other obligation of domestic or international law including those under EU law.¹²²⁹ This decision is in accordance with the understanding of the relationship between domestic or institutional

¹²²³ *The Bosnia Case* (n 1145) at 345.

¹²²⁴ Vera Gowlland-Debbas, 'The Relationship Between the International Court of Justice and the Security Council in Light of the Lockerbie Case' (1994) 88 AJIL 643; Jose E Alvarez, 'Judging the Security Council' (1996) 90 AJIL 1; Akande (n 1219), 309; Michael J Matheson, 'ICJ Review of Security Council Decisions' (2004) 36 George Washington International Law Review 615.

¹²²⁵ See discussion of the ambit of article 103 in section 1.5.

¹²²⁶ The actions at issue were those of peacekeeping forces.

¹²²⁷ *Behrami v France (Behrami v France, Saramati v France Germany & Norway)* Apps. No 71412 & 78166/01 (May 2, 2007) (admissibility decision).

¹²²⁸ Grainne de Burca, 'The European Court of Justice and the International Legal Order after Kadi' (2010) 51 Harvard International Law Journal 1.

¹²²⁹ Case T-315/01, *Kadi v Council & Comm'n*, 2005 E.C.R. II-3649, para 184 ('*Kadi* (Decision of the CFI)').

law and UN obligations to date. The CFI then, however, moved on to say that, despite this supremacy, it was entitled to consider whether the measures required under the UNSC resolution were in accordance with *jus cogens*, which it stated bound all subjects of international law including the UNSC.¹²³⁰

This aspect of the decision confuses two issues. Firstly, as discussed in the previous chapter,¹²³¹ whether the UNSC is constrained in any manner in taking action and, secondly, whether the CFI had competence to impose limits on the UNSC. Even if the CFI accepts that the UNSC must act in accordance with *jus cogens* and that there is no other institution willing or able to ensure that it does so, there is no reason that it should assume competency for the adjudication of this matter.

On appeal, the ECJ, in giving its decision, diverged significantly from the decision of the CFI. It considered that the fact that there was an obligation on Member States to implement UNSC resolutions did not mean that there was a basis in the EC Treaty for immunity from jurisdiction for a measure like the EU regulation implementing Resolution 1267¹²³² ('the Contested Regulation') because derogations cannot be allowed with respect to the principles that form the foundations of the EC legal order and of the EU which includes the protection of fundamental rights.¹²³³ It further precluded immunity from jurisdiction on the basis of the hypothetical place that obligations under the UN Charter would occupy in the hierarchy of EC norms stating that the Charter would only have primacy over acts of secondary EC law and not over the general principles, which constituted primary law.¹²³⁴

In a somewhat contradictory move, the ECJ denied that a review of the Contested Regulation, being an EC regulation implementing an UN resolution, would amount to a review of the resolution itself, or of the Charter, and, in fact, suggested that its annulment of the Contested Regulation would not necessarily call into question the primacy of the resolution in international law.¹²³⁵ The Court seemed to be guided in its analysis by the fact that the UNSC does not prescribe how its sanctions resolutions should be implemented at the domestic level. However, allowing Member States the choice of how economic sanctions are to be implemented does not equate to giving a domestic or institutional court the right to review the measures themselves, which it would be doing in circumstances where the implementing domestic or regional measure faithfully replicated the relevant UNSC resolution.

¹²³⁰ *ibid.* para 226-227.

¹²³¹ See section 5.2.3.

¹²³² Council Regulation (EC) No 467/2001.

¹²³³ *Kadi* (Decision of the ECJ) (n 26), para 300-304.

¹²³⁴ *ibid.* para 305-309.

¹²³⁵ *ibid.* para 286-288.

Furthermore, whilst the EU is not a member of the UN, its Member States are and, as such, have agreed that, in cases of conflict, obligations under the UN Charter take supremacy.

There is a further difficulty inherent in the practical application of the ECJ's decision in that, regardless of its concept of the hierarchy of international law, the EU has, in implementing UNSC sanctions, created an unnecessary and largely ineffective¹²³⁶ middle layer between its Member States and their obligations to implement UNSC resolutions. As such, by overturning EC regulations implementing UNSC resolutions, it does not remove the obligation on Member States to implement UNSC resolutions.

Whereas the European Court, despite criticism of its reasoning, dealt squarely with the issue of competence, the UK Supreme Court largely side-stepped that issue in the case of *A, K, M v HM Treasury (No 1)*. The joined-cases were taken as a challenge to the domestic implementing measures rather than the UN resolutions, which reflects the fact that the appellants accepted the legality of UNSC resolutions and that they would not be open to challenge at the domestic level.¹²³⁷ However, it is submitted that the UKSC was obliged to consider the extent to which it could challenge the domestic measures if ultimately those domestic measures were adopted for the purpose of faithfully implementing UNSC resolutions, which it was accepted were not open to challenge.

In his opinion, dissenting on this point, Lord Brown stated that if a domestic implementing measure exactly fulfils the UK's obligations under the UNSC resolution it purports to implement then, as a UN Member State, the UK is obliged to implement it.¹²³⁸ In other words the UK itself cannot review the resolution either at governmental or at judicial level. Despite the willingness of the courts in both cases to accept jurisdiction, the statement of Lord Brown more accurately reflects the hierarchical nature of international and domestic law with respect to UNSC sanctions resolutions. By accepting jurisdiction and challenging domestic measures that have been put in place to faithfully implement UNSC sanctions resolutions the courts are also inadvertently challenging the resolutions themselves, which they do not have the competence to do. For this reason it is submitted that the courts in these cases wrongly asserted jurisdiction.

A proviso must be added to the discussion of competence. The designation of persons and entities under the Counter-Terrorism Regime, unlike under the 1267 Regime, takes place not at UN

¹²³⁶ The purpose of the EC regulations in this field may be seen as ensuring consistency between the sanctions actions of EC Member States, which, whilst serving a practical purpose, does not serve to impact on the effectiveness of UNSC sanctions resolution.

¹²³⁷ *A, K, M v HM Treasury (No 1)* (n 26), para 217.

¹²³⁸ *ibid.*, para 203.

level but at state level. As such, persons subjected to sanctions under that regime could seek to have their designation judicially reviewed by the domestic courts but only on the ground that their designation did not meet the criteria in the relevant UNSC resolutions and that, therefore, they were incorrectly designated by the state. They may not seek judicial review of the UNSC resolutions themselves.

6.2.2 Fundamental Rights

As outlined in the previous chapter UN economic sanctions, and their implementing measures, have the potential to significantly impact on the due process rights of those targeted.¹²³⁹ Given that the courts were prepared to accept jurisdiction in these cases, they then had to consider the arguments made by the appellants in relation to the impact that being subjected to economic sanctions has on their rights. This thesis accepts that not all individual rights can be protected within the sanctions framework and, as such, has attempted to strike a balance between the rights of individuals and the necessity of UN action by focusing on due process rights. The courts' conception of fundamental rights however went beyond the realm of due process rights and varied significantly between two different courts and for that reason each court will be considered separately.

6.2.2.1 The UKSC

Although decided most recently, the UKSC decision is the most deficient with respect to its consideration of fundamental rights. The UK House of Lords had previously considered the conflict between human rights and the state's obligations under the UN Charter in *Al-Jedda*, a decision handed down in 2007.¹²⁴⁰ In *Al-Jedda* the appellant, a national of both Iraq and the UK, had been detained by British troops at a detention facility in Iraq.¹²⁴¹ The detention was authorised by binding UNSC resolution.¹²⁴² Amongst the arguments put forth on the appellant's behalf was that such detention contravened article 5(1) of the European Convention¹²⁴³ on Human Rights.¹²⁴⁴ The House of Lords unanimously rejected this argument holding (per Lord Bingham) that, whilst the European Convention has special significance as a human rights instrument, 'the reference in article 103 [with respect to the

¹²³⁹ See discussion of the impact of economic sanctions on the rights of those sanctioned at 5.2.3.2.

¹²⁴⁰ *Al-Jedda* (n 133), 58.

¹²⁴¹ *ibid.* para 1.

¹²⁴² UNSC Resolution 1546 (n 144).

¹²⁴³ Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 222.

¹²⁴⁴ *ibid.*

supremacy of UN obligations] to “any other international agreement” leaves no room for any excepted category’.¹²⁴⁵ As such, the House of Lords held that the UK was obliged to fulfil its obligations as a member of the UN and implement UNSC Resolution 1546 (and subsequent resolutions) and detain the appellant irrespective of its obligations under the European Convention on Human Rights. However, consideration of human rights in that decision was limited to the European Convention on Human Rights, which restricts the ambit of the decision. This allowed the UKSC in *A. K. M v HM Treasury (No 1)* to indicate that it was satisfied that the European Convention on Human Rights did not apply to UNSC resolutions but that other undefined rights could be applicable beyond the Convention,¹²⁴⁶ which is consistent with the opinion of some commentators that the ambit of article 103 is limited to international agreements as discussed in section 1.5.1. However, as indicated in section 1.5.1, this concept is inconsistent with state practice to date. In any case, the UKSC did not explicitly rely on this distinction and in fact failed to define precisely the rights that it sought to apply. Furthermore, the UKSC did not deal effectively with such rights by category, which left the consideration of potential breaches of fundamental rights quite disjointed throughout the judgment.

Initially, judicial consideration of fundamental rights was framed in terms of whether the executive had the power to invoke measures implementing UNSC resolutions, which impacted significantly on fundamental rights, without such measures being subjected to full parliamentary scrutiny. Such an implementation process had been provided for in the United Nations Act 1946 (‘1946 Act’).¹²⁴⁷

Lord Hope concentrated on the breach of property rights indicating that there was a point at which interference with such rights became so ‘great, so overwhelming and so timeless’ that in the absence of any effective means of it being challenged it could only be brought about under the express authority of Parliament.¹²⁴⁸ Lord Brown distinguished between implementing legislation that faithfully replicated the requirements of the relevant UNSC resolution and that which goes beyond the given resolution. He stated that the executive could adopt the former whereas the latter would require primary legislation.¹²⁴⁹

However, these decisions only suggest that parliament rather than the executive should have considered the implementing legislation. Therefore, the question as to whether the UK was obliged to

¹²⁴⁵ *ibid.*, para 35.

¹²⁴⁶ *A. K. M v HM Treasury (No 1)* (n 26), 74.

¹²⁴⁷ *ibid.*, 4.

¹²⁴⁸ *ibid.*, 76.

¹²⁴⁹ *ibid.*, 196.

implement UNSC resolutions, which would result in gross breaches of human rights, remained. This issue was also considered but not resolved. Lord Brown expressed his belief that the UK was obliged to faithfully implement UNSC resolutions irrespective of whether the regime is 'contrary to the fundamental principles of human rights'.¹²⁵⁰ He suggested that his approach would not allow for gross human rights abuses – such as internment – unless it was specifically mandated by a UNSC resolution but declined to consider the matter further as it was not an approach shared by the majority.¹²⁵¹ Lord Mance stated that a Chapter VII regime that required an extreme restriction of individual liberty, such as the internment of individuals, without the right of judicial review, would require enactment by primary legislation.¹²⁵² Lord Phillips, took a more restrictive stance stating that he felt that at a minimum in order for the UK to be obliged to implement UNSC resolutions such resolutions must be *intra vires* the powers of the UNSC.¹²⁵³ He indicated that the general, though not universally accepted, view was that, at a minimum, measures that violate *jus cogens* are not *intra vires* the UNSC.

Lord Mance and Lord Rodgers also each considered the necessity of judicial review of economic sanctions. Lord Mance accepted that the UN procedures for de-listing do not equate to a judicial review procedure.¹²⁵⁴ He questioned whether, in light of the UN's commitment to promote human rights and the requirement in UNSC Resolution 1456 that measures to combat terrorism be taken in accordance with international law,¹²⁵⁵ it could be considered that the UNSC would have intended Member States to enact domestic legislation that would violate fundamental principles of human rights.¹²⁵⁶ Lord Mance noted that the basic common law right at issue was the right to access to a domestic court or tribunal to challenge the basis for inclusion on the Consolidated List.¹²⁵⁷ However, he accepted that there was a distinction between measures directed at state or non-state actors such as Al-Qaida or their leaders, which are identified as threats to the peace, whom he felt would not be entitled to challenge their designation, and measures directed in general terms at anyone associated with non-state actors.¹²⁵⁸

Lord Rodgers focused on the lack of judicial review procedures, noting that the 1267 Committee is not obliged to publish more than a narrative summary of reasons for listing, there is no

¹²⁵⁰ *ibid.*, 203.

