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A Decade of Human Rights Protection by the UN Security Council: A Sketch of Deregulation?

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Abstract

This last 'decade of sanctions' began with a most comprehensive set of measures against Iraq, most of which remain in force, despite the fact that they have not solved the 'Iraq problem'. Some lessons may be learned, however, from the Iraqi experience. It has helped the UN Security Council develop the new 'smart sanctions', particularly those targeting regimes with basic human rights implications. Nevertheless, the Council has normally been reluctant to include human rights violations as the principal ratio decidendi of sanctions and, when sanctions are decided, the Council has adopted an ad hoc approach, thus avoiding the creation of precedents. Moreover, although important efforts to increase transparency and effectiveness have been made, the sanction regimes continue to be managed independently, with a case-by-case approach and allowing too much secrecy. Finally, the Council's new practice regarding 'authorizations' for the use of force against targeted states does not provide for a clear system of controls, and the vagueness of the mandate incorporates another caveat in the Council's resolutions. This paper explores whether these recent trends show a tendency towards 'deregulation' in the Security Council's action in defence of basic human rights, seeking as such to create a scenario governed by authoritative case-by-case decisions and avoiding a clear set of legal rules of public international law.

1 Introduction

The situation arising from the invasion and occupation of Kuwait by Iraqi troops a decade ago provides international scholars with a test case which may be studied from many different angles, human rights protection and monitoring being one of them. Human rights were, and still are, under pressure in many ways as a result of the Gulf

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conflict and its aftermath. This article will only try to address two of these: human rights and sanctions against Iraq and human rights and the use of force. These topics have been deliberately selected because they offer, in this author's opinion, the most challenging questions within two of the core issues of our discipline: the limits of sanctions adopted by the UN Security Council and the legal boundaries of the unilateral use of force.

In another recent and provocative symposium, a discussion of unilateralism in international law gave Professors William Michael Reisman and Pierre-Marie Dupuy in particular the opportunity to warn us keenly about a 'deregulation' process, occurring either as a tendency in adjudication and coercion¹ or as a result of economic globalization.² Could deregulation also be a *by-product* of the last 'decade of sanctions', particularly with respect to decisions on the protection and monitoring of human rights? The existence of this deregulation process will be used in this article *ex hypothesi* and is broadly defined, for our purposes, as the deliberate and gradual disappearance of the rule of law, blurred by the persistent conduct of particular interested states 'without aspiring to create a viable new rule',³ and its substitution with the rule of power which allows, for each particular case, the creation of a new scenario governed by case-by-case authoritative decisions.⁴

The following pages will be devoted to a quest for evidence of deregulation in these two areas. As the wide panoply of sanctions adopted against Iraq and the legality of unilateral use of force for 'humanitarian purposes' have already been adequately described and dealt with by prestigious scholars, they will be revisited here only where necessary.

2 Human Rights and the Sanctions against Iraq

Given the virtual absence of Security Council practice on sanctions in relation to 'human rights cases' during the Cold War, its recent practice offers a sharp contrast for the assessment of changes and their impact on current international law. From the Kurdish conflict in Iraq, through to Somalia, the former Yugoslavia, Rwanda and the Central African region, Cambodia, El Salvador, Haiti, Angola, Sierra Leone, East Timor, Liberia and Guinea Bissau, the last 'decade of sanctions' provides a number of examples of UN Security Council involvement, albeit at different levels of intensity. A new panorama of institutional measures against violations of human rights could

¹ Reisman, 'Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention', 11 *EJIL* (2000) 3, at 5.

² Dupuy, 'The Place and Role of Unilateralism in Contemporary International Law', 11 *EJIL* (2000) 19, at 29.

³ Alvarez, 'Multilateralism and Its Discontents', 11 *EJIL* (2000) 393, at 406–407.

⁴ I assume the risk — signalled a long time ago by Sir Arnold McNair and Professor Miaja de la Muela — of importing terms from (public) domestic law to (public) international law. It is for this reason that I propose a tentative definition of 'deregulation' *for our purposes*. On a general concept of deregulation in public domestic law, see S. Cassese and E. Gerelli, *La deregolamentazione amministrativa e legislativa* (1987).

thus frame a new set of rules applicable to future institutional reactions to analogous situations.

But the Council's practice over the last decade does not offer a coherent and unified system of institutional sanctions in the case of violations of basic human rights. In order to discover whether this was a deliberate practice on the part of the Security Council — and its prominent members — or not, leads us to an inquiry into its reasoning. The motivation of sanctions, their scope and their management might offer a valuable inroad into the Council's corridors of reasoning.

A Motivation of Sanctions

Chapter VII of the UN Charter, conjugated with Articles 25 and 103, offers the Council 'the highest possible legislative dignity known to contemporary man'.⁵ Once it has been decided that a situation may threaten the peace under Article 39, the Security Council may decide to adopt measures as laid down in Articles 41 and 42.

But the problem arises when, in exploring its practice, we discover that the Council's determination only obliquely includes the violation of human rights as a cause of the threat to peace. Curiously, it was during the Cold War that this kind of 'human rights determination' was decided by the Council: in the case of the dictatorship in Spain, the violence in the Congo, the racist illegitimate government in Rhodesia or the apartheid regime in South Africa, it was the violation of fundamental human rights and the dignity of persons that mainly attracted the attention of the Council.⁶ But from 1990 onwards, violations of human rights have only been mentioned in relation to other causes of threats to peace,⁷ such as the deterioration of the situation in a particular state as in the case of Liberia or Somalia,⁸ the general humanitarian situation and the obstruction of delivery of humanitarian assistance as in Bosnia or Somalia,⁹ the violation of international agreements as in Haiti,¹⁰ and so on. Determinations by the Security Council have normally combined some of these situations.¹¹

Member States of the Council have normally been reluctant to include human

⁵ 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 Law* (1995) 633, at 665.

⁶ These precedents, however, must be regarded with caution: in the Spanish case, measures were not adopted by the Council but by the General Assembly in its Resolution 39 (I). In the Congo affair, the intervention of the Council and the Secretary-General was highly criticized by the Soviet Union and other states, and SC Res. 161 (1961) was adopted with the abstention of France and the USSR. In the Rhodesian affair, human rights violations were closely connected with the violation by the white minority of the right to self-determination. Finally, in the case of South Africa, the apartheid regime was accompanied by South African aggression towards its neighbouring states and by illicit arms trade in the area.

⁷ Only SC Res. 808 (1993) and 827 (1993) on the the establishment of a criminal tribunal for the former Yugoslavia, and SC Res. 955 (1994) on the criminal tribunal for Rwanda, determined clearly the violations of international humanitarian law as a threat to peace.

⁸ SC Res. 788 (1992) and 794 (1992), respectively.

⁹ SC Res. 770 (1992) and 794 (1992), respectively.

¹⁰ SC Res. 917 (1994).

