

WHY HUMAN RIGHTS CONFUSE THE SANCTIONS DEBATE: TOWARDS A GOAL-SENSITIVE FRAMEWORK FOR EVALUATING UNITED NATIONS SECURITY COUNCIL SANCTIONS

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Abstract

The article searches for a comprehensive moral framework by which to evaluate United States Security Council sanctions. It explores the goals of UNSC sanctions, finding that they largely match the goals of criminal punishment. It then concludes that the discourse of human rights, frequently deployed to justify sanctions, actually confounds these goals. For instance, where a sanction aims to deter, reform, incapacitate, punish, or exclude a state that violates human rights by denying political liberties, the sanction is usually protracted and is comparatively the least likely to its goal. Procedurally, a sanction fails in this situation because of a catch-22: it aims to cure the citizenry's lack of political power, yet that political power is a prerequisite to affecting the change the sanction seeks. Normatively, it fails because the target state, non-democratic as it is, does not share the sanction's value set. For similar reasons, citizens in a liberal democracy may, under certain very narrow circumstances, be collectively responsible for their state's actions, but citizens in a non-democratic state could almost surely not be so responsible. Yet sanctions are costly, and most of their costs are borne by poor, disenfranchised individual citizens in non-democracies. Therefore, justifying sanctions in terms of human rights may require calling for sanctions even where they are bound to be long, futile, and misdirected. Or, more surreptitiously and more perniciously, the theorist may dodge this dilemma by narrowing his or her list of "human rights" to exclude political rights. Since neither result is acceptable, the human rights language is counterproductive. In its place, the article embraces a framework sensitive to the sanctions' underlying goals while aspiring toward liberal democratic accountability and international political legitimacy.

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I. Introduction

The United Nations Security Council has imposed economic sanctions a total of 18 times.¹ From its inception through the Cold War, the UNSC invoked its power to sanction sparingly, just once against Southern Rhodesia² and once against South Africa.³ Since 1990, it has invoked the power much more regularly.⁴ Currently, UNSC sanctions are outstanding against Iran,⁵ as well as certain terrorist organizations.⁶ In recent years, sanctions were nearly imposed against Zimbabwe and against North Korea.⁷ As a result, the topic of sanctions—whether and when they are appropriate, if ever—figures prominently in public discussions of foreign policy and global order. As one scholar writes, “the concept of sanctions lies at the heart of international law.”⁸ Yet, for the most part, these discussions are murky and dissatisfying, because they are predicated on shifting notions of what sanctions attempt to achieve and how they achieve it.

This article attempts to improve such discussions by assembling

¹ KENNETH MANUSAMA, *THE UNITED NATIONS SECURITY COUNCIL IN THE POST-COLD WAR ERA* 189 (2006).

² See VERA GOWLLAND-DEBBAS, *COLLECTIVE RESPONSES TO ILLEGAL ACTS IN INTERNATIONAL LAW: UNITED NATIONS ACTION IN THE QUESTION OF SOUTHERN RHODESIA* (1990); MARGARET DOXEY, *ECONOMIC SANCTIONS AND INTERNATIONAL ENFORCEMENT* 65 (1980); and GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT & KIMBERLY ANN ELLIOTT, *ECONOMIC SANCTIONS RECONSIDERED* 285-293 (1990).

³ *Id.*

⁴ MANUSAMA, *supra* note 1, at 189. See also MAX HILAIRE, *UNITED NATIONS LAW AND THE SECURITY COUNCIL* 13 (2005).

⁵ William Luers, Thomas R. Pickering, & Jim Walsh, *How to Deal with Iran*, N.Y. REV. OF BOOKS, Vol. 56, No. 2, Feb. 12, 2009; Michael Jacobson, *Sanctions Against Iran: A Promising Struggle*, 31 WASH. Q. 69-88 (2008).

⁶ See UN News Centre, *Four Pakistani militants added to UN terrorism sanctions list*, Dec. 11, 2008; but see Jonathan Winer, *EU Court Invalidates Sanctions against Al Qaeda*, THE BRUSSELS JOURNAL, Sep. 3, 2008.

⁷ See Neil MacFarquhar, *Two Vetoes Quash Sanctions on Zimbabwe*, N.Y. TIMES, July 12, 2008; see also Warren Hoge, *China and Russia Stall Sanctions on North Korea*, N.Y. TIMES, Oct. 13, 2006.

⁸ Vera Gowlland-Debbas, *Introduction*, in *UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW* 3 (Vera Gowlland-Debbas ed., 2001).

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a theoretical framework upon which to evaluate UNSC sanctions. The assembly requires three steps: first, determining what sanctions attempt to achieve; second, determining how they achieve it; and third, and most difficult determining what our answers tell us about when sanctions are appropriate, if ever. This article determines: first, that the purposes of sanctions mostly match those of criminal punishment; second, that sanctions work primarily via the political power of the sanctioned state's ordinary citizens; and third, that for a sanction to achieve its goal, the sanctioned state's ordinary citizens must have some mechanism by which to exert their political power. Therefore, to deploy human rights language as the theoretical (or utilitarian, or deontological) basis for sanctions is counterproductive, because the sanction's end goal—recognition of political liberties, say—is often a prerequisite to the sanction's success. A sanctions regime finds better footing on more pragmatic principles, such as democratic legitimacy and accountability.

