

Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-Up Assessment of Long-Term Effects

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I. INTRODUCTION

The evolution of a more functional Security Council in the aftermath of the Cold War has brought about a sharp rise in the use of economic sanctions. Whereas such enforcement measures had only been resorted to on two occasions prior to 1990, they have since been imposed on fourteen states.¹ It is for this reason that the 1990s have rightly been described as the sanctions decade.²

Initially praised as the new method to guarantee effective Security Council action while avoiding the costs and risks of military engagement, it soon became evident that sanctions had a number of unintended side effects,³ predominantly a devastating impact on the civilian population. Most strikingly, albeit by no means exclusively,⁴ these consequences became conspicuously evident in Iraq, after the most severe economic sanctions employed in

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1. In the first forty-five years of its existence, the Security Council had only imposed sanctions on so-called pariah states Rhodesia (1966) and South Africa (1977). The sanctions against Rhodesia in particular were not very effective and consequently have not been strongly criticized for their inhumane impact. See Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to U.N. Economic Sanctions Programs*, 9 EUR. J. INT'L L. 86, 99–101 (1998). For a general overview of the sanctions imposed since the end of the Cold War, see, for example, N. D. WHITE, *KEEPING THE PEACE: THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 107–10 (1997).

2. See DAVID CORTRIGHT & GEORGE A. LOPEZ, *THE SANCTIONS DECADE: ASSESSING U.N. STRATEGIES IN THE 1990s* (2000).

3. It is noteworthy that third-party states, apart from experiencing adverse effects, may also profit significantly from a sanctions regime, which is also an unintended side effect.

4. On the devastating effects of sanctions on the population of Haiti, see Michael Reisman, *Assessing the Lawfulness of Nonmilitary Enforcement: The Case of Economic Sanctions*, 89 AM. SOC. INT'L L. PROC. 350, 351 (1995) (describing how "[t]he rest of the population . . . was, without exaggeration, starving to death").

Security Council history were implemented in response to Iraq's occupation of Kuwait.⁵

Today there is widespread consensus that the comprehensive sanctions regimes of the past amounted to a rather blunt instrument and that future sanctions must be designed more humanely.⁶ Building on these experiences, Security Council measures of the type adopted against Afghanistan in 1999⁷ and in response to the diamond trade in Liberia in 2001⁸ have arguably managed to strike a more tolerable balance between the necessary degree of effectiveness and the injuries imposed. Similarly, arms embargoes, albeit often flawed and ineffective,⁹ have generally proved selective enough to spare the population grave injury and have not featured an overall impact on the socio-economic structure of a state similar to that attributed to economic sanctions.¹⁰

Nevertheless, even with the development of these more recent measures—so-called “smart sanctions”¹¹ (discussed in greater detail in Part III.A)—the humanitarian impact of sanctions regimes demands further consideration given the extent of the current use of sanctions and the potential length of each regime. Sanctions are currently in force against Somalia, Rwanda, Sierra Leone, Liberia, the Democratic Republic of the Congo, the Ivory Coast, as well as against various non-state actors.¹² Increasingly, sanctions are also employed in order to deter terrorist activities.¹³ Such sanctions may have to remain in place over a significant period of time if they are to have a meaningful impact, given the complex goal of deterring terrorism. Moreover, the

5. The Security Council acted within days of Iraq's unlawful invasion of Kuwait on August 1, 1990. Through S.C. Res. 661, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/661 (1990), it imposed a comprehensive ban on trade and financial transactions with Iraq. According to U.N. estimates, this sanctions regime has caused more than 500,000 deaths—five times the death toll in Nagasaki and Hiroshima in 1945; see John Mueller & Karl Mueller, *Sanctions of Mass Destruction*, 78 FOREIGN AFF. 43, June 1999, at 43–54.

6. The Secretary-General has described these comprehensive sanctions regimes as a “blunt instrument.” *Supplement To an Agenda For Peace: Position Paper of the Secretary-General on the Occasion of the 50th Anniversary of the United Nations*, 50th Sess., ¶ 70, U.N. Doc. A/50/60, S/1995/1 (1995). However, with regard to more recent sanctions, in March 2001 the Secretary-General reported that the sanctions on Afghanistan had thus far had no adverse humanitarian impact. *Report of the Secretary-General on the Humanitarian Implications of the Measures Imposed by Security Council Resolutions 1267 (1999) and 1333 (2000) on Afghanistan*, U.N. SCOR, 56th Sess., U.N. Doc. S/2001/241 (2001).

7. S.C. Res. 1267, U.N. SCOR, 54th Sess., U.N. Doc. S/RES/1267 (1999).

8. S.C. Res. 1343, U.N. SCOR, 56th Sess., U.N. Doc. S/RES/1343 (2001).

9. CORTRIGHT & LOPEZ, *supra* note 2, at 181–201.

10. See, e.g., S.C. Res. 918, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/918 (1994) (imposing an arms embargo against Rwanda); S.C. Res. 997, U.N. SCOR, 50th Sess., U.N. Doc. S/RES/997 (1995); S.C. Res. 788, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/788 (1992) (against Liberia); S.C. Res. 733, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/733 (1992) (against Somalia).

11. On smart sanctions, see generally SMART SANCTIONS: THE NEXT STEPS—THE DEBATE ON ARMS EMBARGOES AND TRAVEL SANCTIONS WITHIN THE BONN-BERLIN PROCESS (Michel Brozoska, ed., 2001); LARRY MINEAR, ET AL., TOWARD MORE HUMANE AND EFFECTIVE SANCTIONS MANAGEMENT: ENHANCING THE CAPACITY OF THE UNITED NATIONS SYSTEM (1997), available at <http://www.watsoninstitute.org/pub/OP31.pdf> (last visited Feb. 28, 2005).

12. For an updated overview, see U.N. Security Council, *Security Council Sanctions Committees: An Overview*, at <http://www.un.org/Docs/sc/committees/INTRO.htm> (last visited Feb. 28, 2005).

13. See S.C. Res. 1267, *supra* note 7.

current debate over imposing sanctions against Iran to bring to a halt its nuclear program indicates that the time of relatively comprehensive sanctions may not be over. These are compelling reasons to continue to examine the humanitarian impact of economic sanctions and the adequacy of the humanitarian safeguards currently employed.

Since the sanctions regime against Iraq has come to an end, debate on the humanitarian impact of sanctions has quieted. By and large, it seems that the humanitarian safeguards developed mainly in light of the Iraq experience are now accepted as sufficient protection against the adverse consequences of economic enforcement measures. This inquiry aims to check this assumption. To this end, in Part II, I analyze the legal framework for the imposition of economic sanctions. I map out the legal obligations to which the Security Council must adhere when exercising its discretion in shaping sanctions under Chapter VII of the U.N. Charter.¹⁴ I argue that, though endowed with a wide margin of discretion, the Security Council is bound both by the principle of proportionality and by the right to life, which it must protect against arbitrary infringements.¹⁵

In Part III, I identify shortcomings in current sanctions regimes, focusing on the failure to account for their potentially devastating long-term impact, particularly when coupled with an unexpected crisis. I make three proposals to address these failings. The first is an automatic suspension clause that would suspend a sanctions regime in times of humanitarian emergency. The second is an institutionalized monitoring mechanism that, as a prerequisite for the functioning of all other humanitarian safeguards, monitors the humanitarian impact of sanctions on a regular basis. I argue that the Security Council is under a legal obligation to adopt these first two improvements (or their equivalent). Third, I draw attention to the long-term effects of economic sanctions, which have only rarely featured in the debate over how to design economic sanctions in a smarter way.¹⁶ I argue that as a matter of human rights policy, the Security Council should implement a mechanism for follow-up monitoring even after a sanctions regime has come to an end.

14. This question has already received significant scholarly attention. For an in-depth analysis, see, for example, Erika de Wet, *Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime*, 14 LEIDEN J. INT'L L. 277 (2001). The literature remains largely silent on the question of the Security Council's specific human rights obligations in framing an economic sanctions regime.

15. In focusing on the right to life, I do not intend to suggest that the Security Council is not also bound by other human rights obligations; however, for the purpose of determining the minimum standard to which the Security Council is bound, I focus primarily on this fundamental human right.

16. For example, H. P. Gasser describes the severe impact of sanctions, but then merely states that "[o]bviously, such effects will not automatically disappear at the end of the sanctions regime." H. P. Gasser, *Collective Economic Sanctions and International Humanitarian Law*, 56/4 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 871, 875 (1996). See also *Resolution IV of the 26th International Conference of the Red Cross and Red Crescent*, § F, ¶ 1, 310 INT'L REV. OF THE RED CROSS 73, 74 (Jan.–Feb. 1996), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList151/12316FB2B05FEA50C1256B660059A7CB>.

II. THE LEGAL FRAMEWORK FOR THE IMPLEMENTATION OF ECONOMIC SANCTIONS REGIMES

In order to develop a legal framework for the design and implementation of humanitarian safeguards, it is first necessary to analyze the legal regime applicable to the imposition of economic sanctions. In Part II.A, I outline the basic rules for the imposition of economic sanctions under the Charter of the United Nations. I then argue in Part II.B that the discretion of the Security Council, when resorting to enforcement measures under Chapter VII of the U.N. Charter, is limited by the principle of proportionality and the right to life.

A. The Imposition of Economic Sanctions: Basic Rules Under the Charter of the United Nations

The term "sanctions" is not mentioned in the U.N. Charter. Generally speaking, the term encompasses military as well as non-military measures. However, in the context of measures adopted by the U.N., the term usually refers to measures that entail economic as opposed to military coercion.¹⁷ Such measures may include, *inter alia*, the complete or partial interruption of economic relations; the imposition of arms embargoes, financial barriers, or travel-related restrictions; and the severance of diplomatic relations. Sanctions are a restorative rather than a preemptive tool, and their main purpose is to gain greater bargaining leverage. The mere threat of their imposition has at times proven more efficient than their actual employment.¹⁸ While the typical targets of sanctions are states, non-state entities and individuals have recently also become targets.¹⁹

The organ competent to authorize economic sanctions is the Security Council, which by virtue of Chapter VII may do so either by recommendation or through a binding decision.²⁰ Article 24(1) of the Charter stipulates the primary responsibility of the Security Council "for the maintenance of international peace and security." The only Charter authorization for economic coercion is found in article 39, which indicates that the Security Council may only impose sanctions for the restoration or maintenance of peace and

17. As a term of art, "sanctions" has been reserved by the Special Rapporteurs Roberto Ago and Gaetano Arangio-Ruiz to refer to centralized mechanisms employed by international organizations. Crawford has noted that the Security Council therefore does not impose sanctions in the strict sense because its powers are not described in terms of responses to internationally wrongful acts but to situations that it characterizes as threats or breaches of the peace. See James Crawford, *The Relationship Between Sanctions and Countermeasures*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 57 (Vera Gowlland-Debbas ed., 2001).

18. On positive incentives, see H. Dorussen & Jongryn Mo, *Mixing Carrots with Sticks: Evaluating the Effectiveness of Positive Incentives*, 38 J. PEACE RES. 251 (2001).

19. During the civil war in Angola, for example, the Security Council imposed sanctions on the National Union for the Total Independence of Angola ("UNITA"), an insurgent movement. S.C. Res. 864, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/864 (1993).

20. See U.N. CHARTER arts. 40, 41, 42.

security.²¹ Consequently, General Assembly Resolution 242 provides: "The purpose of sanctions is to modify the behavior of a party that is threatening international peace and security and not to punish or otherwise exact retribution."²² By contrast, article 16 of the Covenant of the League of Nations required the automatic application of economic enforcement measures in cases of aggression, which were determined by individual states.²³ However, the Security Council has taken some creative paths in defining what constitutes a threat to the peace, to the extent that a threat to the peace today arguably amounts to "whatever situations can command an affirmative vote of the Council."²⁴ As such, the scope of situations in which economic sanctions may be employed has grown significantly.²⁵

Non-military enforcement measures are regulated by article 41 of the Charter.²⁶ Article 41 has provided the basis for a variety of measures in addition to sanctions, such as the international criminal tribunals for the former Yugoslavia and Rwanda and the international administrations of Kosovo and East Timor in 1999.²⁷ The enumeration of measures in article 41 is not exhaustive and the individual measures may be resorted to alternatively as well as cumulatively.²⁸ The drafting history of article 41 evidences differing opin-

21. In light of article 39, the decision to implement sanctions must be based on the duty to ease and resolve conflicts. See *Observations of the Representative of China to the Security Council, Record of 4173d mtg.*, at 7, U.N. Doc. S/PV.4713 (2003). Although sanctions constitute enforcement measures, they have occasionally been instituted at the request of a government. See, e.g., S.C. Res. 713, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/713 (1991) (imposing arms embargo); Mark Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992), at 577-81.