¹¹ As in Resolution 1132 (1997) for Sierra Leone or Resolution 1199 (1998) for Kosovo.

rights violations as the principal *ratio decidendi* of sanctions. They have tried, first, to avoid that determination, although human rights have been the object of other kinds of ‘theoretical’ decisions¹² and of ‘instrumental’, albeit important, decisions;¹³ and, second, when deciding sanctions, as we have seen, human rights violations have been a complementary reason for sanctions in cases habitually labelled as ‘exceptional’, ‘without precedent’ or ‘extraordinary’, thus *avoiding the precedent*.¹⁴

This was also the case with Iraq.¹⁵ If we pay attention to some of the latest reports of the special rapporteurs on the situation of human rights in Iraq¹⁶ and the most recent resolutions of the Commission of Human Rights,¹⁷ we might find that Iraq allegedly violated (and continues to violate) basic human rights affecting particularly the Shiite religious community and the Kurds. It also continuously refuses to cooperate with UN human rights mechanisms by not allowing the stationing of human rights monitors throughout Iraq, as requested by the resolutions of the General Assembly and by the Commission on Human Rights. Both sets of circumstances might have given the Security Council a reason to adopt sanctions, as it did against Rhodesia and South Africa. Nevertheless, although the Council was

Gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, which led to a massive flow of refugees towards and across international frontiers and to crossborder incursions . . .

there was the subsequent ‘which threaten international peace and security in the region’.¹⁸ The same reasoning was repeated in the first paragraph of the operative part of Resolution 688 (1991), in which the Council condemned

the repression of the Iraqi population in many parts of Iraq, including most recently in Kurdish-populated areas, *the consequences of which threaten international peace and security in the region* (emphasis added).

¹² Several resolutions have recently linked human rights protection, international peace and security, the individual criminal responsibility and the particular situations concerned: see e.g. SC Res. 941 (1994) on ‘ethnic cleansing’ in Bosnia; SC Res. 1208 (1998) on the situation in Africa (refugee camps); SC Res. 1265 (1999) and 1296 (2000) on the protection of civilians in armed conflicts; SC Res. 1314 (2000) on children and armed conflict; and SC Res. 1325 (2000) on women and peace and security.

¹³ Most prominent of these resolutions are those creating the international criminal tribunals for the former Yugoslavia and Rwanda, see *supra* note 7.

¹⁴ See e.g. the position of member states of the Council when adopting Resolution 688 (1991) in the case of Iraq (UN Doc. S/PV. 2982); or the Resolutions 770 (1992) and 787 (1992) in the case of Bosnia (UN Doc. S/PV. 3106 and S/PV. 3137, respectively); Resolution 794 (1992) in the case of Somalia (UN Doc. S/PV.3145); or Resolution 917 (1994) in the case of Haiti (UN Doc. S/PV.3376).

¹⁵ See Alston, ‘The Security Council and Human Rights: Lessons to Be Learned from the Iraq-Kuwait Crisis and its Aftermath’, 13 *Australian YJIL* (1992) 107.

¹⁶ See e.g. Report submitted by the Special Rapporteur, Mr. Andreas Mavrommatis, in accordance with Commission on Human Rights Resolution 2000/17: ‘Situation of human rights in Iraq’ (UN Doc. E/CN.4/2001/42).

¹⁷ Commission on Human Rights Resolution 2001/14: ‘Situation of human rights in Iraq’ (UN Doc. E/CN.4/Res/2001/14).

¹⁸ SC Res. 688 (1991), preamble.

A close analysis of the voting in the Council and the reasons then given,¹⁹ the early recall of the provisions of Article 2(7) of the Charter in the second *considerando* of the Resolution's preamble, the absence of express reference to Chapter VII and the tasks assigned to Iraq, the UN Secretary-General, humanitarian organizations and states, force us to hesitate, in Peter Malanczuk's words, as to

the precedent value of this resolution with regard to a more active role of the Security Council under Chapter VII in cases of gross violation of human rights threatening international peace [which] should not be overestimated, although it will certainly serve as an important reference in the future for other cases.²⁰

B The Scope and Limits of Sanctions

The Council decided to impose an embargo upon Iraq and the occupied territory of Kuwait and a blockade to implement it. The decision on the lifting of sanctions remains in the hands of the Council under paragraph 24 of Resolution 687 (1991) and a committee was created by paragraph 6 of Resolution 661 (1990) to manage the sanctions.

Humanitarian reasons were first included to alleviate the severity of sanctions in paragraph 2(c) of Resolution 661 and this was later confirmed in paragraph 1 of Resolution 666 (1990) and paragraph 20 of Resolution 687 (1991). At the beginning of the conflict, however, the humanitarian consideration was absent from decision-making, notwithstanding the efforts of some states within the sanctions committee.²¹ Information in New York as to what was happening in the Gulf area was either lacking or distorted: the fact that the Iraqi regime did not accept fact-finding missions and propaganda did not allow for an accurate assessment of the humanitarian situation in Iraq, and this was exacerbated during the conflict. Rather, allied states' policies against Iraq did not emphasize the neutral evaluation of sanctions and their impact upon the population.²² However, submission of the Ahtissaari Report on the humanitarian situation in Iraq and Kuwait of March 1991²³ influenced the subsequent adoption of new measures upon Iraq. Since then, only humanitarian circumstances have softened the sanctions imposed. Even though this humanitarian criterion for sanctions has been more thoroughly analysed in other contributions to this Symposium, three questions may be briefly addressed here:

- First, does this humanitarian standard apply in the subsequent sanctions

¹⁹ See their discussion in Alston, *supra* note 15, at 134 *et seq.*

²⁰ Malanczuk, 'The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War', 2 *EJIL* (1991) 114, at 129. See also Alston, *supra* note 15, at 132.

²¹ Some of these efforts can be traced in the provisional summary records of the Committee, reproduced in D. Bethlehem (ed.), *The Kuwait Crisis: Sanctions and Their Economic Consequences* (1991), part II, at 773 *et seq.* See two accurate explanations of the facts by two insiders of the Committee: Koskeniemi, 'Le comité des sanctions (créé par la résolution 661 (1990) du Conseil de sécurité)', 37 *AFDI* (1991) 119; and Conlon, *supra* note 5.

²² Irrespective of the sequence of measures adopted under Articles 41 and 42 of the Charter, the non-evaluation of an embargo undermines the consideration by the Council that 'measures provided for in Article 41 ... have proved to be inadequate' under Article 42. See Koskeniemi, *supra* note 21, at 136.

²³ UN Docs S/22366 and S/22409.

adopted by the Council, and thus can we infer the existence of a ‘humanitarian rule’ applicable to sanctions in current international law?²⁴ It is possible to discern the ‘humanitarian rule’ in general embargoes on commodities and products other than the military decided by the Council,²⁵ normally having a scope similar to that in the other two cases involving comprehensive economic sanctions: against the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY hereinafter)²⁶ and Haiti.²⁷ In most cases, this kind of comprehensive embargo seems to be explicitly avoided for humanitarian reasons (as happened particularly in the cases of Angola/UNITA,²⁸ Sudan,²⁹ Sierra Leone,³⁰ and Afghanistan/Taliban³¹), and instead other kinds of measures foreseen in Article 41 of the UN Charter are applied. The latter shows a typical tendency in recent practice of Security Council sanctions imposed in fulfilment of the ‘humanitarian rule’: to adopt *targeted* or *smart* sanctions.³² As expressed by the UN Secretary-General, ‘the concept of “smart sanctions” which seek to pressure regimes rather than peoples and thus reduce humanitarian costs, has been gaining support among Member States’.³³

- Second, once the ‘humanitarian rule’ is accepted, the limits of sanctions must also be examined. Two main limits — legal and political — might be applied. The *legal* limit makes international humanitarian law fully applicable to institutional sanctions. The Security Council cannot, and must not, forget its constituent legal basis, the UN Charter, and its political character does not release it from its

²⁴ The humanitarian ‘rule’, ‘exception’ or ‘standard’ could be simply defined — following a recent use by the Security Council — as ‘the necessity for sanctions to contain adequate and effective exemptions to avoid adverse humanitarian consequences on the people . . . and that they be structured in a way that will not impede, thwart or delay the work of international humanitarian assistance organizations or governmental relief agencies providing humanitarian assistance to the civilian population . . .’. SC Res. 1333 (2000), preamble.