This article is divided into seven parts. Part I is this introduction. Part II explores the multiple definitions of sanctions and demonstrates how competing definitions surreptitiously incorporate incompatible moral frameworks. Part III investigates the legal basis for UNSC sanctions, and wonders whether and where we can find meaningful legal limits to UNSC sanction power. Part IV describes what sanctions actually do, in terms of the types of people they tend to affect and in terms of how different types of societies respond to them. We see that the poorer and more disenfranchised the individual, the greater the negative impact of the sanction on that person. We see that the more liberally democratic the target society, the more efficiently it responds. Part V begins this article's substantive work, asking what UNSC sanctions attempt to do, and organizing their frequently articulated purposes into five categories. As stated, the categories mostly match the traditional theoretical purposes of criminal punishment. Part VI asks when UNSC sanctions might be justified, if ever. It first addresses the collective responsibility problem, and then addresses several prior—if incomplete—moral frameworks, including utilitarian and rights-based approaches, as well as the approach implicit in John Rawls's *Law of Peoples*. Informed by the purposes of sanctions outline in

Part V, and the shortcomings of previous moral frameworks discussed in Part VI, the article attempts its own framework. In particular, the framework holds that sanctions are least appropriate where they attempt to remedy a lack of political liberties. Finally, Part VII concludes that the language of human rights is therefore counterproductive to analysis of UNSC sanctions.

II. Defining UNSC Sanctions

There is no mention of the term “sanction” in the United Nations Charter.⁹ Despite frequent use in the international law arena, sanctions are, for all their commonness, rather loosely defined.¹⁰ At the narrow end of the definitional spectrum, a sanction is the denial of customary trade or financial relations. Some commentators add the *threat* of denying these interactions.¹¹ Others expand beyond the financial sphere to include social or strategic denials.¹² Others add a purpose dimension: the denial must be intended to achieve some kind of change, whether social, political, economical, or all three.¹³ Still other commentators conceive of the sanction much more broadly as any mechanism, short of military force, by which to enforce

⁹ See Gowlland-Debbas, *supra* note 8, at 2.

¹⁰ Neta Crawford, *Trump Card or Theater? in HOW SANCTIONS WORK* 5 N. 12 (Neta Crawford, Audie Klotz eds., London, 1999). See also Kim Richard Nossal, *International Sanctions as International Punishment*, 43 INT’L ORG. 301, 304-07 (1989).

¹¹ HUFBAUER, SCHOTT, & ELLIOT, *supra* note 2, at 2. As we will see *infra*, including threats (without subsequent escalation) makes sense from a game theory perspective. If threats change behavior, which they do, then they are important to consider. See Dean Lacy & Emerson Niou, *A Theory of Economic Sanctions and Issue Linkage*, 66 J. POL. 25, 27 (2004). See also *infra* section IV.B. However, incorporating the *threat* of an action within the definition of that action is confusing and violates common usage. If State A threatened to boycott State B’s exports, but then for one reason or another did not carry out its threat, we would not ordinarily say that State A had *sanctioned* State B, nor that State B received a *sanction*. Instead, we would say that State A *threatened* to sanction State B, or that State B was under *threat* of sanction. To do otherwise is confusing.

¹² Crawford, *supra* note 10, at 5.

¹³ *Id.*

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international or multilateral norms.¹⁴ Next there is also the profound detail of who applies the sanction, whether an individual state, an ad hoc coalition of states, or an international organization. In recent years, what international lawyers once called unilateral sanctions—those applied by a single state—they now call “countermeasures.”¹⁵ Meanwhile the term “sanction” has been reserved for multilateral application.¹⁶

The definition of a sanction is in many ways central to the attendant ethical framework. In this regard, the scholar Kim Richard Nossal offers two contentious elements in his definition of sanction: first, sanctions as we know them are imposed only in response to wrongful acts and second, they are punitive in intent.¹⁷ Thus, we see how the definition incorporates the ethical argument, sometimes quite powerfully.

To navigate this morass, or more fairly to skip past it, this article assumes the pragmatic position that sanctions, unless otherwise specified, are those resolutions passed by the UNSC under its Chapter VII powers. However, this article is concerned less with definitions than with the framework for evaluating when such actions might be ethical, legal, and acceptable.

III. The Legal Basis for UNSC Sanctions

The United Nations Charter grants the Council astonishingly broad powers to carry out actions on behalf of the organization.¹⁸ Despite an absence of the word “sanction” anywhere in the Charter,

¹⁴ See MARGARET DOXEY, *ECONOMIC SANCTIONS AND INTERNATIONAL ENFORCEMENT* 1 (1971); MARGARET DOXEY, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* (1987). See also DAVID BALDWIN, *ECONOMIC STATECRAFT* (1985).