22. G.A. Res. 51/242, U.N. GAOR, 51st Sess., ¶ 5, U.N. Doc. A/RES/51/242 (1997).

23. Article 16 provides:

Should any Member of the League resort to war in disregard of its covenants under articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

LEAGUE OF NATIONS COVENANT art. 16. Article 16 was only applied during the conflict between Italy and Ethiopia from 1935 to 1936. See F.P. WALTERS, II A HISTORY OF THE LEAGUE OF NATIONS 623-91 (1952). See generally DAVID MITRANY, THE PROBLEM OF INTERNATIONAL SANCTIONS (1925); CHARLES ANTHONY WOODWARD, SANCTIONS UNDER THE COVENANT (1936).

24. A. Lowenfeld, *Unilateral Versus Collective Sanctions: An American Perspective*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW, *supra* note 17, at 96-97.

25. See Vera Gowlland-Debbas, *U.N. Sanctions and International Law: An Overview*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW, *supra* note 17, at 1-2.

26. The use of force, however, can only be justified under article 42; see *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 35 (Oct. 2, 1995). See also YORAM DINSTEIN, WAR AGGRESSION AND SELF-DEFENSE 249 (2001).

27. S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (1993) (ICTY); S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994) (ICTR); S.C. Res. 1244, U.N. SCOR, 54th Sess., U.N. Doc. S/RES/1244 (1999) (Kosovo); S.C. Res. 1272, U.N. SCOR, 54th Sess., U.N. Doc. S/RES/1272 (1999) (East Timor).

28. See *Prosecutor v. Tadic*, *supra* note 26, ¶ 35. See also T. D. Gill, *Legal and Some Political Limitations on the Power of the U.N. Security Council to Exercise Its Enforcement Powers Under Chapter VII of the Charter*, 26 NETHERLANDS Y.B. INT'L L. 33, 48 (1995).

ions between the Soviet Union on the one hand, and the United States and the United Kingdom on the other, as to whether an exclusive catalogue of measures should be included.²⁹ The Western powers believed an exclusive catalogue would inappropriately limit the authority of the Security Council and the final Dumbarton Oaks proposals accordingly provided: "The Security Council should be empowered to determine what diplomatic, economic or other measures not involving the use of armed force should be employed to give effect to its decisions."³⁰

Throughout the drafting process, the efficiency of the Security Council was generally of primary concern, for which reason any linkage between the maintenance of peace and international law was rejected. The consensus was that it might unduly hinder the work of the Council to have to establish international legality before it could respond to a breach of the peace.³¹ Consider the statement of then U.S. Secretary of State John Foster Dulles in 1950:

The Security Council is not a body that merely enforces agreed law. It is law unto itself. If it considers any situation as a threat to the peace, it may decide what measures shall be taken. No principles of law are laid down to guide it; it can decide in accordance with what it thinks is expedient.³²

The end of the Cold War stalemate and the emerging character of economic sanctions as coercive measures employed for years at a time are new developments that have significantly weakened the once powerful efficiency argument. As early as 1948, the International Court of Justice ("ICJ") held that the "political character of an organ cannot release it from the observance of the treaty provisions established by the [U.N.] Charter when they constitute limitations on its powers or criteria for its judgment."³³ Moreover, in the Reparations Case, the ICJ went on to specify that "the rights and duties of an entity such as the [United Nations] must depend upon its purposes and functions as specified or implied in its constituent documents and developed

29. Jochen Frowein & Nico Krisch, *Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 701, 737 (Bruno Simma et al. eds., 2d ed. 2002).

30. Doc. 1, G/1, 3 U.N.C.I.O. Docs. 15 (1945).

31. Rüdiger Wolfrum, *Chapter I: Purposes and Principles*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 39, 43 (Bruno Simma et al. eds., 2d ed. 2002). According to Kelsen, the purpose of enforcement action "is not to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law." HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 294 (1950).

32. JOHN FOSTER DULLES, *WAR OR PEACE* 194-95 (1950). See also Statement of the Rapporteur, Joseph Paul Boncour, at the opening meeting of the committee entrusted with the drafting of the enforcement provisions of the Charter: "Wide freedom of judgment is left [to the Council] as regards the moment it may choose to intervene and the means to be applied, with the sole reserve that it should act 'in accordance with the purposes and principles of the Organization.'" Doc. 134, III/3/3, 12 U.N.C.I.O. Docs. 572 (1945).

33. Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), 1948 I.C.J. 64 (May 28).

in practice.”³⁴ At a time when the efficiency of the Security Council is no longer reduced to a minimum and the significance of human rights norms and humanitarian law principles is widely recognized at the international level, it would be anachronistic to grant unlimited power to any international organ.³⁵ Consequently, the Security Council, which by virtue of article 24 of the Charter bears primary responsibility for the maintenance of international peace and security, cannot have the discretionary power to disregard one of the foundational principles of a peaceful international order: the rule of law.³⁶

Accordingly, international jurisprudence has held that “neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).”³⁷ In its 1980 Advisory Opinion on the Interpretation of the 25 March 1951 Agreement Between the World Health Organization (“WHO”) and Egypt, the ICJ emphasized the legal personality of the U.N. under international law: “International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”³⁸ Similarly, Judge Weeramantry concluded in the Lockerbie Case that “[t]he history of the United Nations Charter thus corroborates the view that a clear limitation on the plenitude of the Security Council’s powers is that those powers must be exercised in accordance with the well-established principles of international law.”³⁹

B. Limits on Security Council Discretion When Imposing Enforcement Measures Under Chapter VII

The Security Council has a wide margin of discretion in framing enforcement measures under Chapter VII of the U.N. Charter. The problem of striking an acceptable balance between the effectiveness of a sanctions regime and its adverse side effects lies at the heart of the smart sanctions debate. While it is widely accepted today that the Security Council is not entirely unbound by law, it remains to be seen to what extent the Security Council is specifically obliged to incorporate humanitarian safeguards in designing sanctions regimes. I argue that at least the outer limits of its discretion are set by the

34. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 180 (Apr. 11).

35. It is noteworthy that the existence of legal constraints on the activities of the Security Council remains “independent of the question as to whether there is third party review of such activities.” Gowlan-Debbas, *supra* note 25, at 14.

36. Gasser, *supra* note 16, at 881.

37. *Prosecutor v. Tadic*, *supra* note 26, ¶ 28.

38. *Interpretation of the Agreement of 25 March 1991 Between the WHO and Egypt*, Advisory Opinion, 1980 I.C.J. 73, 89–90 (Dec. 20).

39. *Case Concerning Questions of Interpretations and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, Request for the Indication of Provisional Measures (*Libya v. U.S.*), 1992 I.C.J. 114, 175 (Apr. 14) (Weeramantry, J., dissenting).

principle of proportionality, fundamental human rights, and basic principles of international humanitarian law.

1. *The Proportionality Principle*

The U.N. Charter contains no explicit requirement to adopt Chapter VII measures in any specific order.⁴⁰ In theory, then, the Security Council can resort directly to the more severe measures contained in article 42 of the Charter and use force without having employed the less coercive means provided for under articles 40 and 41. However, the Security Council, when resorting to enforcement measures of any nature, is bound by the principle of proportionality,⁴¹ which is commonly inferred from the reference to "necessary" measures in articles 40 and 42.⁴² By stipulating that military action shall only be undertaken if measures under article 41 of the Charter prove inadequate, article 42 indicates a systemic intention of the Charter to minimize the impact of enforcement measures as much as possible.⁴³ The principle of proportionality thus forms part of the positive law of the Charter and measures employed under Chapter VII that proved to be manifestly out of proportion to their goals would violate the Charter.⁴⁴

The proportionality principle is twofold: that the measures adopted be necessary, and that they provide an adequate response to the behavior of the target state.⁴⁵ From this principle, it follows that the Security Council should only impose extreme measures such as sanctions after exhausting all other measures, in particular those outlined in article 40 of the Charter.⁴⁶ The Security Council should notify the target state before the implementation of sanctions, as

40. Gowlland-Debbas, *supra* note 25, at 8.

41. Article 51 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts stipulates that "[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question." U.N. GAOR International Law Commission, 56th Sess., Supp. No. 10, Art. 51, U.N. Doc. A/56/10 (2001).

42. Article 42 of the Charter stipulates: "Should the Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." U.N. CHARTER art. 42. Irrespective of this specific provision, the proportionality principle is a generally accepted principle in international law with particular relevance in the field of countermeasures. See Jost Delbrück, *Proportionality*, in III ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1140, 1143 (Rudolph Bernhardt ed., 1992).

43. U.N. CHARTER arts. 41, 42.

44. Frowein & Krisch, *supra* note 29, at 753. See also Matthias J. Herdegen, *The "Constitutionalization" of the U.N. Security System*, 27 VAND. J. TRANSNAT'L. L. 135, 157 (1994). See generally Enzo Cannizzaro, *The Role of Proportionality in the Law of International Countermeasures*, 12 EUR. J. INT'L L. 889, 909 (2001).

45. Albrecht Randelzhofer, *Article 51*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 788, 805 (Bruno Simma et al. eds., 2d ed. 2002).

46. *Declaration on the Basic Conditions and Standard Criteria for the Introduction and Implementation of Sanctions and Other Coercive Measures: Revised Working Paper*, U.N. GAOR, Special Comm. on the Charter of the U.N. and on the Strengthening of the Role of the Organization, ¶ 1, U.N. Doc. A/AC.182/L.114/Rev.1 (2004) (*prepared by the Russian Federation*) [hereinafter *Declaration on Sanctions Criteria*].

the imminent threat of a sanctions regime may itself be sufficient to alter the state's behavior.⁴⁷

To fulfill the requirement of necessity, a sanctions regime must be designed so that it can reasonably be expected to achieve its objective: To alter the behavior of the target entity to bring it in compliance with legal prescriptions.⁴⁸ As such, sanctions must be directed at the actor responsible for the disturbance of international peace, and they must create an appropriate and effective degree of coerciveness.⁴⁹ This latter requirement can be deduced from article 1(1) of the Charter, which empowers the U.N. to "take effective collective measures for the prevention and removal of threats to the peace."⁵⁰ Since the Security Council, by virtue of article 24(2) of the Charter, is bound to act in accordance with the purposes and principles of the U.N., effectiveness arguably functions as one of its guiding principles in imposing coercive measures under Chapter VII.⁵¹

At first sight, viewed only from the perspective of their coercive effect, it would seem that the most comprehensive sanctions also constitute the most effective ones, and that any inclusion of humanitarian safeguards would ipso facto limit their effectiveness. However, there are strong indications that the opposite is true. Recent experiences indicate that sanctions that primarily target the population of a country, rather than the regime itself, are largely ineffective as third-party nations sympathizing with the suffering population tend to circumvent trade restrictions.⁵² Accordingly, a U.N. study suggests that "[d]ecisions to reduce the suffering of children or minimize other adverse consequences can be taken without jeopardizing the policy aims of sanctions."⁵³

It is also relevant whether we assess the effectiveness of a sanctions regime solely on the basis of its immediate coercive impact, or whether we take its long-term impact into account. In the end, the purpose of invoking economic enforcement measures is to maintain international peace. This sug-

47. *Id.* ¶ 4.

48. Georges Abi-Saab, *The Concept of Sanctions in International Law*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW, *supra* note 17, at 29, 39; *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights: Working Paper*, U.N. ESCOR, Sub-Comm. on the Promotion and Protection of Hum. Rts., 52d Sess., ¶ 46, U.N. Doc. E/CN.4/Sub.2/2000/33 (2000) (prepared by Marc J. Bossuyt).

49. Cortright and Lopez have concluded that "[o]nly in Libya did sanctions appear to accomplish their objectives without military confrontation." CORTRIGHT & LOPEZ, *supra* note 2, at 2. See generally HOSSEIN G. ASKARI ET AL., *ECONOMIC SANCTIONS: EXAMINING THEIR PHILOSOPHY AND EFFICACY* (Praeger 2003); *THE UTILITY OF INTERNATIONAL ECONOMIC SANCTIONS* (David Leyton-Brown ed., 1987).