¹²⁵¹ *ibid.*, 205-206.

¹²⁵² *ibid.*, 249.

¹²⁵³ *ibid.*, 151.

¹²⁵⁴ *ibid.*, 239.

¹²⁵⁵ UNSC Res 1456 (20 January 2003) UN Doc S/RES/1456, 6.

¹²⁵⁶ *J. K. M v HM Treasury (No 1)* (n 26), 245.

¹²⁵⁷ *ibid.*, 246.

¹²⁵⁸ *ibid.*, 248.

appeal body outside of it, individuals cannot apply directly to it and all of its members must agree to de-listing. He submitted that the 1946 Act could not authorise the making of legislation, which so gravely and directly affected the legal right of individuals to use of their property, without the possibility of challenge.

This decision of the UKSC is wholly insufficient. Firstly, in the eyes of the Court, it would appear that if parliament, rather than the executive, adopted the implementing legislation then its impact on the fundamental rights of those sanctioned could not be considered. It fails to address why such a distinction can be made when UNSC sanctions resolutions are binding on all Member States. Their method of implementation at a domestic level, whether by Executive Order or by an act of parliament, does not impact on the binding nature of UNSC resolutions.

Secondly, in circumstances where UNSC resolutions are to be legitimately implemented by Executive Order, and therefore in the UKSC's view must offer some level of protection to the fundamental rights of those subjected to them, the decision does not identify the source of the rights that it proposes should be offered protection. Are these rights rooted in domestic law or customary international law or some unidentified legal instrument? The result is that it is difficult to ascertain on a more general basis, to what extent the UKSC perceives that the UNSC is bound by international or human rights laws in adopting resolutions. It therefore provides no guidelines for future action either by the UNSC or by the UK. Of further concern is the belief expressed by some members of the UKSC that the UK is obliged to faithfully implement UNSC resolutions, even if they totally violate fundamental human rights. It would have been helpful, in light of the repercussions of these sweeping statements, if the judges making these contentions had analysed their reasoning in more detail.

However, the indication by Lords Mance and Rodgers that judicial review of UN economic sanctions is necessary demonstrates an attempt at balancing the competing obligations of the UK, as a UN Member, and the fundamental rights of citizens. Judicial review will be discussed in more detail later in the chapter.

6.2.2.2 The CFI

As noted in the previous section, the CFI held that it only had competence to review UNSC resolutions with respect to their adherence to *jus cogens* norms. It, therefore, limited its consideration of the rights that could be affected by economic sanctions to *jus cogens* norms. The CFI was, however, prepared to

define these norms in a very expansive manner so as to include property rights as well as due process rights.¹²⁵⁹ It noted that there was the possibility of gaining humanitarian exemptions from the provisions of the Contested Regulation, which it suggested demonstrated that the intention of economic sanctions was not to submit persons to inhuman or degrading treatment.¹²⁶⁰ With respect to property rights, it held that they had not been breached because of the temporary nature of economic sanctions, which do not affect the substance of the right to respect for property of the persons concerned, the UNSC review procedures that are in place with respect to the entire system of sanctions and the possibility of submitting an individual case for review to the sanctions committee.¹²⁶¹

Although the CFI accepted that there was no right for an individual to be directly heard with respect to de-listing, it was satisfied that the system then in place, which required an application through a state to the 1267 Committee offered sufficient protection of an individual's right to be heard.¹²⁶² It was not swayed from that position by the fact that the applicant would not be allowed to hear the evidence adduced against him that had resulted in his designation. The CFI indicated that once the UNSC or the 1267 Committee decided that such information should be withheld for the protection of international security, and in light of the temporary nature of economic sanctions, the refusal to provide such information did not impact on a person's right to be heard. It further held that the right to judicial review was not an absolute right and was not breached in this instance in light of the 'essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council in accordance with the Charter of the United Nations.'¹²⁶³

The proposition being made in this chapter is that the UNSC is obliged to protect human rights, as far as is possible, whilst maintaining the efficacy of the economic sanctions in question. The CFI's conception of *jus cogens* norms as including property rights, due process rights and the right of judicial review was clearly an expansive definition when compared with the traditional position,¹²⁶⁴ but this did not materially impact on its analysis because of its concentration on the balance to be struck between competing rights.

However, the CFI clearly favoured the implementation of sanctions over the rights of those subjected to sanctions. For example, in considering that a review through a state to the 1267 Committee

¹²⁵⁹ *Kadi* (Decision of the CFI) (n 1229), 2005 E.C.R. II-3649.

¹²⁶⁰ *ibid.*, para 240.

¹²⁶¹ *ibid.*, para 243-252.

¹²⁶² *ibid.*, para 253-276.

¹²⁶³ *ibid.*, para 289.

¹²⁶⁴ As discussed in 5.2.3.1.2.

offered sufficient protection of both due process and the right to judicial review, the CFI endorsed a situation in which, in certain circumstances, no protection for those rights may be available. This would occur if a sanctioned individual could not get a state to make an application on his behalf. The CFI also accepted that a right of direct hearing was impossible, as it was not provided for by the UNSC, without questioning whether the absence of the provision of such a right impacted on the legality of economic sanctions.

Thus, despite the rhetoric of the CFI, it is difficult to reconcile this decision with the belief that the UNSC is in any way bound by human rights if at every opportunity for the protection of such rights the UNSC is exempt on the grounds of maintaining international peace and security. Following this decision the question remains to what extent the UNSC could, in the view of the CFI, seek to protect human rights whilst maintaining international peace and security.

6.2.2.3 The ECJ

The ECJ, in finding that it could review the Contested Regulation in light of EU law, left itself more scope to consider how targeted economic sanctions were interfering with the rights of individuals. The ECJ stated that the right to be heard and the right to effective judicial review had clearly been breached by the measures imposed by the Contested Regulation.¹²⁶⁵ However, it did not conceive of either of these rights as being absolute in the context of economic sanctions.

The ECJ accepted that there is an obligation to communicate with a person who has been sanctioned under the Contested Regulation but stated that prior communication would jeopardise the effectiveness of the sanctions and was therefore unnecessary and that certain information, which might compromise safety or international relations, could be withheld.¹²⁶⁶ It stated, however, that restrictive measures imposed in those circumstances should still be subjected to review and that the EC judicature should balance the competing problems.¹²⁶⁷

In the instant case, the appellants had not been told why they had been subjected to economic sanctions which meant that they could not form a defence, which breached their right to be heard and to an effective remedy.¹²⁶⁸ This information was also not produced to the ECJ and, as such, it found

¹²⁶⁵ *Kadi* (Decision of the ECJ) (n 26), 333-335.

¹²⁶⁶ *ibid.* 336, 338-340, 342.

¹²⁶⁷ *ibid.* 343-344.

¹²⁶⁸ *ibid.* 345-349.

that it was unable to decide whether the Contested Regulation could be applied to the appellants and could only hold that the fundamental right to an effective legal remedy had not been observed.¹²⁶⁹

The ECJ also considered Mr Kadi's claim that the Contested Regulation was a breach of the right to respect for property.¹²⁷⁰ The ECJ noted that the right to property could be restricted provided that the restrictions are in the public interest and are not disproportionate or intolerable.¹²⁷¹ With respect to economic sanctions provisions, the freezing measures were considered to be a temporary measure put in place for the purpose of the protection of international peace and security, which contained humanitarian exemptions and a re-examination procedure, and could not therefore *per se* be considered inappropriate or disproportionate.¹²⁷² As such, the ECJ found that 'the restrictive measures imposed by the contested regulation constitute restrictions of the right to property which might, in principle, be justified.'¹²⁷³

However, because the restrictive measures set out in the Contested Regulation resulted in Mr Kadi's property rights being significantly restricted without it offering him any guarantee that he could put his case to the competent authorities the ECJ held that the imposition of those measures an unjustified restriction of Mr Kadi's property rights.¹²⁷⁴

It is submitted that the ECJ's decision is the most well-reasoned decision in that it truly undergoes a comparative analysis of the competing rights at issue and attempts to reach a balance between the two.¹²⁷⁵ Of particular note is the indication that, whilst a target of sanctions is entitled to information in relation to his sanctioning, this information could be provided following sanctions being put in place in order to ensure that the purpose of the sanctions is not defeated by prior knowledge. This provides a suitable balance between protecting the rights of individuals and ensuring that economic sanctions are as comprehensive as possible. Furthermore, it is clear that the ECJ, in undertaking this analysis, did not forget the significance of the over arching purpose of economic sanctions – the protection of international peace and security – because it allowed the Contested

¹²⁶⁹ *ibid.*, 350-351.

¹²⁷⁰ *ibid.*, 354.

¹²⁷¹ *ibid.*, 355.

¹²⁷² *ibid.*, 358, 363-365.

¹²⁷³ *ibid.*, 366.

¹²⁷⁴ *ibid.*, 369-370.

¹²⁷⁵ Giacinto della Cananea. 'Case Law: Global Security and Procedural Due Process of Law Between the United Nations and the European Union: Yassin Abdullah Kadi & Al Barakaat International Foundation v Council' 15 Columbia Journal of European Law 511.

Regulation to remain in effect for a period of three months in order that the Council would have the opportunity to remedy the infringements found.¹²⁷⁶

6.3 The Aftermath of the *Kadi* Decision

By deferring the operation of its decision the ECJ gave the EU institutions the opportunity to address the concerns raised by it, whilst Mr Kadi remained subject to economic sanctions.

In the aftermath of the decision the European Commission ('the Commission') attempted to comply with the ECJ's decision. The Permanent Representative of France, on behalf of the EU, requested that the 1267 Committee make available on its website the reasons why Mr Kadi had been included on the Consolidated List.¹²⁷⁷ The 1267 Committee provided a summary of reasons why Mr Kadi had been sanctioned, which it indicated could be provided to Mr Kadi and his legal representatives and which it published on its website.¹²⁷⁸ The summary of reasons it provided were: that Mr Kadi was a founding trustee of the Muwafaq Foundation, which was a organisation that operated under an umbrella organisation founded by *inter alia* Usama bin Laden that was the predecessor to Al-Qaida and which formed part of Al-Qaida upon dissolution of the umbrella organisation; that he hired Mr Shafiq Mohamed Al-Ayadi, who was associated with Al-Qaida and Usama bin Laden, to head the European offices of the Muwafaq Foundation in 1992; that the leader of Al-Gama'at Al-Islamiya, an Islamic terrorist organisation, had said that the Muwafaq Foundation provided logistical and financial support to a mujahidin battalion in Bosnia and Herzegovina in the mid-1990s some of the financing of which was provided by Usama bin Laden; that he was a shareholder in the now closed Depositna Banka in which Mr Al-Ayadi held a position and acted as nominee for his shares and where it is possible that planning sessions for an attack against a US facility took place; and that he owned several firms in Albania, which funnelled money to extremists, some of which were financed in part by Usama bin Laden.

The summary of reasons is deficient in that it does not equate to evidence against Mr Kadi. In fact, one of the reasons was stated to have been based on the comment of a third party and another on the contention that planning may (or as a corollary may not) have taken place in an organisation that Mr Kadi held shares in. As a result of this deficiency, once Mr Kadi received the summary of reasons

¹²⁷⁶ *Kadi* (Decision of the ECJ) (n 26), 373-376.

¹²⁷⁷ *Kadi* (Decision of the GC) (n 163) para 49.