¹⁵ James Crawford, *The Relationship between Sanctions and Countermeasures*, in *UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW* 57 (Vera Gowlland-Debbas ed., 2001).

¹⁶ *Id.*

¹⁷ Nossal, *supra* note 10, at 305.

¹⁸ See, e.g., José Alvarez, *Judging the Security Council*, 90 AM. J. INT’L L. 1 (1996).

the legal basis for UNSC sanctions is well-founded. These powers are enumerated in various articles in Chapters V, VI, and VII. Article 24 grants the Council primary responsibility for maintaining international peace and security,¹⁹ and Article 25 binds all member states to carry out the decisions of the Council.²⁰ Article 39 grants the Council power to identify threats to the peace or acts of aggression, and to thereby exercise its jurisdiction, and Article 41 grants the Council power to take actions short of military force, including “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.”²¹ This list, according to scholars, is illustrative and not exhaustive.²²

Thus, the UNSC has the power to take a broad—so far in our analysis almost limitless—array of actions, and unlike the actions of any other international organ, the actions of the UNSC may bind member states. Furthermore, Council decisions under Chapter VII may not be challenged legally. For instance, there are no procedures for judicial review.²³ This creates a series of interesting questions about the limits of its power. Since these limits are unclear, to some commentators, the UNSC is “unbound by law”²⁴ or “above the law.”²⁵ Furthermore, since resolutions under Chapter VII take precedence over all other member state obligations, and since the Council can impose on member states positive obligations, there does exist a decidedly vertical relationship between the organization and the implementing states.²⁶

¹⁹ U.N. Charter art. 24.

²⁰ *Id.* at art. 25.

²¹ *Id.* at art. 41.

²² *Id.* See also MAKING TARGETED SANCTIONS EFFECTIVE 8 (Peter Wallenstein et al. eds., 2003) (claiming this list is “merely enumerative and does not preclude other measures that the Security Council may wish to decide upon short of committing the use of armed force”); see also Gowlland-Debbas, *supra* note 8, at 2 (outlining other strategies that the UN has taken).

²³ HILAIRE, *supra* note 4, at 7.

²⁴ Gabriel H. Oosthuizen, *Playing the Devil's Advocate: The United Nations Security Council Is Unbound by Law*, 12 LEIDEN J. INT'L L. 549 (1999).

²⁵ Hilaire, *supra* note 4, at 5.

²⁶ U.N. Charter art. 103; see also Gowlland-Debbas, *supra* note 8, at 2.

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Still, the position that the UNSC is legally unconstrained is the minority one, as many lawyers have identified legal constraints. Some argue, for instance, that when exercising this Chapter VII power, the Council is bound by human rights treaties, international human rights law, and international humanitarian law. Others contend it must abide by international customary norms of *jus cogens* and *erga omnes*. These premises are broadly accepted, but the nature and extent of such obligations is murky.²⁷ As is well known, the UN is not a member to, for instance, the Geneva Convention or to any other human rights treaties.²⁸ Therefore, the argument that the UNSC is bound by the Geneva Convention (or a similar treaty) is usually based on the observation that the UN has chosen unilaterally to enforce the Convention's rules in the past and on the fact that the Convention is largely declarative of international customary law anyway.²⁹ However, this latter point—that the Geneva Convention is merely declarative of international customary law—is in some sense circular. It presumes that the UNSC is beholden to international customary law, a contestable presumption.

Another suggestion that the UNSC is bound by human rights law is found in the Charter's preambular statement of purpose "to reaffirm faith in fundamental human rights" and "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."³⁰ Since the Council must uphold the purposes of the UN, and since an avowed purpose of the UN is to respect treaties, one would assume that this binds the Council to respect them too. Among the most prominent treaties are those establishing human

²⁷ August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, 854 (2001).

²⁸ *Id.*

²⁹ *Id.* at 855; see Andrew Clapham, *Sanctions and Economic, Social, and Cultural Rights*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 131-141 (Vera Gowlland-Debbas ed., 2001); Daphna Shraga & Ralph Zacklin, *The Applicability of International Humanitarian Law to United Nations Peacekeeping Operations: Conceptual, Legal and Practical Issues* (22-24 June 1994), ICRC 39-59, 47.

³⁰ U.N. Charter Preamble, paras. 3 & 4.

rights law. Other language in the Charter similarly promotes the notion that one purpose of the UN is to advance and protect human rights.³¹ Furthermore, the fact that in 1948 the brand-new UN ratified the Universal Declaration of Human Rights is contextual evidence suggesting that respect for human rights law was among the body's founding premises.