50. U.N. CHARTER art. 1, ¶ 1.

51. G.A. Res. 51/242, U.N. GAOR, 51st Sess., Annex II, ¶ 2, U.N. Doc. A/RES/51/241 (1997) ("[T]he Council must act in accordance with Article 24, paragraph 2, of the Charter.")

52. In general, hopes that the suffering imposed will motivate regime change have proven unrealistic. See *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights: Working Paper*, *supra* note 48, ¶¶ 48–51.

53. MINEAR, *supra* note 11, at v. Nevertheless, smart sanctions, while designed to avoid such adverse consequences, still need to be effective in order to fulfill the requirement of necessity. For example, the denial of visa and residency permits to members of abusive elites seems to be a measure smart enough to avoid side effects on the population, but its efficiency vis-à-vis the change of governmental behavior is doubtful and arouses suspicions of a punitive purpose.

gests that in assessing the effectiveness of sanctions *ex ante*, we should consider their long-term effects in addition to their immediate coercive impact. Given their complex and often partially or wholly unforeseeable side effects, sanctions can seriously undermine the maintenance of international peace. For example, the aftereffects of comprehensive sanctions regimes can contribute to state failure.⁵⁴ Such failed states are typically safe havens for international terrorists and have been identified as an imminent threat to international peace and security.⁵⁵ Unsurprisingly, many of the states identified as failed or failing states, such as Yugoslavia,⁵⁶ Haiti,⁵⁷ and Sierra Leone,⁵⁸ have experienced severe economic dislocation as a consequence of economic sanctions. Thus, viewed from a long-term perspective, humanitarian safeguards protecting against severe, adverse side effects can actually increase the effectiveness of a sanctions regime in promoting international peace.

The proportionality principle also requires that sanctions constitute an adequate response to the targeted state's behavior. To this end, it is necessary that the advantages associated with a regime prevail over its disadvantages.

54. On failed states, see Robin Geiss, *Failed States: Die Normative Erfassung Gescheiterter Staaten* (Jan. 2005) (unpublished manuscript, on file with author); Gerald B. Heldman & Steven R. Ratner, *Anarchy Rules: Saving Failed States*, 89 FOREIGN POL'Y 3 (1993); Daniel Thürer, *Der Wegfall effektiver Staatsgewalt: "The Failed State,"* in DER WEGFALL EFFEKTIVER STAATSGEWALT: "THE FAILED STATE" 9 (C. F. Müller Verlag ed., 1995); Matthias Herdegen, *Der Wegfall effektiver Staatsgewalt im Völkerrecht: "The Failed State,"* in DER WEGFALL EFFEKTIVER STAATSGEWALT: "THE FAILED STATE," *supra*, at 49.

55. German Foreign Minister Joseph Fischer explicitly referred to failed states as safe havens for terrorist organizations in a speech delivered before the U.N. General Assembly on November 12, 2001. *Statement by the Deputy Chancellor and Minister for Foreign Affairs of Germany to the General Assembly*, U.N. GAOR, 56th Sess., 48th plen. mtg., at 11, U.N. Doc. A/56/PV.48 (2001). See also *Letter dated 3 July 2002 from the Chairman of the Security Council Committee established pursuant to Resolution 751 (1992) Concerning Somalia Addressed to the President of the Security Council*, U.N. SCOR, ¶ 34, U.N. Doc. S/2002/722 (2002) (noting that "Somalia's characteristics as a failed state make it attractive for hard-to-trace financial transactions and transshipment of goods and personnel At least one remittance company named Al Barakat has come to Interpol notice on suspicion of financing terrorism.").

56. After an arms embargo had been imposed against the Federal Republic of Yugoslavia in September 1991 in response to the war between Serbia and Croatia, comprehensive economic sanctions were instituted in May 1992 in response to the war in Bosnia-Herzegovina. See S.C. Res. 713, *supra* note 21 (arms embargo); see also S.C. Res. 757, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/757 (1992) (economic sanctions).

57. After a fuel and arms embargo had already been imposed against Haiti by virtue of S.C. Res. 841, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/841 (1993) and S.C. Res. 873, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/873 (1993), a comprehensive sanctions regime was instituted by S.C. Res. 917, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/917 (1994). S.C. Res. 944, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/944 (1994), which set out the conditions for the termination of the sanctions regime—i.e., Aristide's return to power—did not provide for any kind of follow-up procedures. With regard to the economic and humanitarian impact of the sanctions imposed against Haiti, see ELIZABETH GIBBONS, *SANCTIONS IN HAITI: HUMAN RIGHTS AND DEMOCRACY UNDER ASSAULT* 10 (Ctr. for Strategic and Int'l Studies, Wash. Papers No. 177, 1999).

58. In August 1997, the Economic Community Of West African States (ECOWAS) imposed comprehensive sanctions—allowing humanitarian assistance only upon approval by a special committee—against Sierra Leone in response to the military coup in May 1997. In October, the Security Council, by virtue of S.C. Res. 1132, U.N. SCOR, 52d Sess., U.N. Doc. S/RES/1132 (1997), simultaneously imposed an arms and oil embargo as well as travel sanctions on members of the junta. With regard to the severe humanitarian impact, see *Interim Report of the Inter-Agency Mission to Sierra Leone*, U.N. SCOR, 53d Sess., U.N. Doc. S/1998/155 (1998).

Given the character of economic sanctions as complex measures commonly employed over a significant period of time, the chief problem in assessing their adequacy lies in the fact that circumstances change over time. An initially modest enforcement measure may turn into a devastating form of coercion if circumstances in the target state change in particular ways, severely distorting the adequacy of the measure. The Security Council is endowed with a wide margin of discretion in ensuring the adequacy of a sanctions regime during the entire length of its imposition. But, if the omission of certain humanitarian safeguards would ipso facto render a sanctions regime inadequate (and thus disproportionate), the proportionality principle would require the Security Council to include such safeguards.

2. Human Rights Principles

In addition to the proportionality principle, fundamental human rights principles also set the outer limits of the Security Council's discretion in employing sanctions. First and foremost, the Security Council is bound by *jus cogens* norms, including the right to life. On a formal level, the Council is bound by *jus cogens* as a matter of the extent of the powers granted to it. In conferring primary responsibility for the maintenance of international peace on the Security Council, the members of the U.N. agreed that the Council acts on their behalf. Since the member states are all bound by norms of *jus cogens*, and they cannot have transferred more power than they themselves are permitted to exercise, the Security Council must also be bound by *jus cogens*.⁵⁹ The language of article 24(1) of the Charter, by virtue of which member states "confer" primary responsibility for the maintenance of international peace on the Security Council, supports this conclusion. One might argue that, strictly speaking, this conclusion only supports the Council's obligation to abide by peremptory human rights norms restricting the powers that the member states conferred to the U.N. at the time of its establishment in 1945, when the International Bill of Human Rights was nonexistent and states were only bound by human rights norms that had achieved customary law status. However, Erika de Wet has convincingly shown that the delegation of powers to the U.N. by its member states should be understood as an ongoing interaction, such that the delegated powers continue to be limited by developments in *jus cogens*.⁶⁰

The relevance and force of *jus cogens* with respect to the Security Council is also discernible in the U.N. Charter. Under article 24(2) of the Charter, the Security Council is bound to act in accordance with the purposes and principles of the United Nations. These principles are set forth in articles 1 and 2 of the Charter, and include the promotion of respect for human rights in

59. Gill, *supra* note 28, at 82.

60. ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 189 (2004).

article 1(3). These purposes and principles are formulated broadly and cannot be assumed to be synonymous with specific rules of international treaties and general international law.⁶¹ However, the purposes and principles of the United Nations are not entirely incapable of definition.⁶² Specifically, as they relate to human rights, they can be understood in light of *jus cogens* norms, as well as in view of the International Bill of Human Rights.⁶³

As basic statements of our most fundamental human values, those human rights norms that have acquired *jus cogens* status directly inform the purposes and principles of the United Nations.⁶⁴ The Security Council is, at a minimum, bound to respect the right to life, which is not only non-derogable under the International Covenant on Civil and Political Rights ("ICCPR"),⁶⁵ but which has also acquired *jus cogens* status.⁶⁶ In support of this position, the recently submitted U.N. working paper on the criteria for imposing sanctions stipulated that future sanctions must not create a situation in which fundamental human rights are violated.⁶⁷

With regard to the more specific rights spelled out in the ICCPR, the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), and the Universal Declaration of Human Rights ("UDHR"), the Security Council's legal obligations are less clear, as the U.N. has not yet become a party to any of the human rights treaties currently in force.⁶⁸ Nonetheless, numerous considerations weigh in favor of adherence to these treaties.

61. Gill, *supra* note 28, at 73.

62. *Id.* at 135.

63. The International Bill of Human Rights is comprised of the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess. 1st plen. mtg., at 71, U.N. Doc A/810 (Dec. 10, 1948); the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; and the International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]. See also THE INTERNATIONAL BILL OF RIGHTS (Louis Henkin ed., 1981).

64. Gowlland-Debbas, *supra* note 25, at 16. See also *General Comment* 8, U.N. ESCOR, 17th Sess., U.N. Doc. E/C.12/1997/8 (1997). Furthermore, many of the fundamental human rights constitute norms of *jus cogens*, i.e., peremptory norms of international law as defined in article 53 of the Vienna Convention on Treaties from which no derogation is allowed. See, e.g., THEODOR MERON, HUMAN RIGHTS LAWMAKING IN THE UNITED NATIONS: A CRITIQUE OF INSTRUMENTS AND PROCESS 178-202 (1986).

65. See MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 115 (1987).

66. W. Paul Gormley, *The Right to Life and the Rule of Non-Derogability: Peremptory Norms of Jus Cogens*, in THE RIGHT TO LIFE IN INTERNATIONAL LAW 120-59 (B. G. Ramcharan ed., 1985); Dapo Akande, *The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of Political Organs of the United Nations?*, 46 INT'L & COMP. L. Q. 309, 322 (1997).

67. *Declaration on Sanctions Criteria*, *supra* note 46, ¶¶ 14, 15 (noting that "[d]ecisions on sanctions must not create situations in which fundamental human rights not subject to suspension even in an emergency situation would be violated, above all the right to life, the right to freedom from hunger and the right to effective health care and medical services for all . . . Sanctions regimes must correspond to the provisions of international humanitarian law and international human rights norms.").

68. De Wet, *supra* note 14, at 284. See also Roger Normand, *A Human Rights Assessment of Sanctions: The Case of Iraq, 1990-1997*, in UNITED NATIONS SANCTIONS: EFFECTIVENESS AND EFFECTS, ESPECIALLY IN THE FIELD OF HUMAN RIGHTS: A MULTI-DISCIPLINARY APPROACH 19, 25 (William J. M. Van Genugten & Gerard A. de Groot eds., 1999).

Under article 24(2) of the Charter, the Security Council is bound to uphold the purposes and principles of the U.N. Charter. Articles 1 and 2 list those purposes, one of which is "promoting and encouraging respect for human rights."⁶⁹ The treaties comprising the International Bill of Human Rights were initiated and concluded under the auspices, and in conformity with the purposes, of the U.N. as specified in articles 1(3) and 55 of the Charter,⁷⁰ and thus can be understood as an elaboration of those very purposes and principles.

In addition, the U.N. monitors the implementation of its human rights treaties. In cases of gross violations of human rights, most notably in Somalia,⁷¹ the U.N. has resorted to military enforcement measures to ensure respect for human rights. The Security Council has also repeatedly acted under article 41 of the Charter to ensure individual accountability for severe human rights violations.⁷² The U.N. has thereby created an expectation that its organization, in the course of promoting human rights, will respect these rights.⁷³ The U.N. is arguably estopped from any actions to the contrary.⁷⁴ Although the principle of estoppel is usually applied in interstate relations, it is derived from the broader principle of *venire contra factum proprium* [actions contrary to prior conduct]. Positively formulated, this is the obligation to act in good faith, which, as a fundamental principle of all legal systems, is likewise applicable to international organizations.⁷⁵ In the case of the United Nations, this principle can be deduced from reading article 2(2) of the Charter, which explicitly obliges member states to act in good faith, in conjunction with the first sentence of article 2, which states that the principles spelled out in article 2 of the Charter are binding upon member states as well as on the U.N. itself.⁷⁶ More specifically, the Committee under the ICESCR has concluded that "[t]he provisions of the Covenant . . . cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions."⁷⁷ In addition, it is noteworthy that all permanent members of the Security Council have either signed or ratified the ICCPR and the ICESCR.⁷⁸

69. U.N. CHARTER, art. 1, ¶ 3.

70. See MOHAMMED BEDJAOU, *THE NEW WORLD ORDER AND THE SECURITY COUNCIL: TESTING THE LEGALITY OF ITS ACTS* 14 (Bernard Noble trans., 1994) (emphasizing that the Security Council is only bound by the organization's purposes and not by any specific provisions of the Charter).