¹²⁷⁸ *ibid.* para 50-51.

he wrote to the Commission requesting the disclosure of evidence supporting the reasons given and relevant documents in the Commission's file and an opportunity to comment on the evidence once received. He also attempted to refute the allegations in the summary, as far as possible given the limited information available.¹²⁷⁹

On 28 November 2008 the Commission adopted a new Regulation,¹²⁸⁰ which amended the Contested Regulation and indicated that the Commission in accordance with the judgment of the ECJ, having received and assessed Mr Kadi's comments was satisfied that he should remain subject to sanctions.¹²⁸¹ The Commission also wrote to Mr Kadi stating that: it had now complied with the judgment of the ECJ; it was not required to furnish him with additional evidence; since the measures against him were preventative in nature it only had to prove that it had reasonable grounds to suspect that he is a terrorist or that he finances terrorism; and that the Commission could disregard evidence the applicant had put forward in an attempt to refute allegations against him, particularly evidence that related to the dropping of criminal proceedings against him as that was a different standard of proof.¹²⁸²

On the basis of this Mr Kadi made an application to the GC¹²⁸³ seeking that it: require the Commission to disclose all of the documentation relating to the adoption of the Contested Regulation; annul the Contested Regulation as far as it applies to him; and order the Commission to pay costs.¹²⁸⁴ He put forward five pleas: lack of sufficient legal basis; breach of the rights of defence and the right to effective judicial protection; the breach of the obligation to state reasons laid down in Article 253; a manifest error of assessment of the facts; and breach of the principle of proportionality.¹²⁸⁵

The GC decided on three grounds that the Contested Regulation should be annulled in so far as it affected Mr Kadi.¹²⁸⁶ Firstly, it considered the appropriate standard of judicial review in the case. The GC considered that, as long as the 1267 Committee failed to guarantee judicial protection, the GC had to ensure the 'full review' of the lawfulness of the Contested Regulation in light of fundamental rights.¹²⁸⁷ It noted that, since the ECJ handed down its decision: the UNSC had not established an independent, impartial body responsible for hearing requests for removal from the Consolidated List based on law and fact; removal from the Consolidated List still required consensus; and states that

¹²⁷⁹ *ibid.*, para 55.

¹²⁸⁰ Regulation (EC) No 1190/2008.

¹²⁸¹ *Kadi* (Decision of the GC) (n 163) para 57.

¹²⁸² *ibid.*, para 60.

¹²⁸³ Previously known as the CFI.

¹²⁸⁴ *Kadi* (Decision of the GC) (n 163), para 71.

¹²⁸⁵ *ibid.*, para 79.

¹²⁸⁶ *ibid.*, para 195.

¹²⁸⁷ *ibid.*, paras 126-127.

requested listing still decided what evidence may be disclosed.¹²⁸⁸ It, further stated, that the Focal Point and the Ombudsman do not safeguard the right to judicial review of decisions of the 1267 Committee.¹²⁸⁹ It held that the judicial review of the lawfulness of sanctions extends to the assessment of the facts and circumstances relied on as justifying the sanctions.¹²⁹⁰ It noted that it had not been provided with all of the material supporting Mr Kadi's addition to the Consolidated List and that, as a result, it could not review the lawfulness of the Contested Regulation and the applicant's right to judicial review was infringed.¹²⁹¹ It further commented that the freezing was arguably not a 'temporary precautionary' measure in circumstances where it had been in place for almost ten years.¹²⁹²

The GC then considered whether Mr Kadi's right of defence and right to effective judicial review had been breached. It said that his right to defend himself had been observed only in the strictest sense, noting that he was not given access to the evidence against him.¹²⁹³ As such, he was not in a position to mount an effective challenge to any of the allegations against him and the Contested Regulation was adopted in breach of his rights of defence.¹²⁹⁴ It further stated that, given the lack of information made available to him and the link between rights of defence and the right to effective judicial review, Mr Kadi did not have a right to effective judicial review and that because the relevant evidence was not furnished to the GC it was not in a position to review the lawfulness of the Contested Regulation.¹²⁹⁵

Finally the GC considered the principle of proportionality. It considered that Mr Kadi's right to property had been unjustifiably restricted because the Contested Regulation was adopted without any safeguard, which would enable him to put his case to the competent authorities, in circumstances where, as a result of general application and duration, the restriction of his property rights must be regarded as significant.¹²⁹⁶

Having considered the above issues the GC decided to annul the Contested Regulation, without considering Mr Kadi's other submissions.¹²⁹⁷

¹²⁸⁸ *ibid.*, para 128.

¹²⁸⁹ *ibid.*, para 128.

¹²⁹⁰ *ibid.*, para 143.

¹²⁹¹ *ibid.*, para 145.

¹²⁹² *ibid.*, para 150.

¹²⁹³ *ibid.*, paras 171-173.

¹²⁹⁴ *ibid.*, paras 177-179.

¹²⁹⁵ *ibid.*, paras 181, 183.

¹²⁹⁶ *ibid.*, paras 192-194.

¹²⁹⁷ *ibid.*, para 195.

The result of the GC's decisions is that Mr Kadi is not subject to economic sanctions at EU level. However, as was raised by the Commission during its submissions to the GC, Member States are still be required to freeze his assets as a result of their obligations as UN members.¹²⁹⁸

6.4 The Consequences of the Decisions for UN Targeted Economic Sanctions

As jurisprudential challenges to UN targeted economic sanctions, the court cases considered in this chapter offer an insight as to how such measures are being viewed by states and how they might develop going forward. Lord Bingham stated in 2007 in the *Al-Jedda* decision that 'the consensus of learned opinion' was that a state's obligations under article 103 of the UN Charter, which includes the implementation of binding UNSC resolutions, supersedes its obligation's under 'any other international agreement'¹²⁹⁹ and at that point consideration was not given to measures outside of international agreements. In contrast, both the UKSC and the European Courts were prepared to allow domestic and regional obligations to supersede UN obligations. This shows that there has been a fundamental change in how states view the UNSC and its resolutions.

It is interesting that both the ECJ and the UKSC very much focused on the clash between domestic or regional norms rather than on the hierarchy of norms with respect to UNSC measures. Given the focus of the courts on the domestic implementation of UN economic sanctions a more appropriate resolution may have been to consider domestic remedies for the reported breaches. This was the approach taken by the Human Rights Committee in the *Sayadi v Belgium* decision.¹³⁰⁰ The Human Rights Committee found that Belgium, in implementing targeted economic sanctions against the authors, had breached certain provisions of the ICCPR. However, it noted that Belgium was not competent to remove the individuals from the Consolidated List and, therefore, required instead that it 'do all it can to have their names removed from the list, as soon as possible, to provide the authors with some form of compensation and to make public the requests for removal.'¹³⁰¹ In fact, the Belgian Court of First Instance had handed down a decision previously with respect to the authors requiring that Belgium seek their removal from the Consolidated List as there was insufficient evidence to support their continued inclusion on it.¹³⁰² Compliance with the decision would, therefore, not require that

¹²⁹⁸ *ibid.* 100.

¹²⁹⁹ *Al-Jedda* (n 133), para 35.

¹³⁰⁰ *Sayadi v Belgium* (n 1167).

¹³⁰¹ *ibid.* para 12.

¹³⁰² *ibid.* para 4.3.

Belgium breach its obligations as a UN Member State to implement UN economic sanctions. The UK Supreme Court and the European Courts did not, however, restrict their decisions similarly, ultimately in both cases requiring that domestic implementing measures against the individuals who brought the cases be lifted. Domestic implementing measures are required with respect to the implementation of UN economic sanctions. However, finding such measures unlawful and lifting them has the unexpected consequence of circumventing a state's binding obligation to implement UNSC sanctions.

The courts argued that their decisions did not interfere with the compulsory nature of UN economic sanctions. However, the ultimate impact of the decision of the UKSC does not reflect this position. Firstly, the UKSC rejected the request of the Treasury that it place a stay on its decision in order that the Treasury might put suitable measures in place.¹³⁰³ Secondly, whereas EU Member States were still under a UN obligation to apply sanctions following the various Kadi decisions, once the UKSC decision was handed down there was no domestic mechanism for the appellants to remain subject to economic sanctions. As such, by overturning the domestic implementing measures the UKSC created a situation whereby until new implementing legislation could be drafted, economic sanctions, despite being required by the UNSC, were not being applied against the appellants. This judgment was therefore a fundamental challenge to the binding nature of economic sanctions. However, because it was denying that it was interfering with the UNSC measures the UKSC failed to consider the potential implication of its decision with respect to the creation of a situation whereby the UK was not implementing a binding UNSC resolution.

In the alternative, an examination of the ECJ's willingness to defer its decision offers a situation that is no more satisfactory in some respects. Although the decision was an attempt to adhere to the concept of balancing competing obligations, the ECJ acknowledged that the regime breaches the fundamental rights of those subject to sanctions and should therefore ultimately be overturned. Whilst this could be seen as a victory for the binding nature of UNSC resolutions it has significant consequences for those who are to remain subject to economic sanctions in breach of their fundamental rights. Therefore, this decision also challenges UN economic sanctions although it does so by questioning their interference with the fundamental rights of those sanctioned. In any event, ultimately the measures were overturned by the GC with the result that Member States are now prohibited from

¹³⁰³ *Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants) Her Majesty's Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant) R (on application of Hani El Sayed Sabaei Youssef) (Respondent) v Her Majesty's Treasury (Appellant) (No 2) [2010] UKSC 5.*

applying economic sanctions to Mr Kadi under the EU framework whilst still being required to do so under the UN framework.

De Burca suggests that *Kadi* decision could be used as a ‘striking example for other states and legal systems that may be inclined to assert their local constitutional norms as a barrier to the enforcement of international law’.¹³⁰⁴ It remains too early to see whether this prophecy will prove true, although the handing down of the UKSC decision does lend some weight to it. If, in fact, de Burca is correct, UN economic sanctions will no longer be universally implemented by states because some will be prohibited from doing so by their domestic courts. This attacks the legitimacy of UN economic sanctions, which is defined by Boyle and Chinkin as the belief of states that they must implement them because they are binding.¹³⁰⁵ UN economic sanctions would therefore become less effective as states implement them on an *ad hoc* basis. This may ultimately raise the ‘possibility that an autonomous judgment of a state about the binding force of a resolution is appropriate to destroy the peace-keeping system of the United Nations and to make it, in the end, ineffective and incapable of accomplishing its goals.’¹³⁰⁶

These challenges need to be addressed by the UNSC and a proposal for so doing will be made at the end of this chapter. However, prior to consideration as to how targeted economic sanctions might be amended in order that they remain effective in the future, the next section will examine why the courts decided as they did.

6.5 What Has Caused These Decisions?

This discussion relates not to the legal basis of the decisions taken by the courts but to the problems at the institutional level that have caused such decisions to be necessary. The absence of accountability with respect to UNSC economic sanctions has been highlighted previously in this thesis with respect to both Southern Rhodesia and Iraq.¹³⁰⁷ In 2005 The Vockler Report said that the UN urgently needed reform¹³⁰⁸ to address issues of accountability. However, this did not occur and these decisions arose as a reaction at domestic and regional level to deficiencies within UNSC targeted economic sanctions,

¹³⁰⁴ De Burca (n 1228).

¹³⁰⁵ Boyle and Chinkin (n 124), 24-25.

¹³⁰⁶ Karl Doehring, ‘Unlawful Resolutions of the Security Council and their Legal Consequences’ (1997) 1 Max Planck Yearbook of United Nations Law 91, 99.

¹³⁰⁷ See sections 2.4.2.1.5 and 3.6.1.

¹³⁰⁸ The Vockler Report (n 617), Volume I, 4.

which is due to the vast expansion of UNSC power without a corresponding expansion of accountability. Each element will be considered in turn.

6.5.1 Expansion of UNSC Power

The catalyst for the problems that are now prevalent with UNSC targeted economic sanctions, and that necessitated the judicial decisions discussed in this chapter, was the expansion of UNSC action into the legislative arena.