There is also more strictly textual support for UNSC limits. For instance, international law scholar Vera Gowlland-Debbas posits that, because the UNSC is charged with the duties to maintain peace under Article 24 and to identify threats to the peace under article 39, the purpose of the UNSC sanction may never be law enforcement, but rather was what one might call peace enforcement.³² The point "is not: to maintain or restore law, but to maintain, or restore peace, which is not necessarily identical with law."³³ This likely demands a modicum of Council restraint. Indeed, Kenneth Manusama alleges that Articles 39 and 41 imply a proportionality test.³⁴ Since Article 39 demands some minimum level of threat to the peace before it authorizes UNSC jurisdiction and since Article 41 countenances only non-military actions that are "necessary," the strictures of this language announce the outside limits of proportional sanctions.³⁵ For all these reasons, some scholars are quite confident that the Council is bound. As one commentator has mentioned, quoting the ICTY Appeals Chamber, "neither the text nor the spirit of the Charter conceives of the Security Council as unbound by law."³⁶

³¹ *See id.* arts. 1(3) & 55(c).

³² Gowlland-Debbas, *supra* note 8, at 8.

³³ *Id.*, quoting H. KELSEN, *THE LAW OF THE UNITED NATIONS* (1950) 254. This language is frequently evoked; *see* Reinisch, *supra* note 27, at 856, quoting the same language.

³⁴ MANUSAMA, *supra* note 1, at 123. He adds, less convincingly, that human rights safeguards in the law of countermeasures may be extended to UNSC sanctions. *Id.*

³⁵ *Id.* at 190 ("Some human rights may not be derogated from as a matter of *ius cogens*, and both the Security Council and the target state must do their utmost to guarantee civilians the enjoyment of their human rights, including the right to humanitarian assistance, with the primary responsibility being that of the state").

³⁶ *Prosecutor v. Tadić*, Appeal 011 Jurisdiction, Case IT-941-AR72, para. 28 (Oct. 2, 1995), *reprinted at* 35 ILM 32, 42 (1996).

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However, starry-eyed confidence in such legal limits is misplaced. Though Manusama's reading is appealing, a strict textual reading of the Charter may suggest the opposite, that, insofar as it is acting under Chapter VII, the Council is unbound by international law.³⁷ Whereas the UNSC's commitment to international law is made explicit in the Charter with respect to its other functions, such as the peaceful settlement of disputes. No explicit language commits the UNSC to international law under its Chapter VII functions.³⁸ The negative implication is that it is not committed.³⁹ Indeed, as Manusama admits, "[n]o apparent and realistic limits can be extracted from the jurisdictional provisions of either Chapter VI or Chapter VII."⁴⁰ Also, the implied proportionality test is relatively toothless; the UNSC is the only body capable of defining a minimum threat to the peace and the only body capable of deciding what is necessary to do about it. That is, the test, if not toothless in theory, is toothless in fact, because the Council itself is the only body with authority to apply it.⁴¹ More troubling, Manusama later concedes that "[t]he Security Council must strike a balance between proportionality and effectiveness."⁴² Thus, the proportionality test is not even the final word; it must succumb to another vapid test.

From an objective view it seems the UNSC has *not* been so sparing as to act only when it is strictly *necessary* to international peace and security. The UNSC resolutions under Chapter VII have *not* been totally faithful to *jus cogens* norms. Instead, the UNSC has

³⁷ Oosthuizen, *supra* note 24; Anna M. Vradenberg, *The Chapter VII Powers of the United Nations Charter: Do They "Trump" Human Rights Law?* 14 *LOY. L.A. INT'L & COMP. L. REV.* 175 (1991).

³⁸ Reinisch, *supra* note 27, at 857.

³⁹ See Susan Lamb, *Legal Limits to United Nations Security Council Powers*, in *THE REALITY OF INTERNATIONAL LAW* (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999); see also Reinisch, *supra* note 27, at 856.

⁴⁰ MANUSAMA, *supra* note 1, at 192.

⁴¹ See A. Amir Al-Anbari, *The Impact of United Nations Sanctions on Economic Development*, in *UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW* 371, 372 (Vera Gowlland-Debbas ed., 2001): "In effect, the Council seems to think that any action it takes is consistent with these principles [outlined in the Charter] by virtue of its own approval."

⁴² MANUSAMA, *supra* note 1, at 193-194.

derogated from so-called non-derogable norms. This derogation has been indirect: sanctions regimes have—as has frequently been argued—resulted in accidental (though to some extent foreseeable) human rights disasters.⁴³ But the derogation has on occasion been direct: the UNSC’s counterterrorism campaign of the late 1990’s and early 2000’s saw the UNSC demand the extradition of certain suspected terrorists, such as Osama Bin Laden.⁴⁴ This Chapter VII demand was in violation of the alleged *jus cogens* right of a state not to extradite its own nationals.⁴⁵ The unpunished violation of a law does not necessarily mean that the law does not exist, but, when both the origins and the terms of the law are cloudy, there is good reason to be skeptical.⁴⁶

Even if the terms of the Charter do not place legal limits on UNSC discretion, the UNSC is still not entirely unaccountable. After all, political and other checks do exist as the powers surely have a practical and diplomatic endpoint. Indeed, the General Assembly (the legalist’s answer to the realist’s UNSC) has made calls for greater transparency in Council resolutions.⁴⁷ General Assembly Resolution 51/93 encouraged the UNSC to provide reports as it was obliged to do under the Charter.⁴⁸ Other General Assembly resolutions asked for an investigation into the problems that smaller states faced in carrying out UNSC sanctions under Article 50.⁴⁹

⁴³ See *infra* section IV.A.

