DO ECONOMIC SANCTIONS WORK? A VIEW FROM THE UNITED NATIONS

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I. INTRODUCTION

The question "do sanctions work?" can be interpreted not only as a political or legal assessment about their effects on a State, but also as an analysis of whether sanctions are designed, managed and enforced in a manner which makes them viable for an extended period of time for those who are required to implement them. Recent practice denies the once popular argument that United Nations' sanctions could be a quick tool giving an immediate devastating blow to the economy of the target State. Instead, and especially when they aim at achieving deep policy changes, sanctions are slow to be fully put in place, slow to work, and slow to clearly show their effects, even when they are imposed against extremely vulnerable states such as Haiti. The question whether sanctions work has also to be seen in light of the lack of a widely shared understanding within the Security Council about the purpose and acceptable scope and duration of sanctions, which is reflected in the vague goals and formulation of most current sanctions regimes. While scholarly debates concentrate on the constitutional legitimacy of Security Council actions under the Charter, or on their appropriateness and impact in specific cases, attention should also be paid to some procedural aspects of the imposition, implementation, management, and enforcement of sanctions. I will thus look at sanctions from the perspective of the implementing States rather than their target. In the absence of a consensus as to substantial reforms in the manner of using economic sanctions, possible adjustments to make sanctions regimes more "effective" should for the moment be configured within the existing legal framework.

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II. DESIGN, FORMULATION, AND IMPLEMENTATION OF THE SANCTIONS

Sanctions are conceived and resolutions drafted in a hurried political atmosphere, even though they sometimes remain "in the pipeline" for a while, theoretically ensuring the time for a better conceptual and legal quality of the final product. The extreme politicization of the whole exercise does not militate in favour of good and clear drafting; moreover, the Security Council has shown a considerable linguistic and conceptual conservatism, relying over and over on the language of previous resolutions even though their terms have proved to be imprecise. Thus, the term "transshipment" used in paragraph 6 of resolution 757 (1992) instituting sanctions against Yugoslavia, actually refers to both transshipment and transit, and recurs in this partial sense in resolutions 787 (1992) and 820 (1993). Needless to say, this generated considerable confusion. Again in resolution 757 (1992), paragraph 5 on financial restriction, repeats verbatim the language of paragraph 4 of resolution 661 (1990) on Iraq, even though the latter had generated considerable uncertainties in many States as to whether it contained an obligation to freeze Iraqi assets abroad. The issue was clarified in paragraph 21 of resolution 820 (1993), almost one year later, and only after substantial pressure by the United States. In the case of Iraq, it was clarified in resolution 670 (1990), adopted in October 1990.

The atmosphere in which sanctions are designed also does not militate in favour of a good coordination between measures contained in the same resolution or in different resolutions. Financial sanctions have proven to be particularly problematic, both in scope and, in relation to trade restrictions. The question whether a commercial transaction authorized by the competent Sanctions Committee, or falling outside the scope of the sanctions, automatically legitimates the unfreezing of funds or financial transactions otherwise prohibited, has been a vexing one in the Iraq, Libya, and Yugoslavia Sanctions Committees. The ambiguity of the resolutions, and the lack of agreement within the Committees, weakens the credibility of the various regimes and opens dangerous loopholes. This is particularly evident in the case of Libya where resolutions 748 (1992) and 883 (1993) impose only a limited trade embargo but much wider financial sanctions, including a clear obligation to freeze Libyan assets.

These are probably inevitable shortcomings in view of the way in which the Council operates. However, when a certain provision has proved particularly problematic or contains obvious oversights, a few pragmatic corrective steps could be taken. All existing Sanctions Committees are requested by their establishing resolutions to recommend

to the Security Council possible improvements of the sanctions. The Committees have largely neglected this function, but they might rather easily exercise it, as explained below. On the basis of these recommendations, the Council could proceed to authentic interpretations of its previous decisions. Precedents of this nature already exist, for example, the clarification contained in paragraph 10 of resolution 787 (1992), that the expression "Yugoslav vessels" had to be interpreted for the purposes of the sanctions as including vessels flying the flag of a third State but owned by Yugoslav interests. Also, in paragraph 9 of resolution 670 (1990), the Council confirmed that the financial restrictions against Iraq imposed by resolution 661 (1990) included the freeze of Iraqi assets. Such interpretations could be inserted in a resolution or given in the form of statements made by the President of the Council on behalf of its members.