The UN is changing from a traditional inter-governmental organization to one increasingly entrusted with tasks of global governance.¹³⁰⁹ The UNSC has been at the heart of this development through its adoption of resolutions. A non-sanctions example of this development can be seen in the UN's responsibility for the administration of East Timor when the UN Assistance Mission in East Timor became the Transitional Administrator for the territory as it moved towards independence.¹³¹⁰ In acting as the Transitional Administrator, the UN had the right to legislate and represent the territory in foreign relations, including entering into agreements with other states.¹³¹¹ Wilde accepts that this arrangement meant that an institution of the UN was acting as the government of East Timor for this period.¹³¹²

Traditionally, economic sanctions were a collective action taken by states, albeit mandated by the UNSC, against other states that had acted contrary to desired norms. The decisions that were taken were, because they were taken by the UN as an institution, political in nature¹³¹³ and were widely debated by the UNSC both in their meetings and in less public *fora*.¹³¹⁴ Even as targeted economic sanctions began to emerge in the 1990's the measures in place were still based on sanctions being imposed on government officials¹³¹⁵ or members of opposition or rebel forces.¹³¹⁶

With UNSC Resolutions 1267 and 1373, however, the situation significantly changed to one in which it was not necessary to be linked to a territory in order to be targeted by economic sanctions but to be associated with a particular terrorist organisation or to engage in terrorist activity in some

¹³⁰⁹ Megret and Hoffman (n 1149), 314.

¹³¹⁰ UNSC Res 1272 (25 October 1999) UN Doc S/RES/1272, preamble, 3.

¹³¹¹ Wilde (n 1145), 185.

¹³¹² *ibid*, 187.

¹³¹³ David Kennedy (n 29), 910.

¹³¹⁴ Wood (n 886), 80-82.

¹³¹⁵ For example, economic sanctions against Iraq, UNSC Resolution 778 (n 539).

¹³¹⁶ For example, economic sanctions against UNITA in Angola, UNSC Resolution 864 (n 713).

guise. The ambit of these resolutions has been described as legislative in nature.¹³¹⁷ UNSC Resolution 1373 particularly has been singled out as meeting the criteria for legislation because it lays down legal obligations of a general character, which are unilateral in form, create or modify some element of a legal norm and the legal norm is general in question – that is it is directed to indeterminate addressees and capable of repeated application in time.¹³¹⁸

Whilst it could be argued that targeted economic sanctions are simply a more nuanced form of economic sanctions, and therefore come squarely within the already accepted powers of the UNSC, such a contention was not reflected in the commentary at the time. Andrea Bianchi states: '[n]o one could have reasonably anticipated at the time of drafting of the UN Charter that the subsequent practice of the organ would evolve to encompass a general law-making – and previously quasi-judicial – activity to face threats to the international legal order, the nature of which has changed remarkably since the mid 1940's.'¹³¹⁹ The ECJ in *Kadi* also found it necessary to consider whether sanctions could be taken against individuals within the EU framework, although it ultimately found that they could.¹³²⁰ States too did not conceive of targeted economic sanctions as being equivalent to sanctions against states, as demonstrated by Swedish Prime Minister Goran Perrson, who stated in 2001 that targeted economic sanctions taken under resolution 1267 created a 'conflict between principles that we have not previously seen.'¹³²¹

These resolutions have therefore pushed the UNSC into a legislative role.¹³²²

6.5.2 Absence of Suitable Institutional Development

The expansion of UNSC action is not of itself necessarily problematic. The UN and the UNSC are evolving and states are willing to evolve alongside them.¹³²³ Additionally, the exercise of a legislative function by the UNSC in creating targeted economic sanctions may be a necessary measure for the protection of international peace and security, most notably with respect to counter-terrorism.¹³²⁴ However, in the instance of targeted economic sanctions, power has evolved without the requisite

¹³¹⁷ Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 AJIL Law 175 at 176-177.

¹³¹⁸ *ibid.*

¹³¹⁹ Bianchi (n 1062), 883.

¹³²⁰ *Kadi* (Decision of the ECJ) (n 26), 163-227.

¹³²¹ Ove Bring, Per Cramer and Goran Lysen, 'Sweden' in Vera Gowlland-Debbas, *National Implementation of United Nations Sanctions A Comparative Study* (Martinus Nijhoff Publishers 2004) 509.

¹³²² The UNSC as a lawmaker is discussed in Boyle and Chinkin (n 124), 109-115.

¹³²³ Bring, Cramer and Lysen (n 1321), 509.

¹³²⁴ Bianchi (n 1062), 889.

institutional checks being put in place, or as described by De Burca there has been the ‘expansion of authority without concomitant accountability’.¹³²⁵

This concept of authority without accountability is not new. In 1958 it was stated that the voting procedures of the UN produced, in the circumstances of the Cold War, a situation in which ‘power is frequently divorced from responsibility’ and where ‘[v]oting becomes a substitute for negotiation rather than a measure of the amount of agreement reached or a final result when negotiation fails.’¹³²⁶

With respect to targeted economic sanctions, as discussed in the previous chapter,¹³²⁷ institutions are frequently created at the UN level. The creation of these institutions might be described as a ‘horizontal’ rather than a ‘vertical’ development. What is meant by this is that new institutions are performing identical or overlapping functions with other institutions that are already established within the UN system. For example, a new sanctions committee is created with every new sanctions regime and each of these committees performs tasks broadly similar to other sanctions committees.¹³²⁸ This proliferation of institutions needs to be addressed and it will be suggested in the next chapter that the most appropriate means of doing so is by the creation of a Sanctions Unit, as proposed during the Bonn-Berlin process.¹³²⁹ However, a key issue is that the proliferation of institutions has not resulted in the vertical development of institutions with the result that certain issues, such as the judicial review of UNSC targeted economic sanctions, which have been necessitated by the vertical expansion of UNSC power, are not adequately provided for at UN level. The resulting situation is that it is not clear, when the legal basis of targeted economic sanctions are called into question, where the ultimate authority lies.

6.6 Proposal for a System of Judicial Review at UN Level

There are many amendments that could be proposed with respect to UNSC targeted economic sanctions.¹³³⁰ Indeed it is suggested that the Sanctions Unit proposed during the Bonn-Berlin process¹³³¹ should also be implemented and should be used as a means to consolidate the various

¹³²⁵ De Burca (n 1228).

¹³²⁶ Clarence Wilfred Jenks, *The Common Law of Mankind* (Stevens 1958) 174.

¹³²⁷ See section 5.1.2.2.1.

¹³²⁸ See: <http://www.un.org/sc/committees/>

¹³²⁹ Section 7.2.

¹³³⁰ See for example the recommendations made in Geiss (n 175) and in Cameron Cameron. Report to the Swedish Foreign Office (n 1031).

¹³³¹ See section 4.3.1.3.

sanctions committees, monitoring bodies and other UN institutions that currently exist. However, whilst the consolidation of institutions would benefit the administration of UN economic sanctions, the most important problem currently prevalent with UNSC targeted economic sanctions, which could stifle their implementation going forward, is the absence of an effective judicial review system. This section discusses why such a system is necessary, at what level it should be implemented, and how it should operate.

6.6.1 Why Judicial Review of UNSC Targeted Economic Sanctions is Necessary

There are three reasons why a system for the judicial review of economic sanctions needs to be developed. Firstly, targeted economic sanctions were developed in order to prevent the breaches of human rights and mass humanitarian suffering that arose in some situations where sanctions were enacted against states. As targeted economic sanctions are now breaching the fundamental rights of those targeted, they are acting inconsistently with that aim. Allowing for the judicial review of sanctions would provide a solution to the criticism in chapter 5 that the due process rights of sanctions' targets are not currently being protected under the UN sanctions framework.¹³³² The UN and its Member States should therefore welcome the judicial review of targeted economic sanctions to ensure that they are behaving as intended and that any breaches of fundamental rights caused by sanctions are proportionate to the measures.

Secondly, an adequate system of judicial review would afford greater protection of the fundamental rights of those subjected to sanctions because such a system would seek to strike a balance between the implementation of the sanctions themselves and the rights of those sanctioned. Given the judicial decisions discussed in this chapter, the development of such a system may be critical to the continued implementation of targeted economic sanctions. These decisions are a precedent for domestic courts to find that because domestic implementing legislation does not protect the fundamental rights of those sanctioned it cannot be applied. The result of such a decision may be that the measures contained in the underlying UNSC resolutions are not being applied in some states. As Cameron has stated, without appropriate reform 'it is no exaggeration to say that the very legitimacy of the UN targeted sanction system is at stake.'¹³³³ For this reason, even those who are sceptical of the

¹³³² See section 5.2.3.2.2.

¹³³³ Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (n 129) 181.

extent to which the UNSC is bound by human rights must concede that, it would be advantageous if there was a procedure by which UN economic sanctions could be judicially reviewed because it would prevent domestic courts making such findings.¹³³⁴ A system of judicial review would force the UNSC to allow for appeal from the imposition of economic sanctions on the grounds of fundamental human rights.

Thirdly, the judicial review of economic sanctions would bring the current system closer to adherence with the doctrine of proportionality or, as it has previously been described in this thesis, to achieving balance between competing rights. With respect to targeted economic sanctions it has been stated that ‘this framework, built upon the UN Charter is, despite its deficiencies, the only one capable of coping with challenges such as international terrorism which exceed the reach of the nation-state.’¹³³⁵ However, commentators also agree that such measures should be proportionate,¹³³⁶ or in simple terms ‘the advantages associated with a regime [should] prevail over its disadvantages.’¹³³⁷ The judicial review of targeted economic sanctions would allow for an independent assessment of the balance between a given set of sanctions in achieving its aim and the interference with fundamental rights that such a system entails.

6.6.2 What Entity Should Undertake this Judicial Review?

Although it is clear that the establishment of a system of judicial review would be desirable, it remains unclear what entity should be responsible for the development of such a system. States and regional organisations have undertaken this task thus far and could continue to do so. Equally, the UNSC itself could take responsibility for the development of such a system. Finally, a parallel but independent entity could be established.

Although they have been criticised in this thesis for accepting competence to consider economic sanctions taken on the basis of binding UNSC resolutions, there is an element of practicality in domestic and regional courts reviewing such measures because there is currently no other means of such measures being reviewed. However, it is doubtful whether this situation should remain in place

¹³³⁴ See Nicolas Angelet, ‘International Law Limits to the Security Council’ in Vera Gowlland Debbas (ed) *United Nations Sanctions and International Law* (Kluwer Law International 2001) 71- 82, which argues that it is in the UNSC’s interest to ensure that its decisions are taken in accordance with international law.

¹³³⁵ Reich (n 1165).

¹³³⁶ Reisman and Stevick (n 56), 94; Geiss (n 175), 176.

¹³³⁷ Geiss (n 154), 176.

going forward. Firstly, as previously discussed,¹³³⁸ there is no legal basis for the domestic and regional courts to review binding UNSC resolutions.

Secondly, as de Burca states, it ‘seems inaccurate to say that the primary responsibility for harm caused when a wrongly-listed person’s property is sequestered lies with the state that implements a mandatory UNSC resolution rather than with the UNSC that wrongly named the person as a terrorist and mandated the sequestration.’¹³³⁹ This difficulty is amplified in the case of UNSC targeted economic sanctions because often information in relation to the measures is only available to the state that sought to have the person or entity designated and is not available to the domestic or regional courts.

Finally, leaving the judicial review of UNSC resolutions in the hands of regional and domestic courts has led to more questions than answers.¹³⁴⁰ For example, certain questions, such as to what extent is it permissible for targeted economic sanctions to interfere with the fundamental rights of those sanctioned, have not been adequately resolved by the domestic and regional courts and it is not, therefore, acceptable to leave the consideration of such issues in the hands of those courts.

The UNSC itself could also take responsibility for the judicial review of targeted economic sanctions by strengthening existing bodies such as the Focal Point or expanding the remit of the newly established Ombudsman. In some respects, such a decision would seem logical because the UNSC has gone beyond the bounds of its historical power into the legislative realm in developing systems of targeted economic sanctions and such an expansion of power should be followed by a corresponding expansion of responsibility for the constraint of such power. However, the UNSC is not a judicial organ nor does it exercise quasi-judicial functions.¹³⁴¹ Furthermore, looking to the doctrine of the separation of powers the underlying concept of that doctrine is that power must not be concentrated in one entity and must be subject to some control.¹³⁴² So any suggestion that the judicial review function should or could be performed by the UNSC must be dismissed.