⁴⁴ S.C. Res. 1373, ¶ 3, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

⁴⁵ MANUSAMA, *supra* note 1, at 192.

⁴⁶ See MARTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 198-199 (2005) (highlighting the “difference between the skeptic’s and the rule-approach lawyer’s (such as Kelsen) concept of ‘sanction:’ for the latter, sanction is a matter of the existence of a rule providing for sanctions. For the skeptic, this is a matter of observable fact ... Rules bind ‘more or less’ as the likelihood of sanction grows or diminishes.”).

⁴⁷ See Gowlland-Debbas, *supra* note 8, at 15.

⁴⁸ G.A. Res. 51/193, U.N. Doc. A/RES/51/193 (Feb. 10, 1997).

⁴⁹ See generally GA Res. 49/58, U.N. Doc. A/RES/49/58 (Feb. 17, 1995) (Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization); see also G.A. Res. 50/51, U.N. Doc. A/RES/50/51 (Jan. 29, 1996) (Implementation of Charter provisions related to assistance to third States affected by the application of sanctions); see also G.A. Res. 50/58E, U.N. Doc. A/RES/50/58E (Mar. 7, 1996) (Strengthening of the

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Even if these actions signify a resistance to Council tyranny, note their subtle appeal to the terms of the Charter. 51/93 calls for reports required by the Charter. The others call for concessions in order to effectuate Article 50. These resolutions are more like polite requests than they are enforcement tools, and at the service of a legal end.

Next, judicial review, though neither compulsory nor provided within the UN structure, is not unthinkable.⁵⁰ The scholar August Reinisch has recommended several fora and legal stratagems that might accommodate legal review. Possibilities include judicial review by the ICJ; review by national courts for private causes of action; review by arbitration; and even reliance on human rights institutions such as the Human Rights Committee and the Committee on Economic, Social, and Cultural Rights.⁵¹ Again these would signify a resistance to unbridled UNSC power, but they are confined to a presumptive (though hard to identify) legal framework.

Finally, there is the chance of mutiny within the General Assembly or the greater political universe. Under Articles 25 and 50, a member state that fails to respect and enforce UNSC sanctions may itself face sanctions. However, no state has ever received sanctions for failing to enforce UNSC sanctions, and this is not for lack of trying. For instance, in 1970, Portugal, Mozambique, and South Africa openly flouted sanctions on Southern Rhodesia.⁵² In practical terms, lackluster enforcement and even defiance, particularly at local, sub-state levels, seem to be the most frequent

coordination of humanitarian and disaster relief assistance of the United Nations, including special economic assistance); *see also* G.A. Res. 51/208, U.N. Doc. A/RES/51/208 (Jan. 16, 1997) (Implementation of the provisions of the Charter of the United Nations related to assistance to 3rd States affected by the application of sanctions).

⁵⁰ *See* GOWLLAND-DEBBAS, *supra* note 2, at 14; *see also* Reinisch, *supra* note 27, at 865 (arguing that the question of the ICJ's power of judicial review is still an open question); *see also* Reinisch, *supra* note 27, at 869 (Even so, Reinisch admits that the existing judicial and quasi-judicial means of SC review are woefully insufficient for providing redress for harmed individuals).

⁵¹ Reinisch, *supra* note 27, at 866-68.

⁵² William Michael Reisman & Douglas L. Stevick, *The Applicability of International Law and Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT'L L. 86 (1998).

forms of resistance to the Council's perceived overreaching.⁵³ Thus, although states are legally bound by Council resolutions, there is a rather large zone of immunity, and therefore of discretion, on the part of each member state. The historical reality shows, rather interestingly, that the more powerless the member state is within the UN, the greater its zone of immunity. The need to abide by UNSC resolution or else face sanction is felt more acutely the higher a state climbs up the UN power chain.⁵⁴ This fact has proven particularly disastrous with arms embargoes, where disenfranchised neighbors see little to lose in disobeying sanctions and much to gain.

Whatever legal and political limits bind the UNSC, they are underdeveloped. Therefore, perhaps when we discuss the issue of judicial and other review we have gotten ahead of ourselves. If the UNSC decisions were to be reviewed, how would they be reviewed? Would this be, as seems most likely, judicial review to ensure fidelity to the charter? There are two major problems with that pursuit. First, the Charter might not provide any limits at all (as discussed above). If so, the UNSC could take any action whatsoever under Chapter VII, while remaining fully faithful to the Charter. Second, if the Charter does provide limits, they appear to be of the broadest and most indeterminate scope, such as that the actions must be commensurate with principles of UN. Thus, the review would still be toothless, but would merely substitute the discretion of the court for the discretion of the UNSC.

Judicial review to ensure UNSC fidelity to *jus cogens* or, say, the Geneva Convention might have more teeth and require less discretion. Yet again there are also two problems. First, as explained above, it is not clear that the Council is bound by such common law or treaties, and if it is bound, to what extent. Second, as we will see below, these laws and rules are often contradictory or otherwise at odds with each other. UNSC sanctions invoke the balancing of different indispensable rights against one another.