III. IMPLEMENTATION

The implementation of sanctions by States is obviously the backbone of the whole system. Sanctions resolutions, adopted under Chapter VII of the Charter, are immediately and unconditionally mandatory for all Member States, but their largely non-self-executing nature makes their incorporation into the legal system of each State necessary. The approach used by the Charter, as consistently upheld by the Sanctions Committees, emphasizes the sovereign duty and right of each State to give its own interpretation to the vague and often open-ended terms of the resolutions. This, of course, together with the wide variety of national legal mechanisms regulating trade control measures, does not favour uniformity of application in the absence of an institutional coordinating or assisting mechanism. Recent practice has underlined this rather unorganized state of affairs. For example, the Council has included in most current sanctions regimes a provision prohibiting claims by the target State in connection with the non-implementation of contracts or other transactions as a consequence of the sanctions (for example, paragraph 29 of resolution 687 (1991) and paragraph 9 of resolution 757 (1992)). A typical example are performance bonds or similar bank guarantees. The language used does not clarify whether such guarantees, which are separate undertakings independent from the main contract, are simply suspended until the lifting of the sanctions, or have become null and void. Courts in several European countries have reached opposite conclusions in this respect. These differences could be exploited by the target State, which could engage in forum shopping in certain countries to

obtain a judicial decision confirming indirectly the persistent validity of a bank guarantee to its benefit.

Once again, this lack of uniformity is an inevitable result of the Charter system and, indeed, of the attachment of States to the widest possible preservation of their sovereign prerogatives. However, the existing framework offers the possibility of feasible, if limited, corrective steps which should be considered by the main supporters of the sanctions.

Any attempt to foster a greater uniformity in sanctions implementation should be based on the reporting procedures established by sanctions resolutions. Within the existing regimes, states are required to report to the Council their implementation measures, normally in the resolution initially imposing sanctions. Only one report is required; so far there has been no provision for regular periodic reports. States are to report within a short time-frame, normally a month, which is probably meant to convey a sense of urgency and determination, but which does not necessarily ensure accurate reporting. The reports have no fixed format and vary widely, from vague statements of compliance with the sanctions to detailed overviews of the relevant legislation. The Sanctions Committees, with the initial partial exception of the Committee on Iraq which sent a questionnaire to all states in early 1991, do not examine the reports and do not entrust this task to the Secretariat, thus preventing the establishment of an institutional memory and failing to exercise a systematic scrutiny which could detect loopholes and deter possible violations.

In order to build a more effective system, states should instead be required by the Security Council to report on their domestic measures at least once a year to the Sanctions Committee. They should be requested to use a pre-established format to be indicated by the Committees, which should focus on measures taken, legal problems encountered, patterns of violations detected, and inter-state cooperation established. These reports should then be considered by the Committees or one of their working groups, in the course of formal meetings, on the basis of a preliminary analysis carried out by the Secretariat. In exceptional cases, the reporting states could be invited to provide clarifications during a meeting. On the basis of their findings, the Committees could issue general comments which, without mentioning individual States, would clarify the interpretation of key provisions of the sanctions resolutions or highlight common implementation problems. The Committees would also, if appropriate, recommend to the Security Council the adoption of the authentic interpretations mentioned above. This approach, which is close to that employed by the Human Rights Committee, should not impose an unacceptable burden on the Committees, as the number of countries

entertaining meaningful economic relations with the target State would probably be limited. At the same time, it would go a long way towards making more rational and uniform the implementation of sanctions, and strengthening the credibility of the institutional machinery of the United Nations as a source of assistance and support.

Another practical proposal would be the elaboration of a model law for the implementation of multilateral sanctions or, if this is too far-reaching at this time, of a set of minimum implementation requirements to be issued in the form of a legal guide. The Security Council and its subsidiary organs would not be suitable bodies for such an exercise. A natural candidate for the task would rather be the United Nations Commission on International Trade Law (UNCITRAL), a subsidiary body of the General Assembly, whose goal is precisely the uniformity of trade law and which is a genuinely technical body with substantial expertise. This would, incidentally, ensure a more active participation of the general Assembly in the general management of sanctions.

IV. MANAGEMENT

The Security Council customarily establishes a partially centralized management of the sanctions, centered in the Sanctions Committees. The Committees are subsidiary bodies of the Council, and their membership is the same as that of the Council at any given time; they take all decisions by consensus and always meet in closed sessions. Their documentation is of restricted circulation, thus their decisions are normally not released to the United Nations membership at large. The Committees have been the object of much criticism during the last few years, due to their secrecy, politicization, lack of consistent criteria and penchant for heavy micro-management. The Sanctions Committees are indeed political (and politicized) organs, which discharge their mandate under the influence of their most powerful members and their bilateral policies toward the target State. As a result, they are not particularly well-suited for promoting and ensuring a consistent and rational management of the functions falling within their mandates.