²⁵ It has been deduced, however, from the rulings of the Yugoslavia Sanctions Committee that ‘the “humanitarian exception” applicable to other aspects of the sanctions does not apply to the arms embargo’, see Scharf and Dorosin, ‘Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee’, 19 *Brook. J. Int’l L.* (1993) 771, at 779. Paragraph 7 of SC Res. 1298 (2000) and paragraphs 6 and 15(d) of SC Res. 1333 (2000) seem, however, to challenge this opinion as a general rule since the ‘humanitarian exception’ applies to the arms embargo imposed on Eritrea and Ethiopia and Afghanistan/Taliban, respectively.

²⁶ SC Res. 757 (1992), para. 4(c) and, later, against the Bosnian Serbs in SC Res. 942 (1994), para. 7.

²⁷ SC Res. 917 (1994), para. 7.

²⁸ SC Res. 864 (1993). See the opinions of Council members in UN Doc. S/PV.3277.

²⁹ SC Res. 1054 (1996) and 1070 (1996). See particularly the opinions of China and Russia when adopting Resolution 1054 in UN Doc. S/PV. 3660.

³⁰ SC Res. 1132 (1997). See the opinions of Council members in UN Doc. S/PV.3822.

³¹ SC Res. 1267 (1999) and 1333 (2000). See the opinions of Council members when adopting the latter resolution in UN Doc. S/PV.4251.

³² See Bennouna, ‘L’embargo dans la pratique des Nations-Unies (Radioscope d’un moyen de pression)’, in J. Cardona-Llorens (ed.), *Bancaja Euromediterranean Courses of International Law* (1997) 205, at 221–223. See also the SFDI Aix-en-Provence Colloquium: *Les Nations Unies et les sanctions: quelle efficacité?* (2000).

³³ Annual Report of the Secretary-General on the Work of the Organization (UN Doc. A/53/1, para. 62).

observance.³⁴ The Charter (Preamble and Articles 1 and 55, particularly) refers to international law.³⁵ Appeals to the Council that any sanctions regime must take international human rights instruments and humanitarian standards fully into account have come from different sources.³⁶ Moreover, its five permanent members have also put this interrelation on record,³⁷ as done recently by the Second Panel established by the Council itself concerning the humanitarian situation in Iraq.³⁸ The *political* limit was underlined by the UN Secretary-General in the so-called 'Millennium Report', when Mr Annan warned that '[w]hen robust and comprehensive economic sanctions are directed against authoritarian regimes, a different problem is encountered. Then it is usually the people who suffer, not the political elites whose behaviour triggered the sanctions in the first place. Indeed, those in power, perversely, often benefit from such sanctions by their ability to control and profit from black market activity, and by exploiting them as a pretext for eliminating domestic sources of political opposition.'³⁹ The less democratic (or even less structured) a targeted regime (state) is, the more 'collateral damage' sanctions will do to the civil population.

- Finally, the effectiveness of the 'humanitarian rule' depends upon the gathering of accurate information, either *sur pièce* or *sur place*. Early observance is needed to assess the impact of sanctions on the humanitarian situation. As we have seen above, the gathering of information in Iraq was hindered for several reasons; but the problem worsens politically when information *does* exist and is not accurately used or assessed. The case of Haiti is symptomatic: the Secretary-General informed the UN in general,⁴⁰ and the Security Council in particular,⁴¹ on the humanitarian situation in Haiti; economic sanctions were nevertheless imposed and maintained. In other cases, dual-use commodities which could be labelled either as humanitarian foodstuffs (oil, helicopters, pharmaceuticals, etc.), have been excluded from the humanitarian exception due to the absence of a

³⁴ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*, Advisory Opinion of 28 May 1948, ICJ Reports (1947–1948) 57, at 64.

³⁵ The Security Council's practice from 1945 onwards shows that international law, either customary or conventional, has been invoked as a rule of reference for the Council. See M. J. Aznar-Gómez, *Responsabilidad internacional del Estado y acción del Consejo de Seguridad de las Naciones Unidas* (2000), at 101–102.

³⁶ See several initiatives on smart sanctions on the website of the 'Working Group on General Issues of Sanctions', created by the Security Council (Presidential Statement of 17 April 2000, UN Doc. S/2000/319) at <www.un.org/sc/committees/sanctions/index.html>

³⁷ UN Doc. S/1995/300. See generally the adoption of the concept in the Security Council when discussing the Agenda item 'General issues relating to sanctions' (UN Doc. S/PV.4128).

³⁸ UN Doc. S/1999/356, Annex II. See also the Note of the President of the Security Council of 17 April 2000 (UN Doc. S/2000/319).

³⁹ *We the Peoples: The Role of the United Nations in the 21st Century*, Millennium Report of the Secretary-General of the United Nations, United Nations Department of Public Information (2000), at 50, para. 231.

⁴⁰ See e.g. UN Doc. A/48/931.

⁴¹ UN Doc. S/1994/1012.

monitoring system as to their final use.⁴² A new involvement of the Council in the close monitoring of situations that may endanger international peace and security seems to have been currently adopted.⁴³ In addition to the gathering of information usually done by the peacekeeping operations (PKO) when deployed in the conflict area, a new trend deduced from recent practice shows how regional and sub-regional agencies and organizations must be in close connection with the sanctions committees not only in the gathering of information but in its legal and political assessment as well.⁴⁴

C *The Management of Sanctions*

Once sanctions against a targeted state have been decided, the Security Council establishes a sanctions committee under Article 28 of its provisional rules of procedure. Here a first possibility for a deregulative tendency might be advanced: Why not have the same sanctions committee for all situations? It is true that all the committees are composed of the same states — the members of the Security Council. But personnel from each state are often different in each committee (and even in each meeting), upsetting the uniform interpretation of the sanctions regimes as required by a normally uniform wording of sanctions in the Council's resolutions. Although the Council has attributed to the sanctions committees a quasi-judicial function in interpreting each sanction regime, each committee has performed that function with neither clear instructions from the Council nor an authorization to use the precedent of other committees as authoritative decisions.⁴⁵ As underlined by Michael P. Scharf and Joshua L. Dorosin,

[f]or reasons of fairness and predictability, identical provisions in different regimes should be construed as identical in scope ... [but] [t]here is no mechanism, however, to ensure this consistency under the existing regime. It logically follows that questions arising under one sanctions regime should not be addressed solely in terms of the precedent of that regime. Rather, recourse should be made to the precedent of the other regimes and each case should be viewed as a potential precedent for such other regimes including as yet unforeseen regimes that may be instituted in the future, using the provisions of the current Security Council resolutions

⁴² See some examples for the Yugoslav conflict in Scharf and Dorosin, *supra* note 25, at 781 *et seq.*

⁴³ Deciding a close monitoring of humanitarian situations, as in the Democratic Republic of the Congo (SC Res. 1341 (2001), para. 27) or in Macedonia (SC Res. 1345 (2001), para. 13).