However, with respect to UN economic sanctions, as has been discussed, the information required for the judicial review of sanctions is held at UN level by the UNSC, the Focal Point and multiple sanctions committees. This means that a review of such measures must happen at UN level. It

¹³³⁸ See section 6.2.1.

¹³³⁹ De Burca (n 1228).

¹³⁴⁰ De Wet (n 124), 161.

¹³⁴¹ Wood (n 886), 78.

¹³⁴² Bianchi (n 1062), 911.

has been suggested that the ICJ would be a suitable forum for the review of such measures.¹³⁴³ However, individuals do not have standing before the ICJ.¹³⁴⁴ The UNSC can request an advisory opinion on the legality of its actions but this measure is open to abuse in the context of economic sanctions because it is the UNSC, and not those who are targeted by economic sanctions, that must request the opinion.

It is clear that there is currently no entity that can suitably review the actions of the UNSC. It has been suggested that an independent administrative mechanism be established which would review the listing and de-listing decisions of the sanctions committees.¹³⁴⁵ However, such an institution does not significantly advance the position as it stands. Notably, such a system would not offer a person subject to economic sanctions the right to appeal such measures nor would it offer more transparency with respect to how certain persons and entities come to be designated.

For that reason, it is suggested that a new judicial institution be established for that purpose. The next section will outline the basis for the creation of such an institution.

6.6.3 The Basis for the Creation of a New Institution

The requisite elements of any effective remedy are that any decision be capable of being substantively reviewed by an organ, which: has a minimum level of independence and impartiality; is accessible to the individual; and has the power to indicate measures.¹³⁴⁶ The creation of an Economic Sanctions Tribunal ('EST') for this purpose would be an innovation for the UN and, as such, the legal basis for its creation must be considered.

As an initial point, it is conceded that the creation of an EST is premised on the fact that Member States, particularly the P-5, will be willing to establish such an institution. The EST would be established by the UNSC and it is accepted that it may be perceived to erode the powers of the UNSC with respect to the administration of economic sanctions. However, it is submitted that as more states become unable to fully implement UNSC resolutions, in light of domestic and regional judicial rulings, it will be within the UNSC's interest to modify the economic sanctions regime to ensure that such rulings cease and states are in a position to fully implement economic sanctions.

¹³⁴³ Doebling (n 1306), 100.

¹³⁴⁴ Article 34, Statute of the International Court of Justice (1945) 15 UNCIO 355.

¹³⁴⁵ Reich (n 1165).

¹³⁴⁶ Larrisa Van Den Herik, 'The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual' (2007) 20 Leiden Journal of International Law 797, 807.

There is no express power in the Charter for the creation of such a tribunal although the UNSC is entitled to establish 'subsidiary organs as it deems necessary for the performance of its functions.'¹³⁴⁷ There is, however, precedence for the creation of *ad hoc* tribunals by the UNSC, which are not subsidiary organs to it, because the UNSC has previously established both the ICTY¹³⁴⁸ and the ICTR¹³⁴⁹ by resolution. Shortly after its establishment, the ICTY had to deal with a challenge to its jurisdiction *inter alia* on the ground that it had not been lawfully established, as it was not within the UNSC's remit to establish such an institution.¹³⁵⁰ The ICTY held it had been lawfully established by the UNSC because, although the UN does not have express powers to create such institutions, the creation of the ICTY fell 'squarely within the powers of the Security Council under Article 41'.¹³⁵¹

This reasoning also applies to the establishment of the EST and is not affected by the intended permanency of the EST. The EST would use powers that the UNSC is already utilising now, in terms of reviewing economic sanctions implemented against individuals, but it would do so in a more appropriate manner because it would retain the right (currently exercised by individual UNSC members, as part of the de-listing process) to lift the economic sanctions against an individual where necessary. Because the UNSC is exercising these powers already they clearly fall 'squarely within the powers' of the UNSC and they would simply be devolved to the EST on its creation. As such, although not expressly provided for, the functional powers of the EST would not be *ultra vires* the UNSC.

Whilst the ICTY was prepared to accept that it was validly established by UNSC resolution this cannot be determinative of the UNSC's powers to create such institutions because as Alvarez indicates, it was predictable that the ICTY would have been prepared to accept that the UNSC had power to establish it, as otherwise it would have been effectively signing its own death warrant.¹³⁵² Subsequent practice has, however, added weight to the validity of the ICTY's decision. The ICTY has, as of January 2011, indicted a total of 161 persons, concluded proceedings against 124 with 37 cases ongoing.¹³⁵³ Since the *Tadic* decision the UNSC has also used its power to establish a tribunal again to establish the ICTR.

Furthermore, aside from the *Tadic* decision, the establishment of the EST would also fall within the implied powers of the UNSC set out in previous ICJ decisions. In the *Reparations Case*, the

¹³⁴⁷ Article 29, UN Charter.

¹³⁴⁸ Established under UNSC Res 808 (22 February 1993) UN Doc S/RES/808.

¹³⁴⁹ Established under UNSC Res 995 (8 November 1994) UN Doc S/RES/995.

¹³⁵⁰ *Tadic Case* (n 118).

¹³⁵¹ *ibid.*, para 36.

¹³⁵² Alvarez (n 1224), 246.

¹³⁵³ Statistics obtained from: <http://www.icty.org/> [last accessed: 21 January 2011].

ICJ held that the UN ‘must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties’.¹³⁵⁴ White comments that this range of implied powers will not be static, but will develop over time.¹³⁵⁵ The EST would comfortably fit within these criteria. Under Article 41 of the UN Charter the UNSC was given powers to take economic sanctions. Initially, the provisions of Article 41 were used to develop sanctions regimes targeted against states. This later developed to include sanctions targeted against individuals. However, the efficacy of such measures is now under threat as a result of recent judicial pronouncements by domestic and regional courts as explored in this chapter. In order to address the concerns raised by these courts, the UNSC has to ensure that, in so far as it is possible, the rights of those subjected to economic sanctions are being protected. As such, the creation of the EST, which would offer protection to the due process rights of those subjected to economic sanctions, is necessary to fulfil the provisions of Article 41 of the Charter.

The *Expenses Case* took a more expansive view of implied powers considering that, if an organ of the UN had any competence in a particular field, it was only where there was an express restriction on its competence that an organ would be precluded from having an implied power in that field.¹³⁵⁶ So, in considering the powers of the UNGA in relation to peace and security, it held that it was only precluded from action in relation to matters that are being already considered by the UNSC, which is provided for in Article 12 of the Charter.¹³⁵⁷

White has criticised the court in the *Expenses Case* for failing to consider whether the development of peacekeeping forces by the UNGA was ‘necessary for the fulfilment of the express provisions of the Charter’ as he suggests that proving the necessity of an action is a prerequisite to the UNSC having an implied power to take that action.¹³⁵⁸ Judge Hackworth, in his dissenting opinion in the *Reparations* case,¹³⁵⁹ also argued that implied powers must be necessary. The development of an EST does meet this requirement, as its development is necessary in order to ensure that measures taken under Article 41 are implemented by states.

In light of these decisions and the powers given to it in the Charter, there is no prohibition on the UNSC establishing the EST.

¹³⁵⁴ *The Reparations Case* (n 1120) 182-183.

¹³⁵⁵ White (n 102), 84.

¹³⁵⁶ *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (n 1141) 151 at 163.

¹³⁵⁷ *ibid.*

¹³⁵⁸ White (n 102), 86.

¹³⁵⁹ *The Reparations Case* (n 1120) 198.

6.6.4 An Independent Institution for Judicial Review

Although the EST would be an innovation for the UN its structure and methodology would not differ greatly from the way in which other court systems function. The EST would have two functions. Firstly, it would hear the appeals of individuals who had been subjected to targeted economic sanctions regimes. Secondly, it would answer questions submitted to it by the UN or its organs or by Member States relating to aspects of the legality of any UN economic sanctions regime.

Until it is clear how active the EST will be, the UNGA and the UNSC would, initially, elect three members from a list of persons nominated by the Member States. No two members of the tribunal may hold the same nationality, and in order to distinguish the EST from actions of institutions such as the sanctions committees, only one of its members should hold the nationality of a UNSC Member State. Should a state become a UNSC member whilst one of its nationals is sitting on the EST, and in so doing breach this limitation, the member of the tribunal in question will, at his own election, retire or be replaced for the period during which his state of nationality is a member of the UNSC.

The performance of its latter function – the consideration of questions of legality - will operate by means of written submissions from the entity making the request and from other interested parties as approved by the EST. With respect to the EST's appeal function the initial proceedings will be made by way of written submission, however, due to the difficulties that have plagued this area of targeted economic sanctions there will be an opportunity for oral pleadings and the decision will be handed down in person where possible.

Access to information has been a significant difficulty with respect to targeted economic sanctions with some designating states refusing to reveal themselves, or the sources of their information, beyond the sanctions committees. Cameron identifies this reluctance to share intelligence as the key reason why a judicial tribunal cannot practically be established for the purpose of dealing with targeted economic sanctions.¹³⁶⁰ However, states' reluctance should not be allowed to stifle the creation of an institution, which would ameliorate UNSC targeted economic sanctions, and the EST would function in a manner that should alleviate the concerns of states as far as is possible.

The EST would require all information held by states or the sanctions committees to be provided to it. The EST will be precluded from relying on a state's fears of national security with respect to the absence of information and if insufficient evidence justifying the sanctioning of an

¹³⁶⁰ Cameron, 'UN Targeted Sanctions. Legal Safeguards and the European Convention on Human Rights' (n 129) 210-211.

individual or entity is not provided the EST must lift the requisite economic sanctions. However, a clear indication must be given to the EST as to what information has been made public and what has not. The EST is precluded from revealing the latter information, although it may rely on it in its decision-making. This is to provide some protection for a state's national security when such protection is necessary whilst still allowing the material to be viewed and assessed by an independent body for the purpose of ensuring the protection of the rights of those sanctioned. This measure will provide increased transparency with respect to the application of targeted economic sanctions. Furthermore, a designating state will no longer be permitted to refuse the public revelation of its identity when it recommends that a person or entity be subject to sanctions.

In order for the appeal function to operate successfully the sanctions regimes themselves must also be amended. Currently, once sanctions are imposed against an individual or entity they remain in place unless challenged under the Focal Point procedure or considered by the sanctions committee during a periodic review of sanctions. In order for the appeals procedure to function targeted economic sanctions must be treated in their initial implementation as a temporary measure. Sanctions against an individual or entity would have to be put in place for an initial period of three months. Within that three-month period the target of those sanctions may appeal to the EST for an expedited review of his designation. If such an appeal is made the EST has a further three-month period, from the date of that appeal, to decide whether or not the target should remain subject to economic sanctions. This short timeframe is necessitated by the severe impact of targeted economic sanctions on those subject to them. It essentially requires states, the UNSC and other UN institutions be in a position to defend their action prior to subjecting a target to economic sanctions, which can then be submitted to the EST if necessary.

The EST will be entitled to more resources, including at the level of appointment of its members, should it prove necessary to ensure that cases can be heard and decisions delivered within this time-frame. Whilst the case is being heard sanctions will remain in place. Should a person not appeal within the initial three-month period they may appeal at a later date but such an appeal would not be heard on an expedited basis.

The reason for the establishment of the appeal procedure is to protect the due process rights of those subjected to targeted economic sanctions. As such, when sitting as an appeal tribunal, the EST is not obliged to lift sanctions solely on the basis of breaches of human rights, although it may find that a state is required to provide for a target's basic needs, such as food, water, shelter and clothing under the

humanitarian provisions in the relevant sanctions regime. The decision given may either terminate a person's designation or allow it to remain in place. Because finality is essential there will be no possible appeal from a decision of the EST.