71. S.C. Res. 794, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/794 (1992).

72. See, e.g., S.C. Res. 827, *supra* note 27; S.C. Res. 955, *supra* note 27.

73. De Wet, *supra* note 14, at 284.

74. Akande, *supra* note 66, at 323.

75. DE WET, *supra* note 60, at 195–98; ELISABETH ZOLLER, *LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC* [GOOD FAITH IN PUBLIC INTERNATIONAL LAW] 190–98 (1997).

76. DE WET, *supra* note 60, at 195.

77. *General Comment* 8, *supra* note 64, ¶ 7.

78. With the exception of China, which has only signed the ICCPR, all other permanent members have ratified it. The ICESCR has been ratified by the United Kingdom, Russia, France, and China and signed by the United States. See *Status of Ratifications of the Principal International Human Rights*

It is true that specific considerations of human rights in the overall work of the Security Council remain vague and are evidenced unsystematically.⁷⁹ Nonetheless, today the Security Council's practice in adopting economic sanctions shows a strong tendency of adhering to human rights standards. For example, Security Council Resolution 1333 of December 19, 2000, regarding Afghanistan, explicitly recognized the "necessity for sanctions to contain adequate and effective exemptions to avoid adverse humanitarian consequences."⁸⁰ It is on the basis of these considerations that the oil-for-food program was implemented. In the case of Sudan, a pre-assessment report warning of adverse humanitarian consequences increased the Security Council's reluctance to impose stronger sanctions.⁸¹

The Security Council has also stated its intention to avoid negative human consequences as much as possible.⁸² It has subject international administrations established under article 41 of the Charter to high human rights standards.⁸³ In the civil administration of Kosovo, for example, UNMIK Regulation 1999/24 required all persons exercising public functions to observe international human rights standards as recognized in the U.N. human rights treaties.⁸⁴ The Security Council should adopt similar standards for economic enforcement measures it imposes under the very same provision of the U.N. Charter. Indeed, article 1(3) explicitly states that the U.N. serves a standard-setting role in promoting respect for human rights.⁸⁵ It would be

Treaties as of Oct. 1, 2004, at <http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf>.

79. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 651–52 (2d ed. 2000). This concept is illustrated in a 1999 presidential statement: "The Council emphasizes the need fully to respect and implement the principles and provisions of the Charter . . . and norms of international law The Council also affirms the need for respect for human rights and the rule of law." *Statement by the President of the Security Council*, U.N. SCOR, 54th Sess., at 1, U.N. Doc. S/PRST/1999/34 (1999).

80. S.C. Res. 1333, U.N. SCOR, 55th Sess., pmbi., U.N. Doc. S/RES/1333 (2000); see *Report of the Secretary-General on the Humanitarian Implications of the Measures Imposed by Security Council Resolutions 1267 (1999) and 1333 (2000) on Afghanistan*, *supra* note 6 (regarding the impact of these sanctions).

81. See CORTRIGHT & LOPEZ, *supra* note 2, at 124–25.

82. *Statement by the President of the Security Council*, *supra* note 79, ¶ 10. See also S.C. Res. 1265, U.N. SCOR, 54th Sess., ¶ 11, U.N. Doc. S/RES/1265 (1999); S.C. Res. 1325, U.N. SCOR, 55th Sess., ¶ 14, U.N. Doc. S/RES/1325 (2000).

83. UNMIK Regulation No. 1999/24 On the Law Applicable in Kosovo, ¶ 1.3, U.N. Doc. UNMIK/REG/1999/24 (1999); UNTAET Regulation No. 1999/1 On the Authority of the Transitional Administration in East Timor, ¶ 2, U.N. Doc. UNTAET/REG/1999/1 (1999). UNMIK, however, enjoys immunity from legal process. UNMIK Regulation No. 2000/38 On the Establishment of the Ombudsperson Institution in Kosovo, ¶ 13.1, U.N. Doc. UNMIK/REG/2000/38 (2000). Moreover, the review mechanisms were rather weak. See Frowein & Krisch, *supra* note 29, at 744.

84. UNMIK Regulation No. 1999/24 On the Law Applicable in Kosovo, *supra* note 83. See also DE WET, *supra* note 60, at 320.

85. U.N. CHARTER art. 1, ¶ 3. A similar line of argument is more often pursued with regard to actual U.N. involvement in the conduct of hostilities and the applicability of humanitarian law where the notion of reciprocity is more evident. Why should the opposing side respect humanitarian law if the U.N. does not? See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 400 (1991) ("[T]he practical necessity of equality to ensure observance remains the compelling reason for requiring that U.N. forces comply fully with the humanitarian rules of the law of armed conflict."). Similarly, the Institut de Droit International recognized in its 1971 Resolution that humanitarian rules of armed conflict apply to U.N. forces engaged in hostilities. Gill, *supra* note 28, at 81–82 n.123. This argument, however, leaves

anachronistic and contrary to the purpose spelled out in article 1(3)—the promotion and encouragement of respect for human rights—to exempt the Security Council from the instruments comprising the International Bill of Human Rights, which were developed within the framework of the United Nations.⁸⁶

In conclusion, while the Security Council has wide discretion in designing a sanctions regime, it is at a minimum bound to respect the principle of proportionality and the right to life.⁸⁷ Consequently, it must take care in designing a sanctions regime not to violate the principle of proportionality and not to infringe arbitrarily upon the right to life. Before examining whether today's humanitarian safeguards adequately meet the foregoing obligations, I briefly address the question of whether this relatively strict standard is subject to modification in times of armed conflict.

3. Sanctions During Armed Conflict

Even in peacetime the right to life is not absolute. While article 6 of the ICCPR protects individuals against the arbitrary deprivation of life,⁸⁸ it does not prohibit the deprivation of life in general.⁸⁹ However, the right to life is stronger in peacetime than under the rules of armed conflict, when the more lenient standard derived from humanitarian law is used to determine when the deprivation of life is acceptable. If this more permissive humanitarian law standard were applicable to economic sanctions during wartime, the Security Council's discretion in enacting sanctions would be widened. In this Section, I argue that the reasons for adopting the more lenient standard during armed conflict do not apply in the context of non-military measures such as economic sanctions. Therefore, although sanctions may extend into times of armed conflict, the broader peacetime human rights conception of the right to life remains the more appropriate standard.

open the question of why the U.N. should adhere to humanitarian law if the opposing side is in breach of it. *Id.*

86. DE WET, *supra* note 60, at 199.

87. It is important to note that economic sanctions potentially infringe upon multiple other human rights as well. Because of their very nature as economic enforcement measures, economic sanctions may especially infringe upon the right to food and the fundamental right to be free from hunger under article 11 of the ICESCR; the right to the enjoyment of the highest attainable standard of physical and mental health under article 12 of the ICESCR; the right to education under article 13 of the ICESCR; and the right to work under article 6 of the ICESCR.

88. In paragraph 1 of article 6 of the ICCPR, the third sentence reads: "No one shall be arbitrarily deprived of his life." ICCPR, *supra* note 63, art. 6(1).

89. The third sentence—"no one shall be arbitrarily deprived of his life"—was inserted in order to indicate that the right to life is not absolute and to obviate the necessity of setting out a catalogue of possible exceptions. See BOSSUYT, *supra* note 65, at 122. See also MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 110 (1993) (emphasizing that "only arbitrary deprivation represents a violation"). Whereas article 2 of the European Convention of Human Rights not only safeguards the right to life but simultaneously sets out the circumstances when the deprivation of life may be justified, article 6 of the ICCPR remains silent on the matter of such circumstances. While discussing the criterion of arbitrariness several delegates in the Third Committee of the General Assembly took the opinion that "arbitrarily" was synonymous with the term "without due process of law." *Id.*

In times of armed conflict, the rules of international humanitarian law command special attention as the applicable *lex specialis*, while those rules of human rights law from which parties have not lawfully derogated remain in force.⁹⁰ International humanitarian law provides a significantly more lenient standard for judging permissible action than do the rules of the human rights regime, particularly with respect to the right to life.⁹¹ In the context of the right to life, the ICJ has held that the test of what is arbitrary in times of armed conflict "falls to be determined by . . . the law applicable in armed conflict which is designed to regulate the conduct of hostilities."⁹² As such, arbitrariness in time of war cannot be established solely by reference to the terms of the ICCPR, but must take into account the law applicable to armed conflict.⁹³ In essence, the humanitarian law of war relaxes the strict peacetime criteria of what constitutes arbitrariness, such that killings are only arbitrary if they contradict the more permissive framework of humanitarian law.⁹⁴ In particular, humanitarian law accepts that lawful operations against military targets may cause incidental injury to civilians and civilian objects, subject to the limitation that such injury cannot be excessive in relation to the concrete and direct military advantage anticipated.⁹⁵ The justification for this lower standard lies in the nature of war itself, a time when humanitarian considerations cannot by themselves form the sole legal standard applicable to the conduct of hostilities.⁹⁶

However, the commencement of an armed conflict does not subject the entire range of peacetime international relations to international humanitarian law, which primarily governs the conduct of actual hostilities and occupation.⁹⁷ While it may be morally acceptable that in times of active hostilities only the basic necessities of the civilian population are provided for, this low standard is less acceptable in the context of economic enforcement measures imposed by the Security Council.⁹⁸ Whereas the exigencies of on the ground

90. Lawful acts of war are not prohibited by article 6 of the ICCPR "if they do not violate internationally recognized laws and customs of war." *Respect for Human Rights in Armed Conflicts: Report of the Secretary-General*, U.N. GAOR, 25th Sess., at 104, U.N. Doc. A/8052 (1970).

91. Generally the standard of international humanitarian law is so low that economic sanctions have largely been in conformity with this threshold. See Paul Conlon, *The Humanitarian Mitigation of U.N. Sanctions*, 39 GERMAN Y.B. OF INT'L L. 249, 250-51. (1996).

92. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8).

93. *Id.*

94. Cf. B. G. Ramcharan, *The Right to Life*, 30 NETHERLANDS INT'L L. REV. 297, 308 (1983).

95. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3. See generally YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 115-40 (2004).

96. Humanitarian law is predicated on two diametrically opposed impulses as it intends to minimize human suffering without undermining the effectiveness of military operations. DINSTEIN, *supra* note 95, at 16, 17.

97. See, e.g., SIR ARNOLD DUNCAN MCNAIR, *THE LEGAL EFFECTS OF WAR* (3d ed. 1948).

98. Gasser, *supra* note 16, at 900-04. Similarly the ICJ in its Namibia Advisory Opinion saw no reason why "the non-recognition of South Africa's administration of the Territory should not result in de-

military operations typically demand rapid decision-making, economic sanctions are not implemented under significant time pressure. The luxury of more time permits a much more detailed analysis of the proportionality of a sanctions regime. When the Security Council imposes enforcement measures without significant time pressure and without being directly affected by the war, the rationale for employing the lower standard does not apply.⁹⁹

III. RECENT IMPROVEMENTS, REMAINING SHORTCOMINGS, AND PROSPECTIVE SOLUTIONS

I now turn to the question of the extent to which present day sanctions regimes ensure proportionality under all circumstances and comply with the obligation to respect the right to life. Part III.A identifies recent improvements in and remaining shortcomings of current sanctions regimes by measuring the humanitarian safeguards they employ against the legal framework guiding the Security Council's discretion in imposing Chapter VII enforcement measures. Part III.B proposes three improvements to the current design of sanctions so as to close the loopholes that remain in meeting the Security Council's obligations: automatic suspension clauses (Part III.B.1), periodic monitoring (Part III.B.2), and follow-up assessment of the long-term effects of sanctions regimes (Part III.B.3).

A. Smart Sanctions: Recent Improvements and Remaining Shortcomings

Since the adoption of Security Council Resolutions 661 and 687,¹⁰⁰ a number of improvements in the design of sanctions, commonly known as "smart sanctions," have been adopted.¹⁰¹ By contrast to the comprehensive sanctions regime imposed against Iraq in the early 1990s, these smart sanctions regimes take into account humanitarian factors and unintended side effects. They do so either by (1) targeting specific actors and sectors of the economy *ab initio*, or (2) including humanitarian exemption clauses that make provision for products essential to meeting humanitarian needs.¹⁰² Neither approach

priving the people of Namibia of any advantages derived from international cooperation." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 56 (June 21).