⁴⁴ The involvement of regional agencies in recent practice and the new uses of Chapter VIII of the UN Charter is another by-product of the last decade of the maintenance of international peace and security. See Cardona-Llorens, 'La coopération entre les Nations Unies et les accords et organismes régionaux pour le règlement pacifique des affaires relatives au maintien de la paix et de la sécurité internationales', in B. Boutros-Ghali *amicorum discipolorumque liber: paix, développement, démocratie* (1998) 251; and Gray, 'Regional Arrangements and the United Nations Collective Security System', in H. Fox (ed.), *The Changing Constitution of the United Nations* (1997) 91.

⁴⁵ Between the two main committees (Iraq and Yugoslavia), the latter has barely used the former rulings. See Scharf and Dorosin, *supra* note 25, at 789. Even more so, as in the case of the Yugoslavia Committee, when citing its own previous rulings, it 'explicitly assert[ed] that they are not to be taken as precedent for future cases' (*ibid.*, at 824).

as models. There is no mechanism, however, to ensure this consistency under the existing system.⁴⁶

Each committee has had to construct its rulings within a limited legal framework and apply a case-by-case approach, coming from and going to a *deliberate creative ambiguity*.⁴⁷ Yet, possible deregulation could either be found in the absence of explanation of the legal basis of their rulings or in the secrecy of their work.⁴⁸ For a sensitive issue such as sanctions, the following observation of Karel Wellens may be perfectly applied:

a special obligation to act as transparently as possible is incumbent upon non-plenary organs acting on behalf of the whole membership under the governing provisions of an Organization's constituent instrument. The more extensive powers are bestowed upon a non-plenary organ, the more compelling the impositions of such special obligation from the perspective of effective accountability.⁴⁹

It is true, however, that from 1999 onwards serious efforts have been made to enhance the work of the sanctions committees. In its note of 29 January 1999,⁵⁰ the President of the Security Council declared the agreement of all members of the Council on some proposals, particularly those directed towards improving the gathering and assessment of information, the monitoring of the envisaged situations with comprehensive and technified procedures, including a clarification, harmonization and continued evaluation of the mandatory measures and guidelines on sanctions, and increasing the transparency of the sanctions committees. This is particularly applied to the 'humanitarian exception', which should deserve periodic meetings of the committees to analyse the impact of sanctions on the humanitarian situation.

These peculiarities in the functioning of sanctions committees are relevant to our analysis of the application of the 'humanitarian rule'.⁵¹ Some elements of the

⁴⁶ Scharf and Dorosin, *supra* note 25, at 820.

⁴⁷ This is somewhat familiar to other subsidiary organs of the Council, such as the UNCC. See Aznar-Gómez, 'Environmental Damages and the 1991 Gulf War: Some Yardsticks before the UNCC', 14 *LJIL* (2001) 301. It is also surprising that there is not a provision for seeking legal advice from the UN Legal Counsel. See Conlon, *supra* note 5, at 651–652.

⁴⁸ Since 1995, however, the Council's members have made an effort to make the procedures of the sanctions committees more transparent and routine decisions may receive expeditious treatment; but, as a general rule, the Council has decided that the '[m]eetings of the Sanctions Committees should remain closed, as they are now, and the summary records of those meetings should continue to be distributed according to the existing pattern' (UN Doc. S/1995/234).

⁴⁹ Wellens, 'The Primary Model Rules of Accountability of International Organizations: The Principles and Rules Governing their Conduct or the Yardsticks for their Accountability', in N. M. Blokker and H. G. Schermers (eds), *Proliferation of International Organisations* (2001) 433, at 437.

⁵⁰ UN Doc. S/1999/92.

⁵¹ Though the 'humanitarian rule' applies to all kinds of embargoes, its application to comprehensive embargoes (Iraq, FRY and Haiti) deserves particular attention. Although sanctions against Haiti commenced with SC Res. 841 (1993), the comprehensive embargo began with SC Res. 917 (1994) of 6 May 1994, and terminated with SC Res. 944 (1994) of 29 September 1994. The rulings of its sanctions committee are, therefore, limited, the rulings of sanctions committees on Iraq and FRY being the more important for our purposes. See a general review of the sanctions committees since 1990 in Alabrune, 'La pratique des comités des sanctions du Conseil de sécurité depuis 1990', 45 *AFDI* (1999) 226.

management of sanctions directly affect the proper functioning of that rule, particularly the gathering and assessment of information, the definition of humanitarian items and the final application of the ‘humanitarian rule’:

- Information arrives at the sanctions committees almost exclusively from states and the Secretary-General: this is the basic wording of its constituent rule.⁵² But, as Martti Koskenniemi has remarked with respect to the Iraq Committee, ‘*le comité 661 n’a jamais étudié en détail les divers rapports nationaux, mais en a simplement pris acte.*’⁵³ Therefore, the primary source of information has been the notifications from states on intended shipments of humanitarian foodstuffs and supplies.⁵⁴ As a means of control, notification on humanitarian exceptions might have adopted (but did not) the model of notification for the arms control regime imposed upon Iraq, with the participation of the UN Special Commission (UNSCOM) and the IAEA.⁵⁵
- As a matter of predictability, attempts to formulate a guiding list of exempted humanitarian items, as in the case of Iraq, did not succeed in the case of Yugoslavia. On the contrary, ‘the Committee stated that it preferred to “consider specific questions” concerning proposed humanitarian exports to the FRY “on a case basis, as they arise”.’⁵⁶ But in all cases, consensus governs the decision-making process in committees; and with respect to the no-objection procedure, any objection could delay the arrival of humanitarian items for as long as discussions continue within the sanction committee.
- Finally, as already stated, ongoing verification of the fulfilment of the entire ‘humanitarian rule’ (gathering of information, assessment and application) has

⁵² SC Res. 661 (1990), para. 6. for Iraq; SC Res. 724 (1992), para. 5(b), for Yugoslavia; and SC Res. 917 (1994), para. 14, for Haiti.

⁵³ Koskenniemi, *supra* note 21, at 125–126. The same could be said for the Yugoslavia Committee (see Scharf and Dorosin, *supra* note 25, *passim*). It is true, however, that the Secretary-General’s reports have filled in the gap on information lacking from states.

⁵⁴ In the case of Iraq, however, paragraph 8 of Resolution 666 (1990) recalls that the embargo ‘does not apply to supplies intended strictly for medical purposes, but in this connection recommends that medical supplies should be exported *under the strict supervision of the Government of the exporting State or by appropriate humanitarian agencies*’ (emphasis added). Moreover, paragraph 20 of Resolution 687 (1991), ‘once and for all exempted foodstuffs from Resolution 661’s embargo regime, thereby eliminating the Committee’s role in determining humanitarian circumstances with respect to foodstuff to Iraq’ (Conlon, *supra* note 5, at 640–641). It is true, notwithstanding, that para. 20 of Resolution 687 (1991) refers to a list of materials and supplies for essential civilian needs identified in the Secretary-General’s Report of 20 March 1991 (UN Doc. S/22366).

⁵⁵ Conlon, *supra* note 5, at 643.