⁵³ *UN arms bans 'repeatedly defied,'* BBC NEWS, Mar. 16, 2006, available at <http://news.bbc.co.uk/1/hi/world/europe/4813972.stm>.

⁵⁴ This is not only a recurring theme in the theoretical treatment of sanctions, it is the defining paradox. See *infra* section IV.B.

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Therefore, their invocation only pushes the question one step further: what framework to balance the contradictory impulses?

One does not concede too much ground to pure legal realism in acknowledging that these are practical questions perhaps more than they are legal. The UNSC has a habit of making convenient decisions. As one scholar writes, the response of Council members “generally coincides with threats to their economic or security interests and is usually contingent on domestic politics and international public opinion.”⁵⁵ If politics take precedence over legality, it may be fair to assume that the Council rarely relies on formal logical or ethical reasoning.⁵⁶ Nevertheless, this project assumes that the domestic policies and the international public opinion upon which UNSC behavior is at least somewhat contingent do rely on formal logical and ethical reasoning. The project also assumes that, even absent such reliance, an ethical framework for the work of such an authority is worth pursuing for its own sake. Of course, such reasoning must be rooted in the real world.

Thus, this article essentially proceeds under the following hypothetical: if some court or person could review UNSC sanctions decisions on the merits, what would the substance of that review look like? That is not to ask how, mechanically, such review would operate. It may well be impossible. Rather it is to ask the theoretical question: under what circumstances would UNSC sanctions be legally permitted? It is also to ask the ethical corollary: under what circumstances would the sanctions be *ethically* permitted? In pursuit of such a substantive framework, we will attempt to avoid relying on deep abstractions, such as justice or the greater good. We also wish to avoid the concomitant empirical speculation, such as precisely how much utility will be enjoyed, precisely how much suffering will be endured, and so on. The ideal would be to arrive at a workable framework that hinges on neither incalculable empirical values nor abstract notions of the good. Naturally, as we will see, this is

⁵⁵ HILAIRE, *supra* note 4, at i.

⁵⁶ See generally Simon Chesterman & Béatrice Pouligny, *Are Sanctions Meant to Work? The Politics of Creating and Implementing Sanctions Through the United Nations*, 9 GLOBAL GOVERNANCE 503 (2003).

impossible.

IV. What UNSC Sanctions Actually Do

A. Whom Sanctions Hurt

Sanctions aim to inflict a certain amount of injury; this injury usually falls on the most vulnerable members of societies. There is wide consensus in the literature that economic sanctions tend to harm the most vulnerable (that is, the poorest and most disenfranchised) members of the target state.⁵⁷ Not only that, but their impact can be tremendous. In 1999, *Foreign Affairs* magazine estimated that, according to UN estimates, UNSC “economic sanctions may well have been a necessary cause of the deaths of more people in Iraq than have been slain by all the so-called weapons of mass destruction throughout history.”⁵⁸ This amounted in 1999 to more than a half a million people. This number has grown steeply in the almost decade since.⁵⁹

Reactions to this reality spurred support for so-called “smart” or “targeted” sanctions.⁶⁰ Though often discussed in the literature as a ‘trend,’ they were in use for most of the 1990’s and ever since. These sanctions are directed at the political elites by targeting personal wealth,⁶¹ freedom of travel,⁶² and threat of individual

⁵⁷ See, e.g., UN Dep’t on Humanitarian Affairs: Report by Claudia von Braunmühl & Manfred Kulessa, *The Impact of UN Sanctions on Humanitarian Assistance Activities* (Berlin, Dec. 1995); see also World Health Organization, *The Health Conditions of the Population of Iraq since the Gulf Crisis*, WHO/EHA/96.1 (Mar. 1996).

⁵⁸ John Mueller & Karl Mueller, *Sanctions of Mass Destruction*, 78 FOREIGN AFF., May-June 1999, at 43, 51.

⁵⁹ See Reisman & Stevick, *supra* note 52.

⁶⁰ The Secretary-General, ‘We the Peoples:’ The Role of the United Nations in the 21st Century, ¶ 4, U.N. Sales No. 92-1-100844-1 (2000); see George A. Lopez & David Cortright, *Financial Sanctions: The Key to a Smart Sanctions Strategy*, 72 DIE FRIEDENSWARTE 327 (1997).

⁶¹ See S.C. Res. 1267, ¶ 4, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (regarding Afghanistan).

⁶² See C. Res. 1127, ¶ 4, U.N. Doc. S/RES/1127 (Aug. 28, 1997) (regarding Angola); see also S.C. Res. 1132, ¶ 5, U.N. Doc. S/RES/1132 (Oct. 8, 1997)

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personal criminal liability,⁶³ among others.