99. The absence of any rules within the body of international humanitarian law regarding import and export, or any other aspect of trade or financial transactions has been highlighted. Marco Sassòli, *Sanctions and International Humanitarian Law: Commentary*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW, *supra* note 17, at 241, 243.

100. S.C. Res. 661, *supra* note 5; S.C. Res. 687, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/687 (1991).

101. In the light of Resolution 687—nicknamed the "Christmas Tree Resolution" because of its long list of objectives as well as its multiple and disparate purposes—it has been argued that: no subsequent conditions should be imposed for the cessation or suspension of sanctions except as a result of newly discovered circumstances, a time frame should be set, and the conditions for the lifting of sanctions should be clearly stipulated. See Roger Normand & Christoph Wilcke, *Human Rights, Sanctions, and Terrorist Threats: The United Nations Sanctions Against Iraq*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 299, 318 (2001); *Declaration on Sanctions Criteria*, *supra* note 46, ¶¶ 8, 16.

102. See, for example, the guidelines entailed in the Supplement to an Agenda for Peace, G.A. Res.

has significantly limited the effectiveness of a sanctions regime. To the contrary, practitioners and analysts agree that focused targeting and humanitarian exemption clauses have actually increased the effectiveness of various sanctions regimes.¹⁰³ It is thus a misconception that comprehensive sanctions are necessarily the most effective ones.

1. Targeted Sanctions

Sector-specific sanctions are not new. The measures enumerated in article 41 of the U.N. Charter, which can be imposed alternatively or cumulatively, reflect this approach.¹⁰⁴ Typical sector-specific measures include arms and oil embargoes, as well as travel bans.¹⁰⁵ The Security Council is increasingly relying on such measures: in Angola, Sierra Leone, and Liberia, it has imposed export prohibitions on diamonds;¹⁰⁶ in Sierra Leone and Liberia, it has restricted international travel;¹⁰⁷ and in Libya, Yugoslavia, Sudan, and Afghanistan, it has anticipated reductions in diplomatic personnel.¹⁰⁸ The Council has increasingly regarded restrictions on financial services and the freezing of funds as simultaneously effective and humane.¹⁰⁹ But though its growing use of targeted sanctions represents a significant improvement, humanitarian concerns about economic enforcement measures remain relevant for at least two reasons.

First, directing measures against governments or particular actors will not necessarily protect the population from devastating side effects.¹¹⁰ Even selective sanctions such as travel bans and financial measures will inevitably

51/242, *supra* note 22, at Annex II. "[U]nintended adverse side effects on civilians should be minimized by making the appropriate humanitarian exceptions in the Security Council resolutions." *Id.* ¶ 4. "Efforts should continue to be made to minimize unintended side effects of sanctions, especially with regard to the humanitarian situation and the development capacity that has a bearing on the humanitarian situation." *Id.* ¶ 14.

103. SWISS FEDERAL OFFICE FOR FOREIGN ECONOMIC AFFAIRS, 2D INTERLAKEN SEMINAR ON TARGETING UNITED NATIONS FINANCIAL SANCTIONS 5 (1999).

104. U.N. CHARTER, art. 41 (Measures "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").

105. U.N. SCOR, 55th Sess., 4128th mtg., at 13-14, U.N. Doc. S/PV.4128 (Apr. 17, 2000).

106. S.C. Res. 1173, U.N. SCOR, 53d Sess., ¶ 12, U.N. Doc. S/RES/1173 (1998); S.C. Res. 1306, U.N. SCOR, 55th Sess., ¶ 1, U.N. Doc. S/RES/1306 (2000), S.C. Res. 1343, *supra* note 8, ¶¶ 2, 6.

107. See S.C. Res. 1132, U.N. SCOR, 52d Sess., ¶ 5, U.N. Doc. S/RES/1132 (1997); S.C. Res. 1171, U.N. SCOR, 53d Sess., ¶ 5, U.N. Doc. S/RES 1171 (1998). S.C. Res. 1343, *supra* note 8, ¶ 7. Travel-related sanctions have been imposed on Libya regarding the operation of air traffic in general. See S.C. Res. 748, U.N. SCOR, 47th Sess., ¶ 4, U.N. Doc. S/RES/748 (1992). In Afghanistan sanctions have been imposed against specific airlines. See S.C. Res. 1267, *supra* note 7, ¶¶ 4, 6.

108. S.C. Res. 748, *supra* note 107, ¶ 6; S.C. Res. 757, U.N. SCOR, 47th Sess., ¶ 8, U.N. Doc. S/RES/757 (1992); S.C. Res. 1054, U.N. SCOR, 51st Sess., ¶ 3, U.N. Doc. S/RES/1054 (1996); S.C. Res. 1333, *supra* note 80, ¶ 7.

109. See, e.g., S.C. Res. 841, *supra* note 57; S.C. Res. 883, U.N. SCOR, 48th Sess., ¶¶ 3-4, U.N. Doc. S/RES/883 (1993); S.C. Res. 1173, *supra* note 106, ¶ 11; S.C. Res. 1267, *supra* note 7, ¶¶ 4, 6; S.C. Res. 1333, *supra* note 80, ¶ 8.

110. Matthew Craven, *Humanitarianism and the Quest for Smarter Sanctions*, 13 EUR. J. INT'L L. 44, 48 (2002).

have far-ranging effects if imposed over a significant period of time. While targeting sanctions helps to limit their adverse effects from the outset, given the complexity of state economies and welfare systems, even a focused ban on air flights or the supply of petroleum could adversely affect a state's population in troubling ways.¹¹¹ This effect is amplified if sanctions are imposed during a time of crisis, caused for example by famine or war. The case of Haiti vividly exemplifies the complex and often unintended effects economic sanctions may have. Despite humanitarian relief clauses contained in the sanctions regime imposed against Haiti,¹¹² the fuel embargo—in and of itself raising no specific humanitarian concerns—nevertheless led to an increase in transportation costs that in turn caused a dramatic increase in food prices.¹¹³

Second, while individual or sector-specific sanctions may be effective and humane in some instances, they do not cover the entire spectrum of instances in which sanctions may have to be imposed. Sanctions must be tailored to the particular circumstances and idiosyncrasies of each situation, and some situations still call for more comprehensive sanctions. A targeted sanction, such as an arms embargo, would arguably be adequate if the primary objective of the international community was to decrease the level of violence in an armed conflict.¹¹⁴ But when sanctions are employed to coerce a change in state behavior, they may have to be more comprehensive. For example, if sanctions become necessary against Iran, it may be that a regime of a more comprehensive kind will be needed. Iran has not responded so far to threats of economic enforcement measures and seems prepared to endure the consequences of a sanctions regime rather than end its nuclear program. In such instances, the Security Council may be left with few alternatives other than to implement a relatively comprehensive, coercive sanctions regime. Indeed, not even the U.N. Committee on Economic, Social, and Cultural Rights has entirely ruled out the use of comprehensive sanctions.¹¹⁵ Given that sanctions constitute the only coercive measure available to the international community other than military force, this reluctance to rule out comprehensive sanctions categorically is understandable.¹¹⁶ Thus far, more comprehensive sanctions have only been imposed in the cases of Southern Rhodesia,¹¹⁷ Iraq,¹¹⁸ Yugoslavia,¹¹⁹ and Haiti.¹²⁰ However, it seems quite likely that the restoration or

111. *Id.* at 48 n.37.

112. S.C. Res. 841, *supra* note 57.

113. See ELIZABETH GIBBONS, SANCTIONS IN HAITI: HUMAN RIGHTS AND DEMOCRACY UNDER ASSAULT 11, 12 (1999); Sarah Zaidi, *Humanitarian Effects of the Coup and Sanctions in Haiti*, in POLITICAL GAIN AND CIVILIAN PAIN: HUMANITARIAN IMPACTS OF ECONOMIC SANCTIONS 189, 202 (Thomas Weiss et al. eds., 1997).

114. Craven, *supra* note 110, at 48.

115. *Id.* at 56.

116. U.N. Doc. S/PV.4128, *supra* note 105, at 5–6.

117. S.C. Res. 216, U.N. SCOR, 20th Sess., U.N. Doc. S/RES/216 (1965).

118. S.C. Res. 661, *supra* note 5.

119. S.C. Res. 713, *supra* note 21; S.C. Res. 724, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/724 (1991); S.C. Res. 727, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/727 (1992).

120. S.C. Res. 841, *supra* note 57; S.C. Res. 917, *supra* note 57.

maintenance of peace will one day again require the use of comprehensive sanctions.

2. Humanitarian Exemption Clauses

If more comprehensive sanctions cannot be ruled out, the inclusion of effective humanitarian exemption clauses only increases in importance. Generally speaking, humanitarian exemption clauses exclude certain categories of goods—typically, food and medical supplies—from the sanctions regime. Such exemptions are not entirely new. For example, the Security Council included exemptions in the sanctions regime against Southern Rhodesia¹²¹ as well as in the regime against Iraq (albeit on a very limited basis).¹²² The Security Council also affirmed the importance of humanitarian exemption clauses in the preamble to Resolution 1333, in which it emphasized the necessity “for sanctions to contain adequate and effective exemptions to avoid adverse humanitarian consequences.”¹²³

Both the administration of humanitarian exemptions and the initial decision whether to include them in the design of the sanctions regime are delegated to sanctions committees.¹²⁴ The legal basis for the establishment of these committees is found in article 29 of the U.N. Charter.¹²⁵ Since implementing sanctions against Southern Rhodesia, the Security Council has set up such committees for all sanctions regimes, with the exception of Sudan.¹²⁶ These committees are comprised of member states of the Security Council deciding by consensus and in closed sessions.¹²⁷ Traditionally, their primary task has been to examine the implementation and evaluate the effectiveness of a sanctions regime.¹²⁸ This has included monitoring violations of the regime and gathering information on the detrimental effects of the sanctions on third-party states. Today, the approbation and authorization of humanitarian exemptions has become the main task of the sanctions committees and

121. S.C. Res. 216, *supra* note 117; S.C. Res. 217, U.N. SCOR, 20th Sess., U.N. Doc. S/RES/217 (1965); S.C. Res. 221, U.N. SCOR, 21st Sess., U.N. Doc. S/RES/221 (1966); S.C. Res. 232, U.N. SCOR, 21st Sess., U.N. Doc. S/RES/232 (1966); S.C. Res. 253, U.N. SCOR, 23d Sess., U.N. Doc. S/RES/253 (1968).

122. S.C. Res. 661, *supra* note 5.

123. S.C. Res. 1333, *supra* note 80, pmb1.

124. Occasionally, specific exceptions are already included in the text of the actual resolution. *See, e.g.*, S.C. Res. 1127, U.N. SCOR, 52d Sess., ¶ 5, U.N. Doc. S/RES/1127 (1997) (concerning Angola); S.C. Res. 1343, *supra* note 8, ¶ 5.

125. According to U.N. CHARTER art. 29, “[t]he Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.”

126. *See* Andreas Paulus, *Article 29, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 539, 548 (Bruno Simma et al. eds., 2d ed. 2002).

127. Much has been said about the case-by-case approach adopted by the different sanction regimes, the absence of coherence and the desire to establish a single committee for all sanctions regimes. *See, e.g.*, Mariano J. Aznar-Gomez, *A Decade of Human Rights Protection by the U.N. Security Council: A Sketch of Deregulation?*, 13 EUR. J. INT’L L., 223, 230–41 (2002).