Of course it is conceded that the development of the EST is – like other developments in UN economic sanctions history – reactionary. It is being proposed as a means of addressing the difficulties that now threaten to paralyse the development and implementation of targeted economic sanctions. However, it is hoped that the creation of the EST would ultimately result in less reactive policy-making with respect to UN economic sanctions as the EST would be a new body unburdened by previous decisions or by the political difficulties being experienced in the current system. The development of such a system would be a significant advancement for UN targeted economic sanctions. It would provide a balance between targeted economic sanctions as a necessary and legitimate tool of the UNSC and the rights of those subjected to such measures. Greater transparency with respect to targeted economic sanctions could be ensured by requiring public disclosure of the name of the state that seeks to have a person or entity designated together with full disclosure to the EST of the evidence supporting such designation. The EST could decide that the reasoning or some of the reasoning for the designation should be made public. Finally, by establishing an independent permanent tribunal, the domestic and regional courts would be relieved of their obligation to review sanctions and a more consistent body of precedent decisions might emerge.

Conclusion

This thesis has traced the development of UN economic sanctions from the establishment of the UN to date. The UN economic sanctions landscape is very different today than it was when the UN Charter was drafted, when the first cases of economic sanctions were adopted by the UNSC or even when Nelson Mandela was inaugurated in 1994, as reflected upon by Ronald Dellums in the quotation that opened this thesis.¹³⁶¹

The views of Dellums that economic sanctions could effect political change and could do so in a less destructive manner than armed conflict underline why such measures were included in the UN Charter and invoked by the UNSC in circumstances where military sanctions were unpopular amongst Member States. However, on reflection, and with the benefit of almost two more decades of UN economic sanctions, Dellums' comments now seem at best idealistic or at worst naïve and certainly wholly unrepresentative of the UN economic sanctions experience since then.

Firstly, a review of the economic sanctions regimes discussed in this thesis demonstrates various threats to the effectiveness of UN economic sanctions. For example, firstly, UN economic sanctions have from their very first case been widely breached by both states and corporate entities.¹³⁶² Secondly, in the case of Southern Rhodesia the purposes of economic sanctions were not achieved until more than a decade after binding economic sanctions were first imposed.¹³⁶³ Thirdly, in the case of both Haiti¹³⁶⁴ and Iraq¹³⁶⁵ economic sanctions were followed shortly by military sanctions, which demonstrates that the UN did not believe that the sanctions measures would be effective. Finally, states have not always proved capable of implementing sanctions. With respect to sanctions taken against states this was often because of the close relationship that a state had with the target of such measures.¹³⁶⁶ In the era of targeted economic sanctions, the issue that has arisen has been that some states do not have sophisticated banking systems that are capable of implementing targeted

¹³⁶¹ Dellums, n 1.

¹³⁶² See comments about breaches of sanctions against Southern Rhodesia in section 2.4.2.

¹³⁶³ Binding economic sanctions against Southern Rhodesia stretched from 1966 (UNSC Resolution 232 (n 123)) to 1979 (UNSC Resolution 460 (n 174)).

¹³⁶⁴ UNSC Resolution 940 (n 90), 4.

¹³⁶⁵ UNSC Resolution 678 (n 507), 2.

¹³⁶⁶ See section 2.4.2.1.3, which discusses Zambia's difficulties in implementing sanctions against Southern Rhodesia.

sanctions.¹³⁶⁷ These and other issues discussed in the thesis impact on the effectiveness of economic sanctions in prompting regime change.

Secondly, it is clear that economic sanctions can and do have significant humanitarian consequences. Both economic sanctions against states¹³⁶⁸ and those against individuals¹³⁶⁹ have significant implications for those subject to them. In fact, Simons has suggested that it was economic sanctions taken against Iraq, rather than military measures, that caused the most civilian deaths.¹³⁷⁰ Furthermore, when sanctions were taken against the FRY they were considered, by preserving the military *status quo*, to have given Serbia a military advantage over Bosnia, thus limiting the latter's right of self defence.¹³⁷¹ This, too, was likely to increase the number of people killed. For these reasons economic sanctions cannot be seen as a 'soft' alternative to military force, which result in fewer deaths.

Dellums suggested attributes of economic sanctions have been proven inaccurate by the research in this thesis. However, three key features of economic sanctions within the UN framework have become apparent throughout the thesis, which will be outlined in the next section before a final reflection on the future of UN economic sanctions.

7.1 The Key Features of the UN Economic Sanctions Framework

The three key features of economic sanctions regimes as adopted by the UNSC are: their reactionary nature; the UNSC's powers; and the role that states play.

7.1.1 The Reactionary Nature of UN Economic Sanctions

UN economic sanctions have, to date, developed in a wholly reactionary fashion. This fact underpins the discussion of economic sanctions throughout this thesis.

From the very outset the economic sanctions provisions contained in the UN Charter were reactive to the deficiencies that had been prevalent in the Covenant of the League of Nations.¹³⁷² The League of Nations had made recourse to economic sanctions by its Member States automatic when one of them resorted to war.¹³⁷³ In contrast, the UN Charter provides more nuanced provisions whereby the

¹³⁶⁷ See section 5.2.1.2.

¹³⁶⁸ See section 3.5.

¹³⁶⁹ See section 5.2.3.2.

¹³⁷⁰ Simons, *The Scourging of Iraq* (n 423) xviii.

¹³⁷¹ Horowitz (n 143), 173.

¹³⁷² Claude (n 151), 264-265.

¹³⁷³ Article 16, Covenant of the League of Nations.

UNSC must determine that there has been a threat to the peace, breach of the peace or act of aggression before deciding the most appropriate measures to be put in place, which may include economic sanctions.¹³⁷⁴

This reactionary development continued once the UNSC began to adopt economic sanctions regimes. The first binding economic sanctions taken by the UNSC, against Southern Rhodesia, were clearly reactionary as they were slowly tightened over time, (starting as non-binding measures,¹³⁷⁵ becoming partially binding sanctions,¹³⁷⁶ with further sanctions taken¹³⁷⁷ until they became fully comprehensive in 1976 more than a decade after they commenced¹³⁷⁸) as it became clear that more significant measures were needed. This piecemeal implementation of economic sanctions gave Southern Rhodesia the opportunity to modify its economy, so that it was less responsive to economic sanctions, before fully comprehensive sanctions were implemented.¹³⁷⁹ Southern Rhodesia also ceased repaying its debts when subject to economic sanctions, which also impacted on the effectiveness of economic sanctions.¹³⁸⁰ Furthermore, despite remaining in place for such a long period, only limited force was ever used against Southern Rhodesia, in the form of a port blockade at Beira.¹³⁸¹

When sanctions were taken against Iraq they were responsive to these deficiencies. They were comprehensive from the outset,¹³⁸² they were militant in their requirement that Iraq repay its debts, both those accrued prior to and during sanctions,¹³⁸³ and they moved quickly to military sanctions.¹³⁸⁴ Yet despite, or perhaps because of, these developments economic sanctions against Iraq also had a significant deficiency, in the form of the humanitarian crisis that resulted from them.¹³⁸⁵ Once more economic sanctions reacted to this crisis. Within the Iraqi sanctions regime, the Oil-for-Food Programme was created in an attempt to enable Iraq to use its own resources to ameliorate the humanitarian situation.¹³⁸⁶ As economic sanctions progressed, outside of the Iraqi regime, there was a move to targeted sanctions.

¹³⁷⁴ Articles 39 and 41, UN Charter.

¹³⁷⁵ UNSC Resolution 217 (n 43).

¹³⁷⁶ UNSC Resolution 232 (n 123).

¹³⁷⁷ UNSC Resolution 253 (n 314) and UNSC Resolution 277 (n 322).

¹³⁷⁸ UNSC Resolution 388 (n 327).

¹³⁷⁹ See section 2.4.2.2.

¹³⁸⁰ See section 2.4.2.2.3.

¹³⁸¹ UNSC Resolution 221 (n 294).

¹³⁸² UNSC Resolution 661 (n 44).

¹³⁸³ UNSC Resolution 687 (n 514), UNSC Resolution 778 (n 539).

¹³⁸⁴ UNSC Resolution 665 (n 493) and UNSC Resolution 678 (n 507).

¹³⁸⁵ See section 3.5.

¹³⁸⁶ UNSC Resolution 986 (n 555).

Targeted sanctions were established in order to avoid the collateral damage that had been prevalent in sanctions taken against states. They were initially targeted at government officials¹³⁸⁷ and other non-government regimes threatening peace and stability within a state.¹³⁸⁸ As terrorism became a significant item on the global agenda towards in the later years of the 1990s and there was an increased awareness that terrorist organisations did not necessarily have roots in any particular state, sanctions were targeted at individuals and entities that were connected to an illicit body but that did not have a connection to a named state.¹³⁸⁹ Terrorism, however, is not undertaken by a limited group of organisations nor always by individuals linked to a particular organisation. For this reason, the most recent incarnation of targeted economic sanctions has been those targeted at individuals engaged in some form of terrorist activity, ranging from committing acts of terrorism to the financing of terrorism.¹³⁹⁰

Alongside the development of targeted sanctions there has been increased institutional development with the establishment of the Focal Point¹³⁹¹ to deal with requests for delisting and the recent appointment of the Ombudsperson to monitor and investigate sanctions regimes.¹³⁹² These innovations aside, changes within the targeted economic sanctions regimes have been more incremental than previous developments. For example, whereas they were not initially required to do so, because of criticism that the listing procedures were too opaque, when they are requesting that a party be added to the Consolidated List, states are now obliged to indicate what information supporting that request can be made public.¹³⁹³ They are not as yet, however, obliged to reveal their own identities nor to allow any information be made public, unless they choose to make it public.¹³⁹⁴

The move to targeted sanctions resulted in the first attempt at the less reactionary development of UN economic sanctions, with the occurrence of the European Conferences.¹³⁹⁵ However, the recommendations of the Conferences were not implemented and economic sanctions continued to develop in a reactionary fashion.

The reactionary development of UN economic sanctions has to an extent been beneficial, as it has allowed the UNSC to respond to difficulties within the UN sanctions framework as they developed.

¹³⁸⁷ For UNSC Resolution 778 (n 539) imposed economic sanctions on government officials in Iraq.

¹³⁸⁸ For example UNSC Resolution 864 (n 713) imposed economic sanctions on the UNITA in Angola.

¹³⁸⁹ UNSC Resolution 1267 (n 164).

¹³⁹⁰ UNSC Resolution 1373 (n 164).

¹³⁹¹ UNSC Resolution 1730 (n 1010), see section 5.1.2.2.1.2.

¹³⁹² Kimberley Prost appointed under UNSC Resolution 1904 (n 962).

¹³⁹³ UNSC Resolution 1822 (n 962).

¹³⁹⁴ Press Conference on Activities of the Al-Qaida and Taliban Sanctions Committee, 14 July 2009.

¹³⁹⁵ See section 4.3.

However, in discussing her proposal that international law develops out of crisis, Charlesworth, as well as the ethical costs she identifies as discussed in chapter 1, indicates that such development leads to three problems of construction, which are also reflected in the reactionary development of UN economic sanctions. Firstly, she states that the ‘crisis model of international law... assumes that the elements of the crisis are uncontroversial, that the ‘facts’ are ripe for picking by analysts.’¹³⁹⁶ Throughout the development of UN economic sanctions the UNSC has, on occasion, assumed certain aspects of sanctions, which later prove to be untrue. The clearest example of Charlesworth’s contention occurred in the drafting of UNSC Resolution 1530, which followed the terrorist bombing of Madrid in 2004.¹³⁹⁷ The resolution attributes the bombing to ETA and requests that Member States act in accordance with UNSC Resolution 1530 to bring the perpetrators of the bombing to justice.¹³⁹⁸ However, it became clear that it was not ETA that perpetrated the bombing but Islamic terrorists.¹³⁹⁹ Given the significant consequences of economic sanctions, and the need for states implementing them to believe in their accuracy, the reliance on unfounded facts threatens the implementation of sanctions.