The problem is that, even if sanctions are not aimed at disrupting access to humanitarian goods directly, they are still in their greater sense usually aimed at disruption of infrastructural or economic networks, which in turn disrupts the flow of these goods. As Marco Sassòli describes it, “[t]he main problem is . . . that the state under sanctions and its population are often in the long run unable to buy goods indispensable for the civilian population, because sanctions hinder the national economy from earning the necessary foreign currency through exports of goods and services.”⁶⁴ This is largely true whether the sanctioned goods are luxury goods or not. Thus, this article concedes that targeted or smart sanctions are in most cases an improvement over their predecessors, but that the moral and ethical implications of their use are much the same.

B. Sanctions’ Effectiveness

There is tremendous support, both in the literature and the public media, for the position that economics sanctions do not “work.”⁶⁵ Of scholars, Margaret Doxey is representative in considering sanctions a “slap on the wrist” where “a major change in policy is . . . harder to come by.”⁶⁶ Robert Pape argues that sanctions are effective just 5 percent of the time.⁶⁷ Cortright and Lopez offer a

(regarding Sierra Leone).

⁶³ Reinisch, *supra* note 27, at 871; *see also* S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993) (establishing the Yugoslavia and Rwanda International Criminal Tribunals); *see also* S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

⁶⁴ Marco Sassòli, *Sanctions and International Humanitarian Law: Commentary*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 241-43 (Vera Gowlland-Debbas ed., 2001).

⁶⁵ *See* David A. Baldwin; Robert A. Pape, *Evaluating Economic Sanctions*, 23 INT’L SECURITY 189-198 (1998); *see also* Jean-Marc F. Blanchard & Norwin Ripsman, *Asking the Right Questions: When Do Economic Sanctions Work Best?* 9 (1/2); SECURITY STUD. 219-53 (1999).

⁶⁶ DAVID CORTRIGHT & GEORGE A. LOPEZ, *THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990S* 13 (2000).

⁶⁷ *See* Lacy & Niou, *supra* note 11, at 27; *see also* Robert A. Pape, *Why*

brief example of the vitriol heaped on economic sanctions. Of public media, *The Washington Post* is representative in calling sanctions “an ineffective bromide intended to placate public demands for action but incapable of achieving real results.”⁶⁸ Even the UN itself expressed that the only disagreement among sanctions scholars “relates to the degree to which sanctions fail.”⁶⁹

The better conclusions are more nuanced. As Lacy and Niou have argued, the threat of the sanction, and not only the actual imposition of the sanction, may induce change. This overlooked fact leads many to underestimate the power of sanctions and therefore to bemoan sanctions’ “ineffectiveness.” It also means, rather crucially, that sanctions are most likely to be implemented where they have the lowest likelihood of success: where the threat of the sanction has not already induced change. Indeed, this recurring paradox is something of a touchstone in the literature.

Another game theorist, Daniel Drezner, uses economics and statistics to demonstrate the paradox that sanctions (and threat of sanctions) are more likely to work against allies than they are against hostile nations.⁷⁰ Adversaries anticipate frequent conflicts with each other and therefore adopt long-term outlooks on their goals and bargaining reputations.⁷¹ Allies anticipate infrequent conflicts and are therefore more willing to concede. This paradox also helps explain the sampling error that causes experts’ and politicians’ pessimism. Sanctions and sanction threats between hostile countries are likely to be, in Drezner’s terms, “noisier” and therefore generate much more research than are sanctions between allies.⁷² The question is not, ‘do sanctions work?’ but ‘against whom do they work?’ He also suggests therefore, that economic coercion increases the possibility of war.⁷³

Economic Sanctions Do Not Work, 22 INT’L SECURITY 90-136 (1997).

⁶⁸ Lacy & Niou, at 27.

⁶⁹ *Id.*

⁷⁰ DANIEL DREZNER, *THE SANCTIONS PARADOX* (1999).

⁷¹ *Id.* at 321.

⁷² *Id.*

⁷³ *Id.* at 319.

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For similar reasons, sanctions lasting for a short time tend to be more effective than those lasting a long time.⁷⁴ The corollary is that the duration of the sanction is a good indicator of whether or not a sanction has worked.⁷⁵ There is empirical evidence for this “downward trend” in the in the likelihood of sanctions success: the longer in place, the less it has worked.⁷⁶ Scholars McGillivray and Stam go one step further, arguing that that change of leadership affects the duration of the sanction only in the case of non-democratic states. Counterintuitively, leadership change in democratic states has no effect on the length of sanctions.⁷⁷ On reflection, this makes sense. In a democratic society, a new leadership regime may not be established without a large coalition of support. The necessary coalition of support is so large that it must include some members of the old regime’s coalition of support.⁷⁸ The result is that a new democratic leader is likely to follow his or her predecessor’s lead. Meanwhile, in totalitarian or oligarchical societies, the new regime may eschew the old coalition entirely, and undertake massive changes.⁷⁹ Therefore, leadership turnover does not affect the duration of sanctions, except in the case of non-democracies.⁸⁰

Cortright and Lopez argue similarly that sanctions are more effective at inducing change in societies with at least some democratic freedom than in “rigidly totalitarian states.”⁸¹ Indeed a

⁷⁴ Fiona McGillivray & Allan Stam, *Political Institutions, Coercive Diplomacy, and the Duration of Economic Sanctions*, 48 J. CONFLICT RESOL. 154, 161 (2004).