128. *See, e.g.*, *Note by the President of the Security Council: Work of the Sanctions Committees*, U.N. SCOR, 54th Sess., U.N. Doc. S/1999/92 (1999).

the consideration of exemption requests comprises about ninety-five percent of their work.¹²⁹

Given that the sanctions committees make their decisions behind closed doors, it is difficult to evaluate their work with any degree of precision. They operate according to internally adopted guidelines; their practices are therefore highly divergent and range in approach from stricter to more lenient in their consideration of humanitarian exemptions. Nonetheless, it is possible to draw out certain baseline themes that suggest remaining problems in designing sanctions regimes. It is well known that inconsistent factors figure into the decision-making process of these committees, and that national affiliation and national interests at times override critical humanitarian considerations.¹³⁰ In particular, ambiguous exemption clauses have often favored those opposed to reducing the detrimental side effects of a sanctions regime. In the past, the committees implementing humanitarian exemptions were structured such that individual states—often in pursuit of their own policies—could bring the process of humanitarian relief to a halt. In the case of Iraq, the sanctions committee increasingly put the delivery of humanitarian goods on hold, primarily at the behest of the United States and the United Kingdom.¹³¹ This practice led the Secretary-General to report that “[h]umanitarian exemptions tend to be ambiguous and are interpreted arbitrarily and inconsistently Delays, confusion and the denial of requests to import essential humanitarian goods cause resource shortages.”¹³²

In addition to these procedural shortcomings, humanitarian exemption clauses manifest more general deficiencies. They have been criticized as too marginal and too narrowly focused—i.e., they merely take into account the transactional aspect of welfare delivery, leaving aside other aspects relevant to the limitation of adverse humanitarian consequences.¹³³ These other rele-

129. Paul Conlon, *Lessons from Iraq: The Functions of the Iraq Sanctions Committee as a Source of Sanctions Implementation Authority and Practice*, 35 VA. J. INT'L L., 633, 658 (1995).

130. Paul Conlon, *Legal Problems at the Centre of United Nations Sanctions*, 65 NORDIC J. INT'L L., 73, 86 (1996). See also Michael P. Scharf & Joshua L. Dorosin, *Interpreting U.N. Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee*, 19 BROOK. J. INT'L L., 771, 821 (1993) (describing the decision-making process as “horse-trading” in this context).

131. See U.S. *Objects to U.N. Interpretation of Humanitarian Contract Approval*, ASSOCIATED PRESS, Jan. 27, 2000 (“The United States leads all 15 nations on the Security Council in placing contracts for supplies on hold, currently blocking \$1.3 billion worth of contracts.”). See generally PAUL CONLON, U.N. SANCTIONS MANAGEMENT: A CASE STUDY OF THE IRAQ SANCTIONS COMMITTEE, 1990–1994 (Transnational Publishers 2000).

132. See *Impact of Armed Conflict on Children: Note by the Secretary-General*, U.N. GAOR, 51st Sess., ¶ 128, U.N. Doc. A/51/306 (1996). A 1997 U.N. report concluded that the review procedures established under the various sanctions committees “remain cumbersome and aid agencies still encounter difficulties in obtaining approval for exempted supplies [The] committees neglect larger problems of commercial and governmental violations in the form of black-marketing, illicit trade, and corruption.” MINEAR, *supra* note 11, at vii.

133. Recent experience has shown that humanitarian exemptions designed to permit the flow of essential goods and services destined for humanitarian purposes do not always have their intended effect. See *General Comment 8*, *supra* note 64, ¶ 5 (“[A] number of recent United Nations and other studies which have analyzed the impact of sanctions have concluded that these exemptions do not have this effect. Moreover, the exemptions are very limited in scope. They do not address, for example, the question of access to

vant considerations include whether there is an adequate infrastructure in place for the distribution of humanitarian supplies.¹³⁴ Even if certain goods are provided, lack of transportation or exorbitant prices may render them inaccessible or unaffordable.¹³⁵ These deficiencies in humanitarian exemptions are a continuing source of concern and figure prominently in current debates about how to make smart sanctions smarter.¹³⁶

Additional humanitarian concerns in the use of sanctions remain unaddressed. One problem concerns the fact that sanctions are not usually short-term measures. Initially, a target state either changes its behavior in view of a credible threat of sanctions, or, for whatever reason, it prepares to endure the regime rather than alter its policies. Thus, when sanctions are finally implemented, it is likely—as recent sanctions regimes have confirmed—that they will remain in place for a significant period of time, ranging from a few years to more than a decade.¹³⁷ Two important implications flow from this.

First, if sanctions regimes are imposed over a significant period of time, they will most likely have a prolonged negative impact on the socioeconomic structure of the target states, arguably severely impeding future attempts at economic development and democratic transition.¹³⁸ Nonetheless, not a single Security Council resolution, including Resolution 1483 ending the sanctions regime in Iraq, has provided for follow-up assessment of the aftereffects of sanctions.¹³⁹ At present, there is no monitoring nor are there any proposals for monitoring. Perhaps most problematically, there is not even a significant debate over the adverse long-term implications of economic enforcement measures.

Second, it is true that humanitarian exemption clauses can help fine-tune sanctions regimes over time, by permitting the import of medical or food supplies. However, given the deficiencies laid out above, it is unlikely that

primary education, nor do they provide for repairs to infrastructures which are essential to provide clean water, adequate health care, etc.”).

134. Craven, *supra* note 110, at 50.

135. Koenraad Van Brabant, Overseas Development Institute, *Can Sanctions Be Smarter?: The Current Debate* 27 (1999), available at <http://www.odihpn.org/pdfbin/sanconf.pdf>.

136. *Id.*

137. The case of Iraq is well known and commonly cited as an example of a long-term sanctions regime. Likewise, S.C. Res. 1267, *supra* note 7, was implemented on Oct. 15, 1999 and has only recently been modified by virtue of S.C. Res. 1526, U.N. SCOR, 59th Sess., U.N. Doc. S/RES/1526 (2004).

138. In many parts, this analysis focuses on Iraq because the adverse consequences of the sanctions regime there have been well documented, though the sanctions regimes imposed upon Haiti and the former Yugoslavia have also had severe consequences on their respective populations. See, e.g., Julia Devin & Jaleh Dashti-Gibson, *Sanctions in the Former Yugoslavia: Convoluted Goals and Complicated Consequences*, in *POLITICAL GAIN AND CIVILIAN PAIN: HUMANITARIAN IMPACTS OF ECONOMIC SANCTIONS*, 167, 180 (Thomas Weiss & David Cortright et al. eds., Rowman & Littlefield 1997) (regarding the former Yugoslavia). See also, e.g., GIBBONS, *supra* note 113, at 13 (in relation to Haiti).

139. S.C. Res. 1483, U.N. SCOR, 58th Sess., ¶ 10, U.N. Doc. S/RES/1483 (2003). *But see id.* ¶¶ 16–21 (discussing the winding down of the “Oil-for-Food” program). By virtue of paragraph 16 the Secretary-General is requested to terminate the program within six months and to transfer responsibility for “any remaining activity under the Programme to the Authority [the Coalition Forces].” Under paragraph 20, future sales of Iraqi oil are to be made “consistent with prevailing international market best practices” and they are to be audited by independent public accountants.

humanitarian exemption clauses as currently structured will be able to address the more extensive humanitarian needs that arise in times of severe crisis. A natural catastrophe or the commencement of military operations, for example, would likely severely distort the initial proportionality assessment and demand a more profound adjustment of the sanctions regime than the humanitarian exemption clauses could provide.¹⁴⁰ In short, multiple factors unanticipated at the time of implementation can significantly enhance the negative impact of sanctions. Hyperinflation, the cumulative effects of military operations, the collapse of government institutions, a natural disaster, or the targeted state's own behavior can all transform a sanctions regime intended to be moderate into a devastating means of coercion by drastically augmenting its adverse impact. The humanitarian exemption clauses currently employed are simply not up to the task of preventing a dramatic, adverse impact on the population of the target state with any degree of certainty.¹⁴¹ As such, the consequences of war or a similarly severe crisis (events which, like a natural disaster, can be described as "a public emergency threatening the life of the nation")¹⁴² may render the continued imposition of sanctions disproportionate.¹⁴³

B. *Proposals for Structural Improvements in the Design of Sanctions*

In light of the remaining shortcomings discussed above, I propose the following improvements to sanctions regimes: (a) include automatic suspension clauses triggered by a humanitarian emergency, (b) implement monitoring mechanisms that will periodically assess the humanitarian situation in the target state, and (c) assess the significant aftereffects of sanctions, which have thus far been overlooked in evaluating the proportionality of sanctions regimes.

1. *Automatic Suspension Clauses*

Because of the impossibility of foreseeing all the consequences of a sanctions regime, it is dangerous to assume that a moderately designed sanctions regime will have only a limited impact on the population of the target state. Nonetheless, under article 27(3) of the Charter, the suspension or termination of a sanctions regime requires the consent of all five permanent Security

140. Economic sanctions and the use of force are not mutually exclusive. Rather, they constitute two primary methods of action by which the Security Council can respond to a breach of international peace. See Cassandra LaRae-Perez, *Economic Sanctions as a Use of Force: Reevaluating the Legality of Sanctions from an Effects-Based Perspective*, 20 B.U. INT'L L.J., 161, 180 (2002).

141. *General Comment 8*, *supra* note 64, ¶ 3.

142. European Convention on Human Rights, Nov. 4, 1950, art. 15, B.T.S. 71 (1953), 213 U.N.T.S. 221. See also ICCPR, *supra* note 63. Although the ICCPR does not explicitly mention war as a type of public emergency, war was only rescinded from this provision in order to emphasize that war was not perceived to be a legitimate means of politics.

143. Indeed, the very fact that the use of military force has become necessary suggests that the sanctions regime was ineffective, raising the question of the utility of its continued imposition.

Council members. In light of political realities, it is unrealistic to assume that the Security Council will always achieve the necessary consensus to adapt a sanctions regime with sufficient speed to respond effectively to a humanitarian crisis. To overcome this problem, it is appropriate in employing sanctions to include a suspension clause that automatically enters into force in the case of large-scale humanitarian emergencies, in particular when widespread infringements of the right to life become evident.¹⁴⁴ If adopted at the time of implementation, an automatic suspension clause would provide a timely response to crises, irrespective of procedural infirmities in Security Council decision-making. Two issues demand further inquiry. First, I will analyze whether the Security Council is under a legal obligation to adopt automatic suspension clauses. Second, I will address the design and content of such clauses.

As argued in Part II.B.2, the Security Council is obliged to respect the right to life, which limits its margin of discretion in imposing enforcement measures under Chapter VII of the U.N. Charter.¹⁴⁵ In article 6 of the ICCPR, the U.N. Human Rights Committee has extended the scope of the protection of the right to life to include threats such as malnutrition and life-threatening illnesses.¹⁴⁶ The core obligation under article 6 is not to deprive anyone arbitrarily of his or her life. Though "arbitrariness" remains vaguely defined,¹⁴⁷ it is nevertheless widely agreed that the arbitrary deprivation of life includes not only the direct causation of death, but also the failure to avoid circumstances that will inevitably lead to death.¹⁴⁸ Occasionally, in response to severe threats to international peace, the Security Council may not be able to avoid adopting measures that will cause some number of deaths. Under these extremely narrow circumstances, any deprivation of life that resulted from a sanctions regime would not be arbitrary, as long as the Security Council had made a careful assessment of the situation before deciding to impose sanctions. I focus here, however, on those cases in which the Security Council, without any intention of causing death, establishes an inherently dangerous sanctions regime, which, if coupled with conditions such as famine, natural catastrophe, or war, will have a devastating impact on the lives of the inhabitants of the target country.

144. A recent proposal for the basic criteria of the imposition of economic sanctions suggests a provision for the temporary suspension of sanctions in times of humanitarian emergency. See *Declaration on Sanctions Criteria*, *supra* note 46 (claiming that "[s]anctions should be suspended in emergency situations and cases of force majeure (natural disasters, threat of famine, mass disturbances resulting in the disorganization of the country's Government) in order to prevent a humanitarian disaster").

145. *See id.* ¶ 14.

146. According to this understanding, the right to life—understood as the right to a life with dignity—belongs both to the domain of civil and political rights and to the domain of economic, social, and cultural rights; see NOWAK, *supra* note 89, at 305.

147. *Id.* at 13.

148. Villagrán Morales et al. Case, 1999 Inter-Am. Ct. H.R. (Ser. C) No. 63 (Nov. 19, 1999) (joint concurring opinion of Judges Cançado Trindade & Abreu-Burelli, ¶ 3).

While the Security Council cannot know with certainty at the time of imposition whether such events will occur, it is certain that if such events do take place, the continued enforcement of the sanctions regime will lead to grave consequences. Such consequences could be, at best, only partially addressed through the humanitarian exemptions currently employed. However, given the importance of the right to life as the most fundamental of all human rights, a higher degree of security must be attained. The Security Council can only prevent the arbitrary deprivation of life—that is, the unreasonable deprivation of life—with certainty if an effective safeguard, not suspect to procedural delays, automatically enters into force under certain extreme circumstances. The obligation to include such a safeguard thus flows from the negative obligation not to deprive anyone of his or her life arbitrarily. However, this obligation to safeguard against dangers the Security Council has itself created does not imply a positive obligation to reduce already prevalent conditions, such as infant mortality or malnutrition. While the manner in which the Security Council fulfills its obligation remains within its discretion, absent an equally effective alternative, it should include an automatic suspension clause when implementing economic sanctions.