I will limit myself to a few observations on issues that have a particular impact on the "effectiveness" of existing sanctions. A first observation is that there is a substantial discrepancy between the mandate of the Committees on paper and in practice. A reading of the various resolutions clearly shows that some of the functions provided therein, such as those mentioned above concerning recommendations to the Council for the improvement of the sanctions, are practically not carried out. The actual activities of the Committees can be grouped in three categories:

investigation of possible violations; regulation of exceptions to the sanctions (normally those concerning "humanitarian" situations); and advice, normally on a case-by-case basis, on the scope of certain provisions.

The latter category has no explicit basis in any sanctions resolution. This would not be a matter of great concern per se; reliance on a reasonable interpretation of the implied powers of the Committees, as well as the acquiescence of the Council and the whole United Nations membership, constitute a sufficient legal basis for the legitimacy of this function. However, on the one hand, the Committees have occasionally given general interpretations of the terms of the resolutions, for example, with regards to the conditions for allowing Yugoslav athletes to participate in sporting events. On the other hand, in several important cases, the Committees have gone beyond a purely advisory role and have couched their decisions in terms granting or denying approval for certain actions or transactions. In the latter case, this function is of a rather regulatory nature, but it sometimes concerns issues for which the resolutions do not foresee any regulatory role for the Committee. Even though, to my knowledge, no State has claimed that the Committees act *ultra vires* in this respect, it would still be important for the long-term viability of sanctions that the actual functions of the Committees be spelled out in clearer and more specific terms in the enabling resolutions.

The approval of "humanitarian" and other transactions has raised much criticism for the slowness of the Committees' procedure; its apparent lack of sensitivity for the exceptional gravity of certain humanitarian situations; its tendency to micro-manage in a way that has impaired legitimate trade flows; and its refusal to indicate in a general and consistent way what kind of situations and products will be considered under the humanitarian exceptions. The latter approach obviously makes the approval pattern of the Committees somehow erratic. The performance of the Committee on Yugoslavia has admittedly improved, also as a result of the strong criticism just mentioned, but much remains to be done. The elaboration of general approval criteria, in particular, has proved particularly difficult.

Even though there are clear limits to a "rationalization" of the approach used by the Committees, an improvement of a general nature which would go a long way in making their role and functions more acceptable, relates to their accountability and transparency. Under the latter respect, the Council has recently taken some welcome, if limited, steps, providing for example for the issuing of press releases by the Committees and the distribution of the list of approvals of humanitarian transactions to permanent missions that so request. However, the Council

and the Committees should seriously consider publishing at least a summary of their most important decisions, as well as figures and statistics concerning their work. The proposal made above concerning general interpretive comments should be seen in this context. Moreover, since in a paper-based organization such as the United Nations, reporting is the main instrument to ensure accountability, the reporting requirements for the Committees should be clarified and strengthened. It is unacceptable that the Committees almost never report to the Security Council, and the latter does not report to the General Assembly on their activities. This state of affairs worsens the already existing imbalance within the Organization between the two major policy-making organs. A serious display of commitment and self-restraint in this direction by the Council would make the management of the sanctions more transparent, acceptable, and viable in the long term.

V. MONITORING AND ENFORCEMENT

Also in this case, the United Nations system is based on the sovereignty of each of its Members, which have the duty to adopt the necessary measures for the supervision and enforcement of the sanctions within their jurisdiction. There is a lack of institutional machinery for cooperation and coordination in this regard. The Sanctions Committees are supposed to be the main institutional watchdogs, relying on information provided to them or reported in the media in order to discover and publicize violations. However, the reliance on the sovereign good faith of States acts as a limit to the effectiveness of this function. The Committees have to follow a rather slow and cumbersome diplomatic procedure, which often stops in front of the denial by a state of any wrongdoing. As a result, in the case of Yugoslavia, the violations reported to the Security Council have been a trickle, in strident contrast with the large number reported in the media. This weakens the credibility of the sanctions, and consequently the level of actual commitment by many States.