⁵⁶ Scharf and Dorosin, *supra* note 25, at 783. Depending on the case, a liberal and ample interpretation of the humanitarian exception has been adopted by committees, including not only basic foodstuffs and medical items but other more controversial items (such as cigarettes or matches). Free information items (such as newspapers, journals, etc.) have also been included and special care has been given to the ‘religious exception’ (as a human right exception), which particularly included the pilgrimage to Muslim holy places as an exception to air embargoes in Iraq, Libya and Sudan.

neither been properly entrusted to the committee, nor given appropriate mechanisms to comply with.⁵⁷

The 'humanitarian rule' normally applies and functions on an *ad hoc* basis within each sanctions committee. Avoiding precedent, the sanctions committees have used a case-by-case decision-making process with a limited (if they exist) canvas of reference rules. However, consistency, predictability and fairness — in short: the rule of law — applied to the work of sanctions committees seem to be necessary if a legitimate system of institutional sanctions is to be maintained.

3 Human Rights and the Use of Force

As a result of a process initiated before the Second World War, but accelerated by and projected from the 'UN human rights regime', the end of the 1980s witnessed the confirmation of a new set of rules of *public* intervention⁵⁸ in the quest for human rights protection. These rules cannot — and must not — be assimilated into old patterns of 'humanitarian intervention', which were 'elaborated in a specific context, i.e. in the notable absence of both human rights law and an all-out prohibition of the use of force.'⁵⁹

The protection of human rights seems to be a collective (and selective) will determined by the Security Council, but the enforcement of that protection by means of the use of force returns to old patterns of unilateralism, leaving the Security Council aside. Both of these aspects contain evidence of deregulation.

A Determination of the Collective Will

In the last two decades, the renewed 'humanitarian action' has adopted a step-by-step approach, which may or may not be headed by the Council. Depending on whether or

⁵⁷ See Conlon, 'The UN's Questionable Sanctions Practice', 53/54 *Law and State* (1996) 131, at 137. See also Scharf and Dorosin, *supra* note 25, at 788. In general, the absence of a specific monitoring mechanism to ensure the effective implementation of sanctions has been a common feature of every sanctions committee and is referred to in their reports to the Security Council. See e.g. among the most recent reports of sanctions committees for Somalia (UN Doc. S/2000/1226, para. 9), Rwanda (UN Doc. S/2000/1227, para. 5), Liberia (UN Doc. S/2000/1233, para. 7), Sierra Leone (UN Doc. S/2000/1238, para. 26), the Federal Republic of Yugoslavia (UN Doc. S/2001/102, para. 17) and Eritrea and Ethiopia (UN Doc. S/2000/1259, para. 7). In some cases, however, this 'monitoring mechanism' has been recently created, as in Angola: although sanctions against UNITA began in 1993, the monitoring mechanism was created on 12 July 2000 under paragraph 3 of SC Res. 1295 (2000). See its interim report in UN Doc. S/2000/1026, and its final report in UN Doc. S/2000/1225. In other cases it seems to function from the beginning of sanctions, as in Afghanistan (UN Doc. S/2000/1254, para. 10 *et seq.*).

⁵⁸ 'Public intervention' in the sense given by Pierre-Marie Dupuy in 'Implications of the Institutionalization of International Crimes of States', in J. H. H. Weiler *et al.*, *International Crimes of State. A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989) 170, at 182; and 'Action publique et crime international de l'État. A propos de l'article 19 du projet de la Commission du droit international sur la responsabilité des États', 25 *AFDI* (1979) 539. This notes the difference between *public* action and *collective* action.

⁵⁹ Gowlland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance', 11 *EJIL* (2000) 361, at 363.

not the humanitarian situation can be categorized as a ‘threat to the peace’ under Article 39 of the Charter, action may be governed by either the rules of humanitarian assistance⁶⁰ or by the particular law-making of the Security Council acting under Chapter VII of the Charter. But this law-making begins with that prior determination under Article 39 of the Charter. Here we find the first deregulation in the entire process due to the fact that, as expressed by Jean Combacau in a deliberate truism, ‘*une menace pour la paix au sens de l’article 39 est une situation dont l’organe compétent pour déclencher une action des sanctions déclare qu’elle menace effectivement la paix.*’⁶¹

Determination under Article 39 is thus a caveat which bestows upon the Security Council a power of appreciation not easily subject to control.⁶² Actually, the framers of the Charter wanted to avoid specific control over this determination.⁶³ The practice of this UN organ has also shown that the Council has found ‘threats to peace’ in such different kinds of situations that it cannot be said that there is a clear, precise and well-defined concept of ‘threat to peace’. It is true that several ‘humanitarian situations’ have been invoked by the Council, either directly or indirectly, as a ‘threat to the peace’; but it is also true that a broad interpretation of *human security* has been adopted by the Council — at least theoretically — as a term of reference.⁶⁴ Such a broad assessment of what can be understood as ‘threat to peace’ allows the Council to approach each particular case with differing levels of formal⁶⁵ and material ‘intensity’,⁶⁶ leaving room for an *ad hoc* approach in each particular case. Issues of double standards, different involvement depending on the case, and secrecy in prior consultations before action (or inaction) in the Security Council⁶⁷ threatens the legitimacy of the UN executive organ, undermining its authority in public opinion.⁶⁸

⁶⁰ See the guidelines laid down in GA Res. 43/131 and 46/182, and their elaboration in Boutros-Ghali’s *An Agenda for Peace* (UN Doc. A/47/277– S/24111, para. 30). See also R. Abril-Stoffels, *La asistencia humanitaria en los conflictos armados* (2001).

⁶¹ J. Combacau, *Le pouvoir de sanction de l’O.N.U.: étude théorique de la coercion non militaire* (1974) at 100.

⁶² See generally M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of Its Acts* (1994).

⁶³ See Aznar-Gómez, ‘El control de legalidad de la acción del Consejo de Seguridad de las Naciones Unidas in el ámbito del capítulo VII de la Carta’, 8 *Anuario Argentino de Derecho internacional* (1998) 31.

⁶⁴ Statement of the President of the UN Security Council on behalf of its members (UN Doc. S/23500). See also UN Doc. S/24344.

⁶⁵ Adopting its position as a resolution under Chapter VII, compulsory in all its terms *ex* Article 25 of the Charter; or expressing its ‘concern’ by means of a presidential statement.

⁶⁶ Simply adopting recommendations, condemnations, or sanctions in a scalable intensity.

⁶⁷ In the first six months of 2001, 12 out of 89 of the Council’s meetings were held in private. In these cases, in accordance with rule 55 of the provisional rules of procedure of the Security Council, an ‘Official Communiqué’ is issued by the Secretary-General in place of a verbatim record.

⁶⁸ Cf. Franck, ‘The Security Council and “Threats to Peace”: Some Remarks on Remarkable Recent Developments’, in R.-J. Dupuy (ed.), *Peace-Keeping and Peace-Building: The Development of the Role of the Security Council* (1993) 83, at 85. See a recent criticism of the Council’s ‘crisis of credibility’ made by the Secretary-General in the second meeting of the Council at the level of heads of state and government (UN Doc. S/PV.4194).

B Enforcement, with or without the Security Council

Since 1990 the Council, with a more or less clear humanitarian scope, has authorized the use of force in the former Yugoslavia, Somalia, Haiti, Rwanda, the Great Lakes Region in Africa, Albania, the Central African Republic, Guinea-Bissau and East Timor. The cases of Iraq, Liberia, Sierra Leone and Kosovo, however, warrant a different legal approach.