I now turn to the question of the design and content of automatic suspension clauses. I argue that in the event of war, famine, natural catastrophe, or state collapse,¹⁴⁹ the Security Council should suspend economic sanctions until it can assess the humanitarian situation on the ground and make adequate provisions to protect the right to life.¹⁴⁹ The most significant problem in designing suspension clauses is how to minimize the procedural obstacles to a decision to suspend in the face of severe and disproportionate infringements of the right to life—without enabling states to suspend for improper reasons. A suspension of sanctions by individual states independent of any U.N. decision could in many cases seriously undermine the effectiveness of a sanctions regime. Individual states might try to legitimate violations of a sanctions regime by claiming, for example, that famine had broken out. Given the idiosyncrasies of decision-making by the Security Council and its subsidiary organs, no solution will be perfect. However, one possible response might be to define the circumstances that trigger suspension in the initial

149. Thus far the Security Council has suspended sanctions regimes with a view to subsequent termination only in such instances where it saw good prospects that the objective envisaged by the imposition of sanctions would be achieved in the near future but where it wanted to remain in a position to immediately reimpose the sanctions if need be. See S.C. Res. 861, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/861 (1993) (Haiti); S.C. Res. 1022, U.N. SCOR, 50th Sess., U.N. Doc. S/RES/1022 (1995) (the former Yugoslavia). Paragraph 1 of the latter resolution reads:

The measures imposed by or reaffirmed in resolutions 757 (1992), 787 (1992), 820 (1993), 942 (1994), 943 (1994), 988 (1995), 992 (1995), 1003 (1995) and 1015 (1995) are suspended indefinitely with immediate effect subject to the provisions of paragraphs 2 to 5 below, and provided that if the Secretary-General reports to the Council that the Federal Republic of Yugoslavia has failed formally to sign the Peace Agreement . . . the measures described above shall be automatically reimposed from the fifth day following the date of such report.

Id.

Security Council resolution authorizing the sanctions regime. Then, under article 27(2) of the Charter,¹⁵⁰ the Security Council could characterize the actual decision as to whether the triggering circumstances exist as a procedural one, which only requires majority support in the Security Council or the sanctions committee.¹⁵¹

Alternatively, the responsibility could fall to the Secretary-General to determine when a triggering situation has arisen. The Security Council has adopted such an arrangement before when it has asked the Secretary-General to determine whether the objectives of certain measures have been met; if the Secretary-General deems so, the measure is automatically terminated.¹⁵²

Once the U.N. determines that triggering conditions exist in the target state, it will suspend the sanctions regime, either for a predetermined period of time, or until the Security Council decides by an affirmative vote under article 27(3) of the Charter (which requires a consensus of the permanent members) to end the suspension. In this way, the procedural obstacle of consensus among the permanent Security Council members would be shifted to the subsequent decision on reimposition, rather than retained at the decision to suspend at the cost of the right to life. Such a process would give the Security Council the opportunity to reassess the proportionality of its measures after a severe crisis, and perhaps redesign its sanctions accordingly.¹⁵³

One more recent response to the need to reassess the proportionality of sanctions regimes has been the development of time-limited measures—i.e., sanctions that automatically end after a given period, usually twelve months.¹⁵⁴ Although some member states have voiced doubts as to the effectiveness of a sanctions regime that automatically ends, the Security Council is increasingly adopting such measures.¹⁵⁵ In addition to countering procedural obstacles in Security Council decision-making, time limits are also

150. "Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members." U.N. CHARTER art. 27(2). This provision must be read in contrast to U.N. CHARTER art. 27(3) ("Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members *including the concurring votes of the permanent members.*") (emphasis added).

151. For an argument in favor of less strict voting requirements with regard to the termination of Chapter VII measures, see BARDO FASSBENDER, U.N. SECURITY COUNCIL REFORM AND THE RIGHT OF VETO 339 (1998).

152. See S.C. Res. 1192, U.N. SCOR, 53d Sess., ¶¶ 6–7, U.N. Doc. S/RES/1192 (1998) (Libya); S.C. Res. 1298, U.N. SCOR, 55th Sess., ¶ 17, U.N. Doc. S/RES/1298 (2000) (Eritrea/Ethiopia). Moreover, when the Security Council suspended the sanctions regimes imposed against the former Yugoslavia it relied upon information received from "the High Representative described in the Peace Agreement, or the commander of the international force to be deployed in accordance with the Peace Agreement," in order to terminate the suspension in case of non-compliance. S.C. Res. 1022, U.N. SCOR, 50th Sess., ¶ 3, U.N. Doc. S/RES/1022 (1995).

153. See also Lutz Oette, *A Decade of Sanctions against Iraq: Never Again! The End of Unlimited Sanctions in the Recent Practice of the U.N. Security Council*, 13 EUR. J. INT'L L. 93, 99 (2002).

154. *Id.*

155. See, e.g., S.C. Res. 1298, *supra* note 152, ¶ 16 (Eritrea/Ethiopia); S.C. Res. 1306, *supra* note 106, ¶ 6 (Sierra Leone); S.C. Res. 1333, *supra* note 80, ¶¶ 23–24 (Afghanistan); S.C. Res. 1343, *supra* note 8, ¶¶ 9–10 (Liberia). On the doubts regarding a measure's effectiveness, see U.N. SCOR, 55th Sess., 4168th mtg. at 4–5, 8 U.N. Doc. S/PV.4168 (July 5, 2000) (comments of delegates from the United States and the Netherlands).

responsive to the evolution of circumstances in the target state, as they require a follow-up proportionality assessment to maintain the sanctions. Following the same logic, automatic suspension during emergencies would prevent a sudden distortion in the proportionality of the sanctions regime in times of crisis. Indeed, the case for automatic suspension is even stronger. Unlike the permanent termination attached to time-limited sanctions, a temporary suspension impinges more lightly on the effectiveness of a sanctions regime. Since the target state will not know when or whether the sanctions will formally end, it will not be able to count on waiting them out.¹⁵⁶ Automatic suspension clauses also arguably increase the legitimacy of enforcement measures by accounting for human rights concerns, thereby strengthening compliance by third-party states and increasing the effectiveness of the sanctions regime.

2. Periodic Monitoring of the Humanitarian Impact of Sanctions

Although members of the Security Council are increasingly aware of the potentially adverse impact of economic sanctions on the enjoyment of fundamental human rights,¹⁵⁷ the lack of monitoring of this adverse impact remains a grave problem. Commonly, sanctions committees charged with initiating humanitarian relief swing into action solely upon outside requests rather than becoming active *proprio motu*. The humanitarian situation in the target state is often assessed on the basis of haphazardly gathered information rather than on the basis of any organized and periodic monitoring process.¹⁵⁸ There has been some improvement in recent sanctions regimes, for example, in Angola, Afghanistan, and Liberia, where monitoring mechanisms have now been implemented.¹⁵⁹ Still, in Angola, the Security Council imple-

156. Since sanctions with time limits will eventually expire regardless of compliance, they have been said to provide countries under sanctions an incentive to simply outlast "the arbitrary passage of time." U.N. Doc. S/PV.4168, *supra* note 155, at 4–5 (comments of delegate from the United States).

157. See, e.g., U.N. SCOR, 59th Sess., 4933d Mtg. at 2, U.N. Doc. S/PV.4933 (Mar. 25, 2004); U.N. SCOR, 59th Sess., 4987th Mtg. at 4, U.N. Doc. S/PV.4987 (June 8, 2004).

158. Regarding the absence of coherent human rights monitoring, see recent reports from sanctions committees, e.g., *Letter from the Chairman of the Security Council Committee Established Pursuant to Res. 751 (1992) Concerning Somalia Addressed to the President of the Security Council*, U.N. SCOR, 55th Sess., ¶ 9, U.N. Doc. S/2000/1226 (2000); *Letter from the Chairman of the Security Council Committee Established Pursuant to Res. 918 (1994) Concerning Rwanda Addressed to the President of the Security Council*, U.N. SCOR, 55th Sess., ¶ 5, U.N. Doc. S/2000/1227 (2000); *Letter from the Chairman of the Security Council Committee Established Pursuant to Res. 985 (1995) Concerning Liberia Addressed to the President of the Security Council*, U.N. SCOR, 55th Sess., ¶ 7, U.N. Doc. S/2000/1233 (2000); *Letter from the Chairman of the Security Council Committee Established Pursuant to Res. 1132 (1997) Concerning Sierra Leone Addressed to the President of the Security Council*, U.N. SCOR, 55th Sess., ¶ 26, U.N. Doc. S/2000/1238 (2000).

159. S.C. Res. 1295, U.N. SCOR, 55th Sess., ¶ 3, U.N. Doc. S/RES/1295 (2000) (Angola); *Letter from Chairman of the Security Council Committee Established Pursuant to Res. 864 (1993) Concerning Angola Addressed to the President of the Security Council*, U.N. SCOR, 55th Sess., ¶ 14, U.N. Doc. S/2000/1026 (2000); *Final Report of the Monitoring Mechanism on Angola Sanctions*, U.N. SCOR, 55th Sess., U.N. Doc. S/2000/1225 (2000); regarding Liberia, see S.C. Res. 1408, U.N. SCOR, 57th Sess., ¶ 16, U.N. Doc. S/RES/1408 (2002). Similar improvements are foreseen in a recent U.N. working paper on the basic conditions and standard criteria for the introduction of sanctions. *Declaration on Sanctions Criteria*, *supra*

mented the monitoring mechanism a full seven years after it imposed the sanctions regime against UNITA in 1993, and primarily with the aim of improving the effectiveness of the sanctions regime rather than observing its humanitarian impact.¹⁶⁰ In the case of Afghanistan, the Security Council required that the sanctions committee, established pursuant to Resolution 1267, report to it periodically on the impact, including humanitarian impact, of the enforcement measures.¹⁶¹ In the rest of this section, I argue that the Security Council is obliged to monitor the humanitarian impact of economic sanctions as part of its duty to protect fundamental human rights.¹⁶²

The obligation not to deprive anyone arbitrarily of his or her life also implicates an obligation to institute mechanisms to monitor the humanitarian impact of sanctions. Without any form of monitoring, the adverse consequences of a sanctions regime will either not come to the attention of the Security Council, or will do so only belatedly. An automatic suspension clause, the triggering of which depends on certain circumstances on the ground, is rendered meaningless if the conditions on the ground are not monitored. Similarly, sanctions committees need accurate data about the humanitarian situation in a target state in order to make informed decisions regarding whether to grant a humanitarian exemption, or whether to pursue a stricter or more lenient policy with the target state. The meaningful functioning of these humanitarian safeguards depends on a regular assessment of the circumstances on the ground.

The obligation to provide for extensive monitoring is found throughout the U.N. human rights system.¹⁶³ The U.N. has implemented human rights monitoring mechanisms when it has assumed administrative functions comparable to those of a government.¹⁶⁴ There should be a similarly clear expectation that the Security Council will provide for human rights monitoring in situations where it is in a position to impede severely upon fundamental human rights.¹⁶⁵ The international community can only prevent the arbitrary deprivation of life with any acceptable degree of certainty if it monitors closely the coercive impact of sanctions. The Security Council should not wait until the situation in the target state has reached a critical level to institute assessment missions—as it did in the case of Iraq—but should make such missions a common feature of all sanctions regimes. More comprehen-

note 46.

160. S.C. Res. 1295, *supra* note 159, ¶¶ 3–7.

161. S.C. Res. 1267, *supra* note 7, ¶ 6; see also, *Report of the Security Council Committee Established Pursuant to Res. 1267 (1999) Concerning Afghanistan*, U.N. SCOR, 54th Sess., ¶ 10, U.N. Doc. S/2000/1254 (2000).

162. See, e.g., DE WET, *supra* note 60, at 225.

163. *Id.* at 323.