The inherent weakness of the United Nations' role in monitoring and enforcement, and the evident need to go beyond absolute reliance on individual compliance by States, explains the proliferation of forms of naval enforcement authorized by the Security Council.[1] It is worth recalling the interesting discussions about the Charter basis for the naval quarantine established against Iraq; such discussions have not generated a real consensus among scholars, but, in the meantime, the formula used in

1. For example, in resolution 665 (1990) for Iraq; resolution 787 (1992) for Yugoslavia; and resolution 875 (1993) for Haiti.

the Gulf has developed into a legally more coherent instrument. The Multinational Interception Force operating in the Gulf under United States command had no clear connection with, or reporting obligation to, the United Nations; the forces operating in the Adriatic were, instead, under the aegis of regional organizations (NATO and WEU), acting within Chapter VIII of the Charter and reporting regularly to the Sanctions Committees. This is a welcome development, as it makes enforcement activities more transparent and complementary to the monitoring role of the Committees.

However, "hard" enforcement by itself can be an unpopular and non-viable option in the long term, among other reasons for its high costs, the concerns raised by a foreign military presence, and open questions about liability for expenses and damages caused by the interception of innocent ships. The Council, or regional organizations supporting a particular sanctions regime, should thus consider the establishment of forms of "soft" monitoring and enforcement, focusing more on assistance to implementing States than on coercive measures. Whereas this is totally lacking in the case of Iraq, a very developed and interesting example regards the sanctions against Yugoslavia. The European Union and the OSCE deployed a number of Sanctions Assistance Missions (SAMs) in countries neighbouring Yugoslavia, on the basis of bilateral agreements with the latter. These Missions were staffed with customs officers who assisted the local customs in complying with the sanctions, detecting violation, and managing the traffic in goods authorized by the Sanctions Committee. They reported to, and were coordinated by, a communication centre (SAMCOMM) based in the European Community Commission in Brussels, which liased with the Committee, regional organizations, and humanitarian agencies. The high level of expertise, and the sophisticated equipment supplied, allowed SAMs and SAMCOMM to exchange information in real time and to assess with a high degree of accuracy the absolute impact of sanctions. The installation of computer links, and the secondment of liaison officers to the Sanctions Committee, ensured the possibility of a full participation by the United Nations side. The presence of customs officers from virtually all Western countries provided local authorities with invaluable technical assistance, and constituted a strong deterrent against a weak implementation of the sanctions. Thanks to the presence of the SAMs, but with the exception of Albania and Macedonia, the number of violations has been extremely low, thus maximizing the impact of the sanctions on Yugoslavia. Finally, the establishment of a reliable monitoring mechanism on the Danube has been vital for minimizing the disruption of legitimate traffic and economic hardship for riparian States.

Interestingly enough, this exercise has taken place entirely outside the legal framework established by the Security Council, which limits itself to encouraging regional efforts and cooperation. Moreover, the Sanctions Committee has shown reluctance in following the recommendations and technical advice from the SAMs and SAMCOMM, and even more, in delegating some of the micro-management to them. It has taken more than a year to convince the Committee to relax the restrictions on traffic on the Danube, and to entrust the SAMs with the monitoring of non—strategic goods passing through Serbian waters. Once again, the political "instinct" to preserve as much authority as possible, and not to commit oneself to a particular course of action, clashes with considerations of rational management of sanctions or the need to minimize the inconveniences to third, particularly front-line, States. Still, the presence of the SAMs and the technical input of SAMCOMM has inevitably shaped and somehow rationalized the work of the Committee, as compared to that of the Committee on Iraq. The form of regional involvement just described constitutes a very important precedent, and should be considered again for future sanctions regimes. Certainly, the imposition of sanctions within the European context, which brought forth the deep involvement of NATO, EU and OSCE, may not recur easily. However, the EU or OSCE, whose members have been quite frequently the direct initiators of sanctions regimes in recent times, could offer the same kind of assistance to States outside Europe, as a form of technical cooperation in the enforcement of collective security measures. Its soft features, which would avoid Chapter VII actions, together with the financial and political leverage of the offering states, would make this formula potentially appealing and promising for the success of sanctions programmes.

VI. CONCLUSIONS

United Nations sanctions have been described as a blunt and rough instrument, producing much collateral damage and showing few results in the short term. It is important that the overall design and management of the sanctions not be equally "blunt", that it could decrease their negative impact for *blind* States as well as companies and international organizations, obliged to give them effect. It would be highly desirable if the international community could agree on a more rational and strategic use of this instrument. However, since this result is quite unlikely in the short term, the Security Council could and should consider a number of rather pragmatic and feasible improvements within the existing regimes, which would substantially enhance both the implementation and the image

of United Nations sanctions. I have tried through this contribution to highlight a few of them.