Leaving aside the discussion on the general lawfulness of these authorizations or delegations,⁶⁹ what is true is that this new practice is not so clearly submitted to control within the Council — its checks and balances⁷⁰ — as the never-used powers pursuant to Articles 42 *et seq.* of the Charter would be. The decision process within the Security Council, including the negotiations and consensus among its members (and particularly the ‘big five’) and the participation of the military staff foreseen in Articles 46 and 47 of the Charter, at least offers the necessary checks and balances when deciding where, when, how and by whom the force must be used (and stopped). One attempt at a solution has been to give a large degree of command and control over the operation to the Secretary-General — a role not foreseen in the Charter — and to impose upon the latter (and the states concerned) a more or less clear obligation to report to the Council on a regular basis on the implementation of the mandates.⁷¹ But these command and control powers have been continuously debated in the Council and the lack of effective control has caused concerns or abstentions in the voting for draft resolutions.⁷² Even when these command and control powers have been explicitly retained by the Council, the vagueness of the mandate — often worded as

⁶⁹ Literature on this new exception to Art. 2(4) of the Charter is abundant. See generally D. Sarooshi, *The United Nations and the Development of Collective Security. The Delegation of Powers by the UN Security Council of its Chapter VII Powers* (1999). See also Cardona-Llorens, ‘La aplicación de medidas que implican el uso de la fuerza armada por el Consejo de Seguridad para hacer efectivas sus decisiones’, 47 *REDI* (1995) 9; Blokker, ‘Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by “Coalitions of the Able and Willing”’, 11 *EJIL* (2000) 541; and Momtaz, ‘La délégation par le Conseil de sécurité de l’exécution de ses actions coercitives aux organisations régionales’, 43 *AFDI* (1997) 105. For the more particular case of ‘humanitarian intervention’, see generally O. Corten and P. Klein, *Droit d’ingérence ou obligation de réaction?* (1992) and S. D. Murphy, *Humanitarian Intervention. The United Nations in an Evolving World Order* (1996). For a different view, see Tesón, ‘Collective Humanitarian Intervention’, 17 *Michigan J. Int’l L.* (1996) 323; and another view in Lillich, ‘Humanitarian Intervention through the United Nations: Towards the Development of Criteria’, 53 *ZaōRV* (1993) 557.

⁷⁰ Nor to ‘financial’ control since ‘it need not to be financed through the general budget and, hence, is not subject to control by the General Assembly’, Reisman, ‘Peacemaking’, 18 *Yale J. Int’l L.* (1993) 415, at 421.

⁷¹ See e.g. para. 4 of SC Res. 770 (1992) in the case of Bosnia; paragraphs 13, 15 and 18 of SC Res. 794 (1992) for Somalia; para. 10 of SC Res. 929 (1994) for Rwanda; paragraphs 5, 6, 13 and 14 of SC Res. 940 (1994) for Haiti; para. 9 of SC Res. 1101 (1997) for Albania; and para. 12 of SC Res. 1264 (1999) for East Timor.

⁷² This was the case with China, India and Zimbabwe in SC Res. 770 (1992) for Bosnia (UN Doc. S/PV. 3106); or the abstentions of Brazil and China in SC Res. 940 (1994) for Haiti and the concerns of New Zealand, Mexico and Pakistan though they voted in favour of that resolution (UN Doc. S/PV.3414). In another case, Zimbabwe supported SC Res. 794 (1992) for Somalia because the command and control authority seemed to remain with the Council via the Secretary-General (UN Doc. S/PV. 3145). However,

‘all the necessary means’ — incorporates another caveat in the resolutions giving the concerned state(s) or regional arrangement(s) an ample, not limited, spectrum of possible uses of force.⁷³ This problem has usually arisen when acting through a PKO as well, leaving room for misunderstandings as to the operation’s mandate.⁷⁴ And exploring the different mandates and tasks assigned to PKOs created since 1990, one cannot find a common pattern of human rights involvement in each and every operation.⁷⁵

Cases of the use of force in humanitarian situations show a *glissement* not foreseen in the Charter that gives to the state(s) or authorized arrangement(s) a power originally only recognized with respect to the Security Council.⁷⁶ The exception to the general rule set down in Article 2(4) is becoming the current rule, with a ‘privatization’ of the exercise of the power⁷⁷ when ‘the algebraic rule of the lowest common denominator’⁷⁸ is achieved among the members of the Council. And the deregulative process could be found in the fact that there is no coherent or unified framework for that exception. Although in the case of Rwanda an express reference was made to the Somalia precedent in order to provide a ‘legal framework’ for the intervention,⁷⁹ in the end each case has been constructed depending on particular or common interests of the member states of the Council (and particularly the permanent members). Forces have been offered by states far removed from the system foreseen in Articles 43 and 45 of the Charter, and at the disposal of a unified command

when adopting this resolution, reservations on the decided action were expressed by India, Belgium and China, in order to avoid ‘a precedent for the future’ (India), and ‘a purely United Nations operation’ (Belgium) being preferred (*ibid.*). The same could be said with respect to the concerns of Nigeria when adopting SC Res. 929 (1994) for Rwanda (UN Doc. S/PV.3392).

⁷³ This is a source of controversial interpretation among states and the Secretary-General, as arose in the case of the ‘Unified Task Force’ (UNITAF) in Somalia (see Sarooshi, *supra* note 69, at 214 *et seq.*). In other cases, such as the extension of the mandate of the ‘Multinational Protection Force’ (MPF) in Albania, there was no further discussion but simply an implied extension in order to include the protection of the OSCE electoral monitoring mission (*ibid.*, at 223). Finally, states concerned with the use of force have sought express step-by-step particular authorizations from the Council to extend their mandates: this was the case when France proposed the establishment of ‘safe humanitarian zones’ in Rwanda (*ibid.*, at 226).

⁷⁴ In order to avoid this, the ‘Report of the Panel on United Nations Peace Operations’ (the ‘Brahimi’ Report) recommended ‘clear, credible and achievable mandates’ for all PKOs (UN Doc. A/55/305 — S/2000/809, at 10, paras 56–64). See the endorsement of that idea by the Council in SC Res. 1318 (2000) and 1327 (2000), and the follow-up of its application in UN Docs A/55/502, A/55/507 and A/55/507/Add.1.

⁷⁵ Escobar-Hernández, ‘Paz y derechos humanos: Una nueva dimensión de las operaciones para el mantenimiento de la paz’, in *Cursos de derecho internacional de Vitoria-Gasteiz* (1996) 47.

⁷⁶ Bothe, ‘Les limites des pouvoirs du Conseil de sécurité’, in Dupuy, *supra* note 68, at 67, esp. at 73–74; and Weston, ‘Security Council Resolution 678 and Persian Gulf Decision-Making: Precarious Legitimacy’, 85 *AJIL* (1991) 561, at 562–567.

⁷⁷ Quigley, ‘The Privatization of Security Council Enforcement Action: A Threat to Multilateralism’, 17 *Michigan J. Int’l L.* (1996) 249. For another view, see Blokker, *supra* note 69, at 543, note 3.

⁷⁸ Wedgwood, ‘Unilateral Action in the UN System’, 11 *EJIL* (2000) 349, at 351.