Secondly, Charlesworth indicates that the crisis model results in an issue being ‘[rediscovered] constantly and... [analysed] without building on past scholarship.’¹⁴⁰⁰ In being reactionary, economic sanctions do consider past sanctions regimes. However, this consideration is not generally extended beyond the next sanctions regime. For example, as mentioned previously in this section, following the difficulties caused by the slow move to comprehensive sanctions against Southern Rhodesia the UNSC responded by placing comprehensive sanctions against Iraq from the outset. Now, as discussed in chapter 5, the UNSC has begun to allow states or entities a period of time before sanctions are implemented against them, stated to be for the purpose of that state or entity rectifying its behaviour prior to the implementation of sanctions.¹⁴⁰¹ It appears, therefore, that the UNSC has failed to take a long-term lesson from the issues, such as economy modification, that arose in Southern Rhodesia, which may result in their reoccurrence in later sanctions regimes.

¹³⁹⁶ Charlesworth (n 2), 382.

¹³⁹⁷ UNSC Res 1530 (11 March 2004) UN Doc S/RES/1530.

¹³⁹⁸ *ibid.* 2-3.

¹³⁹⁹ Victoria Burnett, ‘7 Are Acquitted in Madrid Bombings’ *The New York Times* (New York 1 November 2007). For a discussion of Resolution 1530 and its implications see Therese O’Donnell, ‘Naming and Shaming: The Story of Security Council Resolution 1530 (2004)’ (2006) 17 EJIL 945.

¹⁴⁰⁰ Charlesworth (n 2), 384.

¹⁴⁰¹ See section 5.1.2.1.

Thirdly, Charlesworth submits that the crisis model may result in a focus on 'a single event or series of events' and therefore miss the larger picture.¹⁴⁰² This is true of the development of economic sanctions, which, whilst responding on a piece-meal basis to the various crises that have arisen, has failed to deal with the significant breaches of economic sanctions that have occurred. Breaches to economic sanctions, which have been experienced with every case of economic sanctions to date, damage the effectiveness of economic sanctions as they enable targets to avoid their most severe consequences and, therefore, such be punished. The UNSC has, on one occasion, cited a state's breaches of UN economic sanctions as the justification for adopting economic sanctions, when it imposed an arms embargo against Liberia.¹⁴⁰³ However, such action was novel at that time and has not been replicated in later sanctions episodes.

Whilst the reactionary development of economic sanctions has led to some worthwhile and necessary developments, the time has come for the UNSC to take a meaningful pause and assess its use of economic sanctions. Decisions as to how economic sanctions within the UN framework need to progress and how this should be achieved need to be made. And, unlike the recommendations made at the European Conferences, these decisions must be implemented.

7.1.2 The UNSC and Economic Sanctions

The second feature of economic sanctions that has become apparent throughout this thesis is the significant role played by the UNSC in their development. The section could have been titled the 'Institutional Framework of UN Economic Sanctions' because it is clear that one of the features of UN economic sanctions has been the development of numerous institutions responsible for making recommendations, monitoring the implementation of sanctions and liaising with states in relation to sanctions.¹⁴⁰⁴ The reason that it instead focuses on the role of the UNSC is that, despite the powers and functions that have devolved to institutions such as the Focal Point and the various sanctions committees and monitoring bodies, the key decisions, and thus the true power, remain with the UNSC.

The UNSC not only drafts all of the sanctions resolutions, thus deciding who should be subjected to sanctions and what format they should take, it also decides what role other institutions and entities have with respect to economic sanctions within the UN framework and it makes key decisions,

¹⁴⁰² Charlesworth (n 2). 384.

¹⁴⁰³ UNSC Resolution 1343 (n 710).

¹⁴⁰⁴ See section 5.1.2.2.1.

such as whether a target will remain subject to sanctions. Leaving these powers in the hands of the UNSC means that they are exercised by a small number of states and, because of the actions of the UNSC, that there is a lack of accountability within the UN sanctions framework.

A key issue for economic sanctions, as well as for any other collective action taken by the UNSC is the veto, as discussed in chapter one.¹⁴⁰⁵ In his key text on international organisations Claude espouses the view that '[t]he ideal setting for a collective security system is a world characterized by a considerable diffusion of power.'¹⁴⁰⁶ The veto, which leaves it open to the P-5 to quash any proposed economic sanctions, clearly prevents the diffusion of power within the UN system when dealing with economic sanctions. It allows each of the P-5 Member States to unilaterally block economic sanctions for political reasons when they so choose and to avoid ever being subject to such measures themselves. This difficulty with the veto powers was, of course, known when the UN was founded. Claude notes that, even in the absence of the veto power, by 1945 the US and the Soviet Union would have been immune from the effects of any economic sanctions that could be imposed on them because they possessed or were in the position to control such a significant percentage of the world's war-making resources.¹⁴⁰⁷ As such, the issue is not the veto powers themselves but their combination with an expansion of UNSC action beyond what was envisaged when the UN was founded.

In taking targeted economic sanctions the UNSC has strayed into the realm of legislator, a role that was never envisaged for it.¹⁴⁰⁸ However, whilst it has been prepared to legislate for its Member States in adopted economic sanctions, it has not been willing to bear responsibility for the repercussions of such measures. This is clear from the difficulties that have arisen with economic sanctions targeted at individuals. Even when given the opportunity, in *Kadi* (Decision of the ECJ),¹⁴⁰⁹ to rectify the information deficient that surrounded Mr Kadi's sanctioning, the UNSC failed to do so adequately with the result that the GC ultimately ordered he should no longer be sanctioned under the EU's implementing measures.¹⁴¹⁰ Equally, when dealing with sanctions against states, the UNSC has adopted wide-ranging sanctions regimes and given other institutions powers with respect to monitoring and reporting on breaches by states and other entities but has failed to use any of its powers to resolve such breaches.

¹⁴⁰⁵ See section 1.5.2.

¹⁴⁰⁶ Claude (n 151), 256.

¹⁴⁰⁷ *ibid.*, 273.

¹⁴⁰⁸ See section 6.5.1.

¹⁴⁰⁹ *Kadi* (Decision of the ECJ) (n 26).

¹⁴¹⁰ *Kadi* (Decision of the GC) (n 163).

The UN is a public institution, albeit an international one, as such, when it takes action there should be concurrent accountability for that action. The significant unfettered powers of the UNSC, an institution which has proved unwilling to be accountable for its actions and which operates in an opaque manner, has had repercussions for the UN in terms of recent judicial pronouncements on the domestic and regional implementation of economic sanctions.¹⁴¹¹ These decisions threaten the continued implementation of UN economic sanctions by states.

7.1.3 The Role of States

Throughout this thesis a wide variety of difficulties with UN economic sanctions have been identified. However, these difficulties only become apparent once economic sanctions have been implemented by Member States. As such, Member States play a key role in the outcome of UN economic sanctions regimes.

The implementation of economic sanctions by states has always been an important and a contentious issue. In Southern Rhodesia, where sanctions were widely breached, the US overtly breached economic sanctions by implementing domestic legislation to allow it to do so.¹⁴¹² At that time it was widely known, and outlined in various UNSC resolutions, that Portugal and South Africa were breaching sanctions.¹⁴¹³ Furthermore, commercial entities, particularly some of the key oil corporations were also breaching sanctions.¹⁴¹⁴ As sanctions progressed these breaches continued but less overtly. So, for example, it is known that during economic sanctions against Iraq some corporations that were otherwise legitimately exporting goods to Iraq under the Oil-for-Food Programme were providing the Hussein regime with kickbacks.¹⁴¹⁵ Equally, in the 1990's when arms embargos were in place in the Horn of Africa it is understood that weapons were flowing freely across the borders of Sudan, Ethiopia, Eritrea and Uganda.¹⁴¹⁶ These breaches impact on the effectiveness of UN economic sanctions and have yet to be prevented or restricted by the UNSC.

However, in analysing targeted economic sanctions it becomes clear that the Member States are tasked with a far greater role in relation to them. Whereas previously, when dealing with economic

¹⁴¹¹ See chapter 6.

¹⁴¹² Act of November 17 1971, Pub. L. No. 92-156. See commentary in 'The Rhodesian Chrome Statute: The Congressional Response to UN Economic Sanctions Against Southern Rhodesia', (1972) 58 Va L Rev 511 (n 246).

¹⁴¹³ UNSC Resolution 326 (n 341) and UNSC Resolution 328 (n 337).

¹⁴¹⁴ Bailey (n 275), 59.

¹⁴¹⁵ Cole Report (n 617); Duelfer Report (n 615); Gordon (n 679), 173-189.

¹⁴¹⁶ Prendergast (n 687), 2.

sanctions against states, Member States were simply required to ensure that sanctions were not breached, with respect to targeted economic sanctions Member States also have other roles. They are required to locate any assets of targeted individuals and entities being held on their territory and ensure that such assets are frozen. This assumes that states have the requisite capacity to achieve this. Specifically, it presumes that there is suitable banking and financial legislation in place, as it is at that level that assets will generally be frozen.¹⁴¹⁷ In freezing these assets Member States are frequently being asked to take significant measures against their own citizens, which they may not agree with, in circumstances where there has been no criminal charge taken against the target and his or its due process rights have not been respected.¹⁴¹⁸ Furthermore, targeted economic sanctions may place a burden on states that have to pay state benefits to a target once his assets are frozen, in order to ensure that their humanitarian obligations are fulfilled, and have to deal with extensive requests for exemptions from sanctions measures.¹⁴¹⁹ These requirements place an increased burden on Member States and they should be given further support by the UN.

Whilst Member States are obliged to implement economic sanctions measures, a key issue in their doing so in practice is whether they continue to have faith in the legitimacy and necessity of the measures. This faith has been eroded of late. Firstly, the recent judicial pronouncements call into question whether states and regional organisations can be required to implement UNSC resolutions that fail to protect fundamental rights.¹⁴²⁰ The immediate impact of these decisions may be that particular individuals or entities are not subject to UN economic sanctions within a particular Member State. However, the long-term impact may be more significant as the decisions may serve to erode Member States belief that UN economic sanctions are legitimate or that they are obligated to implement such measures.

Secondly, the inconsistent application of economic sanctions may colour Member State's views on the legitimacy of such measures.¹⁴²¹ Bianchi describes the decision-making policy of the UNSC as ad-hoc.¹⁴²² He notes that this ad-hoc development has prevented UNSC decisions being 'grounded and justified on a clear set of principles and objectives', which he suggests would make their

¹⁴¹⁷ Section 5.2.1.2.

¹⁴¹⁸ See *A. K. M v HM Treasury (No 1)* (n 26), para 36, 82, which discusses the UK's belief and request that a UK resident should be removed from the Consolidated List although he remained subjected to economic sanctions.

¹⁴¹⁹ See *A. K. M. Q & G v HM Treasury* [2008] EWHC 869 (Admin), para 42, which indicates one instance where in excess of 50 applications for exemptions from economic sanctions were made.

¹⁴²⁰ See chapter 6.

¹⁴²¹ See section 1.4.3.

¹⁴²² Andrea Bianchi, 'Ad-hocism and the Rule of Law' (2002) 13 EJIL 263 at 270. ('Bianchi, Ad-hocism and the Rule of Law')

efficacy and impact on international law much greater. He also comments that this impacts on the perceived legitimacy of UN economic sanctions.¹⁴²³ When UN economic sanctions against Zimbabwe were being considered there were indications that Member States felt that economic sanctions were being unjustly targeted at Zimbabwe. Mugabe had indicated his belief that UN economic sanctions are a neo-colonialist construct stating that they are put in place to 'force Western norms upon sovereign nations in an effort to continue or to renew colonialism.'¹⁴²⁴ This type of rhetoric was also clear during the UNSC debates on sanctions against Zimbabwe where the country's representative said that Zimbabwe was 'at peace with itself and its neighbours', but that the British and their allies had used their media to 'viciously portray Zimbabwe as a lawless, disorderly and undemocratic country' and that 'the current sanctions are basically an expression of imperialist conquest and no amount of propaganda or denial can ever wish this away.'¹⁴²⁵ Of course Zimbabwe, as the proposed subject of the economic sanctions, would have been anxious to resist such measures by any means that it could. However, other Member States also viewed the proposed sanctions suspiciously with the Russian delegate, Mr Churkin, submitting that to subject the individuals in the resolution to sanctions would be 'artificially elevating [the problems of Zimbabwe] to the level of a threat to international peace and security.'¹⁴²⁶

The reality is, of course, that economic sanctions have predominately been taken against former colonial states. However, this may not be attributable to any intention on the part of the UNSC to create a two-tier system of statehood but may rather simply be reflective of the vast number of states that were at one point colonised. Statistically, however, there is geographic disparity in relation to where there have been UN economic sanctions imposed. As Wallenstein and Johansson note, the UNSC has concentrated on conflicts in Africa, Europe and the Middle East in adopting resolutions.¹⁴²⁷ For example, out of the 1,400 UNSC resolutions dealing with conflicts to the year 2004, 400 dealt with Europe, 400 dealt with the Middle East/North Africa and 350 dealt with Africa proper whereas fewer than 200 dealt with Asia or the Americas.¹⁴²⁸ In terms of economic sanctions regimes, only the sanctions imposed against Haiti were outside of Europe, the Middle East or Africa. Whilst attributing this in part to the colonial links those states have with some of the P-5 members, they also focus on the

¹⁴²³ *ibid.* 270.