164. See UNMIK Regulation No. 2000/38 On the Establishment of the Ombudsperson Institution in Kosovo, *supra* note 83.

165. The ICESCR Committee has highlighted the fundamental obligation to monitor the extent of the realization or non-realization of economic, social, and cultural rights; see *General Comment 1*, U.N. ESCOR, 3d Sess., Supp. 4, U.N. Doc. E/1989/22 (1989).

sive information about the prevailing circumstances in the target state would help the sanctions committee and the Security Council fine-tune the sanctions regime at critical junctures. This would increase the overall effectiveness of the sanctions regime, not only by increasing its credibility as a humane enforcement measure, but also by preventing the level of humanitarian crisis that would negatively impact regional stability and force the temporary suspension of the sanctions regime.

3. *Follow-Up Assessment of Long-Term Effects*

Despite extensive debate over the humanitarian impact of economic sanctions, the international community has rarely assessed and indeed largely overlooked their long-term effects.¹⁶⁶ In order to draw greater attention to these effects, this section focuses on those aspects of a sanctions regime that are likely to impede a state's efforts to recover and grow long after the sanctions regime has come to an end. Even absent a clear legal obligation, monitoring of the humanitarian situation in the target state should not automatically cease when a sanctions regime is lifted. Rather, the international community should carefully study aftereffects to enable the Security Council to account for them in future proportionality assessments and to design sanctions regimes smart enough to pass the test of time. Given the complexity of economic sanctions, it will not be possible to account for aftereffects with a perfect degree of precision, but a minimum understanding of such effects is plainly a prerequisite to designing enforcement measures that are genuinely effective, and that thus promote sustainable peace and stability. Moreover, whether or not the Security Council is obliged to remedy devastating aftereffects,¹⁶⁷ their monitoring is in all cases a basic prerequisite to their alleviation.

Where the Security Council has provided for monitoring mechanisms and acute need assessment missions as part of current smart sanctions regimes, it has tied these mechanisms to the regime itself such that once the sanctions end, the mechanisms dissolve. It is striking that since the Security Council lifted the comprehensive sanctions against Iraq in Resolution 1483, it has not instituted any kind of monitoring or assessment system in Iraq. Neither the U.N. nor the WHO—both of which had documented the impact of sanctions on various sectors of Iraqi society while the sanctions were in place—have been involved in assessing the aftereffects of the sanctions regime. Human rights NGOs have not filled this gap, either. Iraq is just one of many examples of the failure of the international community to consider the after-

166. *But see, e.g.,* KOENRAAD VAN BRABANT, CAN SANCTIONS BE SMARTER?: THE CURRENT DEBATE, REPORT OF A CONFERENCE HELD IN LONDON, 16–17 DECEMBER 1998, 23 (1999), available at <http://www.smartsanctions.ch/Papers/odireport.pdf>.

167. An analysis of this question exceeds the scope of the present inquiry. For an overview of organizational responsibility, see, for example, Clyde Eagleton, *International Organization and the Law of Responsibility*, in 76 ACADEMIE DE DROIT INT'L, RECUEIL DES COURS 319 (1950).

effects of sanctions regimes. Thus far, in no case has the international community systematically monitored these long-term effects.

Despite the lack of contemporary reports on aftereffects, there are a number of older reports issued while a sanctions regime was in force that suggest the long-term, often unintended, but inevitably debilitating consequences of economic sanctions. The impact of sanctions on the socioeconomic infrastructure of Iraq is well-documented and universally acknowledged and may thus serve as an illustrative point of reference.¹⁶⁸

The World Health Organization in its 1996 Report on the Health Conditions of the Population in Iraq declared that “[t]his tragic situation has tremendous implications on the health status of the population and on their quality of life, not only for the present generation, but for the future generation as well.”¹⁶⁹ *Inter alia*, it stated:

The terrible hardships enduring with the sanctions since [the 1991 war] can be expected to leave indelible marks on the mental health and behavioral patterns of these children when they grow to adulthood. This tragic aspect of the impact of the war and conditions surrounding the sanctions is rarely articulated, but the world community should seriously consider the implications of an entire generation of children growing up with such traumatized mental handicaps, if of course, they survive at all.¹⁷⁰

The expert panel on humanitarian conditions in Iraq, established by the Security Council in 1999, concluded that the situation in the country was dire and would continue to be so until there was a “sustained revival of the Iraqi economy.”¹⁷¹ Bracketing for a moment the present security dilemma in Iraq and concentrating instead on the aftereffects from the previous sanctions regime, with an infant mortality rate among the highest in the world,¹⁷² wide-

168. In light of the overwhelming amount of evidence from the various field missions of different organizations, the dire consequences of the economic sanctions imposed on Iraq have been officially acknowledged by U.N. officials as well as state representatives. See, e.g., *Statement by the Inter-Agency Standing Committee to the Security Council on the Humanitarian Impact of Sanctions*, U.N. SCOR, 52d Sess., at 2, U.N. Doc. S/1998/147 (1997); *Report of the Secretary-General Pursuant to para. 11 of Res. 986 (1995)*, U.N. SCOR, 52d Sess., U.N. Doc. S/1997/206 (1997); *Report of the Secretary-General Pursuant to para. 7 of Res. 1143 (1997)*, U.N. SCOR, 53d Sess., U.N. Doc. S/1998/90 (1998). See also *Concluding Observations of the Human Rights Committee: Iraq*, U.N. CCPR, Hum. Rts. Comm., 61st Sess., ¶ 4, U.N. Doc. CCPR/C/79/Add.84 (1997) (concluding that “the effect of sanctions and blockades has been to cause suffering and death in Iraq, especially to children”).

169. *The Health Conditions of the Population in Iraq Since the Gulf Crisis*, World Health Organization, ¶ 5, U.N. Doc. WHO/EHA/96.1 (1996), available at <http://www.who.int/disasters/rep0/5249.html> (last visited Feb. 28, 2005).

170. *Id.* ¶ 8.

171. *Report of the Second Panel Established Pursuant to the Note by the President of the Security Council of 30 Jan. 1999 (S/1999/100) Concerning the Current Humanitarian Situation in Iraq*, U.N. SCOR, 54th Sess., ¶ 58, U.N. Doc. S/1999/356 (1999).

172. Amnesty International, *Iraq: U.N. Security Council Considers the Humanitarian Panel's Report on Sanctions, A Summary of Amnesty International Position and Concern*, July 28, 1999, AI Index MDE 14/006/1999, at <http://web.amnesty.org/library/Index/engMDE140061999?OpenDocument&of=COUNTRIES%5CIRAQ>.

spread malnutrition among virtually the entire young child population,¹⁷³ and significant shortages in water, food, and power supplies, it is unlikely that Iraq will be able to initiate a sustained revival of its economy on its own.¹⁷⁴ For years, high unemployment rates and low salaries have forced highly skilled Iraqis to accept low-skill jobs,¹⁷⁵ while the extreme isolation of the scientific community has led to a steady decline in skills and expertise. Poverty, begging, prostitution, and black markets are on the rise and organized crime is thriving. These conditions, to a significant degree an aftereffect of the previous sanctions regime, will undoubtedly have a long-term impact on Iraqi society. While these continuing effects raise the question of organizational responsibility for past and present humanitarian wrongs in Iraq, they also provide a more general lesson regarding the framing of future sanctions regimes.¹⁷⁶

Since it is certain that aftereffects will occur, the Security Council should consider these effects in its initial proportionality assessment. Clearly, the harsher a sanctions regime, the more harmful we can expect its aftereffects to be. Once the targeted entity alters its behavior and international peace is restored, sanctions become unnecessary. At this point, they become disproportionate and must be lifted immediately. It is in this context that the ICJ, in its *Gabčíkovo-Nagymaros Project* decision, held that countermeasures must be reversible.¹⁷⁷ However, given the complexity of economic enforcement measures, their aftereffects will continue to harm the country even after the sanctions have been lifted. In some cases, these harmful aftereffects may be justified as acceptable side effects of a proportionate sanctions regime. Nevertheless, given that aftereffects, by definition, do not aid in achieving the objectives of the sanctions regime, they should be minimized as much as possible. Otherwise, they may ultimately render the original sanctions regime an ineffective and unjustifiable measure (depending on the degree of hardship they continue to impose on the targeted state after it has returned to compliance with its international obligations). In this sense, these aftereffects risk un-

173. Press Release, UNICEF, Disastrous Situation of Children in Iraq (Oct. 4, 1996), at http://www.unicef.org/media/media_7609.html (last visited Feb. 28, 2005).

174. The chain of causation is of course heavily distorted by the consequences of the war and the ongoing incidences of armed violence.

175. For a summary of the consequences see LaRae-Perez, *supra* note 140, at 163.

176. It seems noteworthy that under Protocol V to the Convention on Weapons, states have now accepted post-war responsibilities with regard to clearing up landmines and other remnants of war such as cluster bombs and depleted uranium ammunition. Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), Nov. 28, 2003, U.N. Doc. CCW/MSP/2003/3. Whereas the effects of these weapons, despite their severity, are at least territorially limited, the consequences of a comprehensive sanctions regime may be far more complex and potentially affect a country in its entirety. See also Phillip Meilinger, *A Matter of Precision: Why Air Power May be More Humane than Sanctions*, 123 FOREIGN POL'Y 78 (2001).

177. Case Concerning The *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. 7, 57 (Sept. 25). See also Crawford, *supra* note 17, at 66 ("It is significant that the international community has moved away from the classical terminology of reprisals and towards the notion of countermeasures as temporary, reversible steps taken in response to and for particular purposes in relation to prior international wrongful conduct.").

dermining the very goal of the original sanctions regime: the maintenance of international peace.

The obligation to monitor would only be partially fulfilled if all monitoring mechanisms came to an end at the *de jure* cessation of a sanctions regime. As a follow-up procedure, the Security Council should maintain a monitoring mechanism in the target state for as long as the harmful effects of a sanctions regime persist. Unfortunately, even the Committee on Economic, Social, and Cultural Rights does not presently contemplate this latter step. In its attempt to draw attention to the adverse impact of economic sanctions on economic, social, and cultural rights, the Committee has merely stated that “effective monitoring, which is always required under the terms of the Covenant, should be undertaken throughout the period that sanctions are *in force*.”¹⁷⁸ But given the complex nature of economic enforcement measures, they will inevitably have a prolonged impact on the target state. This impact should be taken into consideration in designing smarter sanctions.

IV. CONCLUSION

Despite recent improvements in designing sanctions as well as lessons learned from past experiences in implementing sanctions regimes, important questions in this field remain unresolved and demand further attention. Even though sanctions of the scope imposed against Iraq may not be employed again, it is likely that relatively comprehensive sanctions will be used in the future, given that mere arms embargoes or travel bans will not prove sufficiently coercive in all situations. Moreover, particularly in the fight against international terrorism, sanctions are no longer employed solely to change an entity's behavior, but also increasingly to create conditions which will deter certain activities. In light of this development, there are strong reasons to believe that sanctions regimes will continue to be imposed on long-term bases. The fact that a change in circumstances may then distort an initial proportionality assessment and render a once moderate sanctions regime into a devastating means of coercion thus demands serious attention. The changing nature of the facts on the ground in the targeted state makes it critical to monitor the adverse impact of sanctions regimes on a continuous basis, to allow for temporary suspension of the measure if the situation on the ground becomes intolerable, and to assess the long-term effects of the regime.

Economic sanctions—even when targeted and designed in a “smart” way—are liable to cause severe human rights violations due to their complexity and the fact that unforeseen factors may greatly enhance their adverse side effects. The humanitarian safeguards presently employed, namely, exemption clauses and time limits, do not provide adequate protection for the fundamental right to life in all circumstances. As such, in addition to these

178. *General Comment 8, supra* note 64, ¶ 13 (emphasis added).

safeguards, the Security Council must include a mechanism that ensures immediate suspension of sanctions in times of severe humanitarian crisis. It can best meet this obligation by incorporating an automatic suspension clause into the original Security Council resolution authorizing the imposition of sanctions. Additionally, to ensure the effective functioning of humanitarian exemption and temporary suspension clauses, the Security Council must monitor the humanitarian impact of its measures on a regular basis. Finally, sanctions regimes will continue to influence targeted states long after they have formally come to an end. Thus far, this fact has only rarely figured in the debate over how to design sanctions in a smarter way. Increased awareness of the aftereffects of sanctions is a prerequisite for making balanced proportionality assessments in the future, as well as for ensuring the long-term effectiveness of sanctions regimes. Ultimately, regardless of the extent of the Security Council's legal obligations, the price of including automatic suspension clauses and regular monitoring mechanisms is relatively slight, especially given that their absence continually jeopardizes the credibility of the Security Council as a human rights-promoting body.