⁷⁹ See the reference to UNITAF as a precedent in the Secretary-General’s letter of 19 June 1994 to the President of the Security Council (UN Doc. S/1994/728). See also the French representative’s letter of 20 June 1994 to the Secretary-General requesting the authorization of the Council ‘[i]n the spirit of resolution 794 (1992)’ (UN Doc. S/1994/734, 21 June 1994).

led by a single state⁸⁰ which creates its military staff committee, again far removed from Chapter VII and, particularly, its Articles 46 and 47.

In the Iraqi case, command and control of the different uses of force authorized (to implement the blockade or the withdrawal of Iraq from Kuwait) were certainly not in the hands of the Council or, at least, the Secretary-General; and this was even worse when the use of force was for alleged humanitarian reasons. After the determination of the consequences of the repression of the Iraqi civilian population as a threat to peace in Resolution 688 (1991), the Council never, expressly or implicitly, authorized any state to deal with the situation using force. As Christine Gray has said,

although referred to at the time by the States involved, [Resolution 688] clearly [did] not authorize forcible humanitarian intervention. It was not passed under Chapter VII and did not expressly or implicitly allow the use of force.⁸¹

Nevertheless, from April 1991 and August 1992, under the euphemistic titles of *Operation Provide Comfort* and *Operation Southern Watch*, two 'no-fly zones' were created over Iraq,⁸² allegedly to protect the Kurd and Shiite populations.⁸³ Since then, different attacks against Iraqi aircraft and air defence sites have been initiated to enforce both no-fly zones, particularly from December 1998 to the present.⁸⁴

Though the use of force has been claimed by the UK and the US to be authorized by different Security Council resolutions, both no-fly zones in Iraq were imposed and are maintained unilaterally without any Council authorization,⁸⁵ in contrast to the model adopted for the no-fly zone over Bosnia which was decided for a similar purpose.⁸⁶ The alleged protection of the Kurds and Shiite populations was thus the first case of the use of force for humanitarian purposes *without* the Council.

The second case was in Sierra Leone, with the involvement of a regional agency: the Economic Community of West African States (ECOWAS) and its 'Monitoring Group' (ECOMOG).⁸⁷ By Resolution 1132 (1997), the Council authorized ECOWAS to

⁸⁰ The United States in Iraq, Somalia and Haiti; France in Rwanda; Italy in Albania; Nigeria in the ECOMOG intervention in Sierra Leone; and Australia in East Timor.

⁸¹ Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force', 65 *BYBIL* (1994) 135, at 162. In a similar sense, Alston, *supra* note 15, at 151. For an contrasting view, see Tesón, *supra* note 69, at 347–348.

⁸² For the facts, see the detailed articles by Malanczuk, *supra* note 20, and Alston, *supra* note 15.

⁸³ 'Curiously', no particular ongoing human rights monitoring mechanisms were either proposed or foreseen by the powers acting institutionally or unilaterally, as was the case with disarmament issues which were deemed to deserve the creation of several ad hoc Council subsidiary organs. Hence, human rights protection seems to have been more of a rhetorical ground for action than a *real* motive for action, before, during and after the conflict.

⁸⁴ Attacks have included not only air combat among fighters and strikes against Iraq's SAM batteries, but also severe cruise missile attacks against Iraq's military capabilities.

⁸⁵ Reactions from China, Russia, the Non-aligned Movement and the Arab League can be found in Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council', 3 *Max Planck UNYB* (1999) 59, at 77.

⁸⁶ SC Res. 781 (1992) and 816 (1993).

⁸⁷ A similar case occurred in 1990–1992 with the ECOWAS/ECOMOG involvement in Liberia, later 'commended' by the Council in its Resolution 788 (1992). See Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone', 12 *Temple Int'l & Comp. L. J.* (1998) 333.

monitor the embargo on oil and weapons against Sierra Leone. The regional arrangement used ECOMOG to implement that embargo. However, from February 1998 onwards, ECOMOG troops arrived in Sierra Leone to monitor and implement — using force when necessary — the peace agreement signed on 23 October 1997,⁸⁸ but not authorized by the Council under Article 53(1) of the Charter.

As in the precedent of Liberia, ECOWAS acted more in line with the old ‘humanitarian intervention’ model instead of a current peace-keeping operation.⁸⁹ But, what is more remarkable is that it did so without the prior consent of the Security Council, as Resolution 1132 (1997) cannot be a legal basis for the kind of force used by ECOMOG in Sierra Leone. Later on, in its Resolution 1162 (1998), the Council seems to have assumed, from this resolution onwards, responsibility for the action as it authorized the coercive measures with respect to Sierra Leone as it did with respect to Liberia.⁹⁰

Closing the cycle of the decade, the use of force against Yugoslavia in the Kosovo case demonstrates use of force by a regional agency (NATO) but, again, without prior Council authorization,⁹¹ the possible *ex post facto* authorization by Resolution 1244 (1999), 10 June 1999, being the subject of critiques⁹² and discussion.⁹³

Nevertheless, though several states, particularly Russia, Namibia, India and China,⁹⁴ highly criticized the military intervention and the circumvention of the Security Council’s role, perhaps the most interesting issues concerning this unilateral action as a possible deregulation precedent were the ideas implied in the new ‘Alliance’s Strategic Concept’, approved in the April 1999 NATO Washington Summit, while bombing in Yugoslavia still continued. Paragraph 31 of the ‘Concept’ offers NATO

to support on a case-by-case basis in accordance with its own procedures, peacekeeping and other operations under the authority of the UN Security Council or the responsibility of the

⁸⁸ The so-called ‘ECOWAS Six-Month Peace Plan for Sierra Leone’, 23 October 1997 (see UN Doc. S/1997/824).

⁸⁹ See Torrelli, ‘Chronique des faits internationaux’, 101 *RGDIP* (1997) 737, at 776.

⁹⁰ Issues of international responsibility resulting from this authorization are analysed in Gowlland-Debbas, *supra* note 59, at 370 *et seq.*

⁹¹ On the lawfulness of this armed intervention see Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’, 10 *EJIL* (1999) 1; and Cassese, ‘*Ex iniuria ius oritur*: Are We Moving towards Legitimation of Forcible Humanitarian Countermeasures in the World Community?’, 10 *EJIL* (1999) 23 (hereinafter Cassese, ‘*Ex iniuria*'). See also Krisch, *supra* note 85, at 81 *et seq.*; Ripoll-Carulla, ‘El Consejo de Seguridad y la defensa de los derechos humanos. Reflexiones a partir del conflicto de Kosovo’, 51 *REDI* (1999) 59; and the ASIL debate published in 93 *AJIL* (1999) 824 *et seq.* See also Cassese’s *addendum*: ‘A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*’, 10 *EJIL* (1999) 791 (hereinafter Cassese, ‘Follow-Up’).

⁹² See UN Doc. S/PV.4011.

⁹³ See Pellet, ‘Brief Remarks on the Unilateral Use of Force’, 11 *EJIL* (2000) 385.

⁹⁴ See their interventions within the Council when the allied attacks began in UN Doc. S/PV.3988. See other reactions against the NATO attacks in Krisch, *supra* note 85, at 84. See also a *mild* reminder by the ICJ on the primary role of the Council in *Case concerning Legality of Use of Force (Yugoslavia v. Belgium)*, Provisional Measures, ICJ Reports (1999), para. 50.