¹⁴²⁴ Hughes (n 154).

¹⁴²⁵ UNSC Verbatim Record (11 July 2008) UN Doc S/PV/5933.

¹⁴²⁶ *ibid.*

¹⁴²⁷ Wallenstein and Johansson (n 73), 24-25.

¹⁴²⁸ *ibid.* 24.

cultural, economic and geographic links between the P-5 members and the subjects of UNSC resolutions.¹⁴²⁹

However, the issue is not whether sanctions against a particular target can be justified, as indeed the proposed sanctions against Zimbabwe could have been justified,¹⁴³⁰ but whether states perceive the selection of targets as discriminatory or focused on a particular category of states. If UN Member States do perceive the selection of economic sanctions to be discriminatory this may impact on whether they support their adoption and implementation, as seen with the Russian criticism of the proposed measures against Zimbabwe.

It is clear that UN economic sanctions require the support of Member States if they are to be implemented. It is further clear that this support is currently under threat. For this reason the resolution of the difficulties outlined by national and regional courts and the concerns raised at the UNSC meeting in relation to proposed sanctions against Zimbabwe need to be addressed.

7.2 The Future of UN Economic Sanctions

The Volcker Report notes that the UN's 'ability to respond promptly and effectively to the responsibilities thrust upon it by the realities of a turbulent, and often violent, world... rests upon the Organization's credibility – on maintaining a widely-held perception among member states and their populations of its competence, honesty, and accountability.'¹⁴³¹ It is clear, in light of the judicial decisions discussed in this thesis that Member States are now concerned about the legality of economic sanctions. However, despite the flaws of UN economic sanctions outlined in this chapter and throughout this thesis, the UNSC is continuing to adopt economic sanctions regimes. Craven has commented that 'economic sanctions are no longer isolated or exceptional but rather commonplace and that this routinization has tended to bring with it a broad acceptance of the necessity and utility of sanctions'.¹⁴³² The more suitable progression of economic sanctions in a manner that addresses the criticisms currently being levelled at UN economic sanctions is therefore needed to order to ensure that they remain an effective measure. They must be responsive when necessary, implemented fully by states and have adequate institutional support. They must not cause unnecessary collateral damage. Decisions made with respect to their implementation, revocation and development must also be

¹⁴²⁹ *ibid.* 25.

¹⁴³⁰ Section 1.4.3; Hughes (n 154).

¹⁴³¹ The Volcker Report (n 617), Volume I, 1.

¹⁴³² Craven (n 669), 45.

consistent in order to bolster the political credibility of the UNSC and ‘establish a sense of predictability and fairness.’¹⁴³³ Like cases should be treated alike. Institutional change is necessary to ensure that UN economic sanctions meet these criteria. It is for this reason that the proposal for the creation of the EST was made in chapter 6. This, together with the creation of the Sanctions Unit suggested at the Bonn-Berlin process, would address the issues raised and strengthen UN economic sanctions.

To an extent the development of such institutions would take place in a reactionary fashion because they would be developed as a reaction to the difficulties currently apparent with UN economic sanctions. However, in some respects their development would not be reactionary because, as it would be a substantial long-term investment for the UN intended to resolve difficulties seen across all sanctions regimes to date, it would have to be carefully considered and structured and could not be unduly influenced by any particular sanctions regime. Their establishment would provide an opportunity for the UNSC to take a meaningful pause and assess its use of economic sanctions.

The EST would restore legitimacy to the use of economic sanctions by the UNSC in circumstances where domestic and regional courts as well as commentators have raised significant concerns about their use. It would focus on resolving the due process issues that have arisen, which would allow a balance to be struck between ensuring that economic sanctions are being implemented and protecting the human rights of those targeted by them. It would allow for a direct right of appeal for any individual who believes that he has wrongly been subjected to economic sanctions and should, therefore, ensure that economic sanctions are only implemented against the correct people. This would discourage further judicial decisions mandating the lifting of economic sanctions. Furthermore, the EST would be able to address concerns about the legality of UNSC economic sanctions, which may be useful if the limits of UNSC power with respect to economic sanctions are clarified in the future.

It must be noted that the EST will not address all of the difficulties experienced by those targeted by economic sanctions. Cameron identifies four categories of individuals who may seek to challenge their designation.¹⁴³⁴ Firstly, individuals who argue that they are wrongly identified by the sanctions committee. Secondly, individuals who state that they were rightly identified in the first instance but that they are now no longer engaged in the sanctioned behaviour. Thirdly, individuals who

¹⁴³³ Bianchi, *Ad-hocism and the Rule of Law* (n 1422), 271-272.

¹⁴³⁴ Cameron, ‘UN Targeted Sanctions. Legal Safeguards and the European Convention on Human Rights’ (n 129) 197.

argue that the behaviour cited is not one that should be sanctioned. Fourthly, individuals who argue that the sanctions in place against them are disproportionate. The EST would only deal with requests from individuals that come within the first three categories. It would not deal with the fourth category of individuals because the EST would only protect the due process rights of those targeted by economic sanctions and not other fundamental rights. As such, it would not consider whether an individual who it is established should legitimately be the target of economic sanctions is suffering unduly as a result of sanctions. The EST would be limited in this way because it is accepted that economic sanctions do restrict the rights of those subjected to them and that such restriction is necessary when economic sanctions are legitimately imposed in order for economic sanctions to be as effective as possible. However, it is important that a balance be achieved between meeting the aims of economic sanctions and ensuring that an individual's rights are protected. The EST would ensure this by allowing the targets of economic sanctions a means of appealing their subjection to sanctions on the grounds that they are not rightly the target of economic sanctions, whether by mistake or because they have changed their behaviour or indeed because the behaviour they are accused of should not be sanctioned. For those individuals arguing that economic sanctions have adversely impacted on them their only recourse would be through making a humanitarian application to the Sanctions Unit.

Aside from the limitations noted above it is also the case that the EST would not respond to problems with economic sanctions targeted broadly against states. In practice this is not a significant restriction for two reasons. Firstly, UNSC economic sanctions no longer usually take the form of broad sweeping sanctions against states. Secondly, if there is a resurgence of that type of economic sanctions states are in a stronger position than individuals with respect to having their views heard by other states and by the UNSC and thus having economic sanctions against them removed if they are not legitimate or if they become illegitimate over time.

The Sanctions Unit would be responsible for providing the UNSC with full administrative support in relation to UN economic sanctions. By and large the Sanctions Unit would consolidate the roles of the various institutions already in place, rather than performing any new function. It would replace the various sanctions committees and monitoring bodies as well as the role of the Ombudsman. It would be responsible for investigating proposed targets of economic sanctions to assess whether or not they should be subjected to such measures, providing any relevant information to the UNSC, which would decide whether in fact the proposed targets should be subjected to sanctions, and maintaining

lists of those that were targeted. It would monitor the implementation of sanctions and investigate potential breaches of sanctions by states and commercial entities. In investigating breaches of sanctions the Sanctions Unit would include consideration of the various means and ways in which individuals and entities subject to targeted economic sanctions hold their assets.¹⁴³⁵ The UNSC will need to address how such breaches are to be punished.

The Sanctions Unit will also deal with granting humanitarian exemptions in relation to economic sanctions regimes. Although it is not argued here that the UNSC is obliged to adhere fully to human rights in taking economic sanctions, the importance of humanitarian exemptions that work efficiently cannot be underestimated. Further work is needed in relation to humanitarian exemptions in the sanctions context. Too often it appears that there are no clear rules with respect to what should be considered as a suitable humanitarian exemption either in sanctions against states, as demonstrated by the difficulties experienced in Iraq,¹⁴³⁶ or with respect to targeted economic sanctions, as discussed in section 5.2.3.2.1. It is recommended that certain humanitarian organisations, such as the ICRC, be allowed a blanket humanitarian exemption to import goods for humanitarian purposes when a state is under sanction. Targeted economic sanctions too could benefit from further consideration of exempted activities, such as transportation for the purpose of obtaining food or medical supplies. Even if such advances are not made, by consolidating the decision making with respect to humanitarian exemptions in the Sanctions Unit the process should become quicker and more transparent as experience and knowledge develops in the Unit.

In terms of innovation the Sanctions Unit would collate material in relation to all sanctions in place, which would enable it to ensure that material is not duplicated and that it can be located and accessed where necessary. It would also allow for the creation of standing expert committees where necessary, which could focus on particular features of UN economic sanctions across all regimes rather than focussing on a single regime. The key benefit of the Sanctions Unit is that institutional memory can be built, which should limit the replication of mistakes previously seen in economic sanctions. It would, however, only make recommendations with decision-making resting with the UNSC.

The issue of state capacity, which was mentioned in this chapter and discussed in detail in chapter 5,¹⁴³⁷ remains outstanding. The process of building state capacity with respect to the

¹⁴³⁵ See section 5.2.2.

¹⁴³⁶ See section 3.6.2.

¹⁴³⁷ Section 5.2.1.2.

implementation of economic sanctions, against states and particularly against individuals, is going to be gradual and will need to be driven by the states themselves. It would not be feasible for example for the UN to insist that every state develops the type of sophisticated banking systems that jurisdictions like the US and UK have, which facilitate the implementation of economic sanctions. The Sanctions Unit can, however, play a role in assisting states to develop capacity where such assistance is requested.

By developing the Sanctions Unit, the UN is creating an institution that will have a wealth of information with respect to how Member States have implemented and monitored economic sanctions and any state in difficulty or requiring assistance will be able to approach a single institution in the knowledge that that institution possesses all of the relevant information to come to its aid. The Sanctions Unit will also, by combining the resources already available to the UN in relation to economic sanctions, be able to provide monitoring teams to go to states and investigate and supervise the implementation of sanctions. Furthermore, one of the standing expert committees that it develops could be tasked with supporting states in building capacity in relation to economic sanctions. This expert committee could provide support not only to states but also to the financial institutions within states that are responsible for freezing the financial assets of the targets of economic sanctions.

In contrast to the Sanctions Unit the EST, as outlined in detail in chapter 6, would be almost wholly innovative. It would replace the Focal Point, however, its role would be far more expansive than the role of the Focal Point, as it would decide whether an individual or entity should remain subjected to sanctions. It would, therefore, provide accountability for UN economic sanctions. By placing a limit on the actions of the UNSC, the EST would address the criticisms that too much power rests in its hands. The EST would also address the criticisms levelled at UN economic sanctions by both states and courts. Any target of economic sanctions, whether an individual a corporate entity or a member of a government or other regime, would be afforded a right to appeal their selection as a target, by being allowed to address the EST. It would provide greater transparency and should therefore reassure states of the legitimacy of economic sanctions.

The UN has now been adopting economic sanctions for almost fifty years with varying degrees of success. This thesis has traced the historical development of UN economic sanctions, it has outlined their current deficiencies and made recommendations for their future development. It is

tempting to allow economic sanctions to continue to develop in a reactionary fashion. However, it is clear that the time has come for some significant changes to UN economic sanctions in order that they can be usefully employed by the UNSC in the future.

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