OSCE, including by making available Alliance resources and expertise. In this context NATO recalls its subsequent decisions with respect to crisis response operations in the Balkans.⁹⁵

The development of NATO's tasks has come not only from the 'out of zone' operations⁹⁶ but also from the 'out of treaty' operations.⁹⁷ A case-by-case approach following the Balkans model is thus admitted, but, as the 'Concept' says, under the authority of the UN Security Council *or* of the OSCE.

Professor Simma's *tour d'horizon* of the rule prohibiting the threat or use of force and its exceptions⁹⁸ describes the state of current law. Professor Cassese for his part proposes that unlawful NATO intervention in Kosovo

may gradually lead to the crystallization of a general rule of international law authorizing armed countermeasures for the exclusive purpose of putting an end to large-scale atrocities amounting to crimes against humanity and constituting a threat to the peace.⁹⁹

Is customary process thus in motion?¹⁰⁰ The second of Professor Cassese's *EJIL* articles is also illuminating for our purposes when addressing *opinio necessitatis* as distinct from *opinio iuris*. Even accepting that 'the *opinio necessitatis* was strong and widespread', this might lead to a deregulative process if non-authorized interventions 'constitute a fallback solution for cases where inaction would be utterly contrary to any principle of humanity.'¹⁰¹ Is this a 'fallback solution' in any case, depending on whether or not a 'coalition of the able and willing' exists? Or is limited by a minimum legal framework?

As Security Council practice has shown during the last decade, the legal panorama on the use of force to protect and monitor human rights is subject to many and varied circumstances (the target of the humanitarian intervention, the intervening actors, the mandates, etc.). The interaction of all of these variables impedes, in the present author's view, the establishment of a pattern of clear, homogeneous legal criteria on the authorization of the use of force in humanitarian situations. Oscar Schachter, towards the beginning of the 'authorization decade', stated that

[e]ven in the absence of such prior approval, a State or group of States using force to put an end to atrocities when the necessity is evident and the humanitarian intention is clear is likely to have its action pardoned. But, I believe it is highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention. It would be better to acquiesce in a violation that is considered necessary and desirable in the particular

⁹⁵ See the development of this new 'concept' in Simma, *supra* note 91, at 15.

⁹⁶ See Cardona-Llorens and Aznar-Gómez, 'Las operaciones fuera de zona de la OTAN y de la UEO', 22 *Tiempo de Paz* (1991) 88.

⁹⁷ See Simma, *supra* note 91, at 14 *et seq.*, particularly addressing the *ultra vires* consequences at 18–20.

⁹⁸ Simma, *supra* note 91, at 1–6.

⁹⁹ Cassese, 'Ex iniuria', at 29.

¹⁰⁰ Perhaps we might retain here the relativity of inconsistencies upon which the ICJ theorized in the *Nicaragua* case: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports (1986) 14, at 98, para. 186.

¹⁰¹ Cassese, 'Follow-Up', at 797 and 798. It must also be remembered that the customary process, in this particular case, would be referred to a generally recognized *jus cogens* rule — the prohibition of the threat or use of force — in close connection with another cogent rule — the protection of human rights.

circumstances than to adopt a principle that would open a wide gap in the barrier against unilateral use of force.¹⁰²

The absence of this new rule, however, poses a serious question for current international law if that absence is due to a deliberate policy of powerful states. As Niko Krisch has said:

The problem is rather the manner of its invocation. Had it been possible to perceive it as a serious claim to a new, limited right, it would have succeeded or failed, but would not have severely damaged the system. But it is rather perceived as an expression of the freedom of western states when they deem it right . . .¹⁰³

4 Some Concluding Remarks

Evidence of at least a *tendency* to deregulation as understood in this paper may be found in some of the recent practice of the Security Council protecting and monitoring human rights. A deliberate *ad hoc* approach from the Council seems to be the *leitmotif* of its action.¹⁰⁴ Some of its prominent member states seem to be searching for a *carte blanche* when acting with respect to human rights protection. It begins with the Council's hesitation to declare clearly that human rights violations are a threat to peace in themselves. Hidden among other determinations, human rights violations usually appear as a cumulative cause of action, although humanitarian concerns were the real motivation behind the action. A *décalage* between the wording of Council resolutions and the verbatim records denounces the diplomatic efforts to avoid vetoes and, as a by-product, does not permit a clear set of rules to be established for putting into motion a public intervention against hideous crimes. But, at least, human rights protection and monitoring, once written into the Security Council's agenda, may again be included in any future public action, perhaps with a more prominent role. It will depend on the will of the Council's member states and, at least, the Council has recently reaffirmed its determination 'to give equal priority to the maintenance of international peace and security in every region of the world'.¹⁰⁵

On the other hand, anti-deregulative efforts seem to appear when applying human rights as a standard when imposing and managing sanctions. Reinforcing communication channels between the UN (particularly the Security Council and its sanctions committees) and the actors involved in peace-keeping and peace-building measures (states, regional agencies, NGOs, UN system organizations, PKOs, the Secretary-

¹⁰² O. Schachter, *International Law in Theory and Practice* (1991), at 126.

¹⁰³ Krisch, *supra* note 85, at 100.

¹⁰⁴ Thus participating in a general trend to which Philip Alston has already adverted in the general UN human rights protection regime. See Alston, 'Appraising the United Nations Human Rights Regime', in P. Alston (ed.), *The United Nations and Human Rights* (1992) 1, at 2–3.

¹⁰⁵ 'Declaration on ensuring an effective role for the Security Council in the maintenance of international peace and security, particularly in Africa' (SC Res. 1318 (2000), annex). See the follow-up to this resolution in S/PRST/2001/10.

General and its envoys, etc.), is paramount in order to provide updated information on measures affecting human rights. A closer relationship between the Security Council and UN human rights bodies must also be developed, with the former taking full account of expert advice from the latter. Once information has been accurately gathered and assessed, the concept of 'smart' or 'targeted' sanctions acquires all its virtues, becoming attractive even to reluctant states.

The policy of 'avoiding the precedent' is another factor which could lead to some kind of deregulation: both within the different sanctions committees and within the Security Council itself when deciding coercive measures, states are reluctant to bind themselves to previous decisions so that they may remain free for future action.¹⁰⁶ Ad hoc solutions have been normally preferred, thus translating into legal action the political will of states and their particular policies within a highly politicized organ: the Security Council. 'Ad-hocism' therefore appears as a deregulative tool in the sense that, avoiding the precedent, it cannot permit a clear set of rules on current humanitarian intervention (soft and hard) to be elucidated by the UN and/or its Member States.

This may have a somewhat schizophrenic impact on the current international law of institutional protection of human rights since states' conduct — the material component of custom — differs dramatically from their *opinio juris*, thus impeding clarification of the legal framework of public humanitarian intervention (soft and hard). It also might have an impact on the legal construction of a *public* intervention of the international *community* with a proper *public order*, with normative and institutional primary and secondary rules in defence of human rights as a shared basis of the foundation of that community.

¹⁰⁶ It is true, however, that exceptional situations need exceptional solutions. Public humanitarian (hard) intervention might therefore be restricted to those cases where human rights are flagrantly, massively and gravely violated. For other cases, 'mild' but firm intervention might be preferred, thus preserving hard interventions as *ultima ratio*.