⁷⁵ *Id.* at 164 (citing S.M. Bolks & Al Sowayel, *How Long Do Economic Sanctions Last? Examining the Sanctions Process through Duration*, 53 POL. RES. Q. 241-265 (2000)).

⁷⁶ McGillivray & Stam, *supra* note 74, at 164.

⁷⁷ *Id.* at 170.

⁷⁸ *Id.* at 156, 161.

⁷⁹ *Id.*

⁸⁰ See Han Dorussen & Jongryn Mo, *Ending Sanctions: Audience Costs and Rent Seeking as Commitment Strategies*, 45 J. CONFLICT RESOL. 395-426 (it is politically costly for leaders of democratic sender states to back down from sanctions regimes, even when imposed by their predecessors).

⁸¹ *Id.* at 22.

series of studies from the late 1990's all reach the same conclusion: that sanctions are more successful when directed against states with multiple parties than states with one totalitarian party.⁸² Democratic target states are more likely to back down, and democratic sender states less likely to give up.

But this assessment rests on the central methodological question, are sanctions effective? The rejoinder is, effective at what? In the following section, we address this rejoinder, by attempting to define the purpose(s) of UNSC sanctions.

V. *What UNSC Sanctions Are Supposed to Do*

Since both the intended and easily foreseeable consequences of an action are the ethical responsibility of the actor, it is crucial to establish the intended purpose of UNSC sanctions.⁸³ Partly because sanctions are loosely defined, many commentators neglect to account satisfactorily for the purpose of UN or other sanctions.⁸⁴ Their conclusions are then contaminated when they operate on conflicting, shifting or unrealistic notions of the sanctions' purpose or terms of success.

⁸² Cortright & Lopez, *supra* note 66, at 22: "A 1997 analysis by van Bergeijk found a statistically significant correlation between the success of sanctions and the degree of democracy within the targeted regime. A 1998 assessment by Canadian scholar Kim Richard Nossal also found that sanctions are most successful against states with a functioning multiparty electoral system, whereas they almost always fail when imposed against dictatorial regimes. Kaempler and Lowenberg find that unilateral sanctions are more effective than multilateral ones in part because high volume trading states tend to be more democratic and vulnerable to economic coercion. Although these studies are limited and tend to focus solely on the declared instrumental purposes of sanctions, they are valuable in confirming that sanctions are more likely to succeed against open societies than closed regimes."

⁸³ TONY HONORÉ, *Responsibility and Luck*, in TONY HONORÉ, *RESPONSIBILITY AND FAULT* 29 (1999).

⁸⁴ "[T]here is no standard definition of international sanctions, nor a clear set of arguments about how they might work, and differing notions of success." Neta Crawford, *Trump Card or Theater?*, in *HOW SANCTIONS WORK* 5 (Neta Crawford & Audie Klotz eds., 1999).

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Unfortunately, political bodies rarely offer coherent purposes for their actions. The UN itself has addressed the lack of clarity in sanction objectives.⁸⁵ As one scholar demonstrates, in the past even clearly defined objectives that were fully realized have subsequently given way to further resolutions with more ambiguous objectives.⁸⁶ Therefore, we need to define the purpose of the sanction from a theoretical perspective. Other commentators' attempts have been under inclusive or problematic.⁸⁷ Nossal shows that James Lindsay's list (compliance, subversion, deterrence, international symbolism, or domestic symbolism) does not include punishment. Nossal's, in turn, does not include rehabilitation or broader symbolic goals.⁸⁸

The ripest theoretical perspective on this subject is found in domestic criminal law. Commentators have compared the UNSC sanctions to criminal punishment. For instance, Al-Anbari writes that a determination of a threat to the peace under Article 39 and subsequent measures under Article 41 "is the equivalent to a judgment that an international crime has been committed, but the punishment to be imposed is left totally to the discretion of the Council."⁸⁹ Kim Richard Nossal defines sanctions as involving a punitive element.⁹⁰ Margaret Doxey would seem to agree.⁹¹

Though the analogy may be tortured, this article makes the leap

⁸⁵ Supplement to An Agenda for Peace: Position Paper of the Secretary General on the Occasion of the Fiftieth Anniversary of the United Nations, ¶ 68, UN Doc. A/50/60-S/1995/1 (Jan. 3, 1995) (chiding the sanction objectives for their "imprecision and mutability" and suggesting that these ambiguities makes lifting of sanctions especially difficult).

⁸⁶ Al-Anbari, *supra* note 41, at 374. The two clear objectives in the Council's resolution 661 (1990) were 1. return of Iraqi forces and 2. reinstatement of the Kuwaiti Government. *Id.* Though both objectives were fully realized within a year, the Council imposed new sanctions based on a new but much vaguer threat to the peace that remained in place until the ends of Saddam Hussein's rule in 2003. *Id.*

⁸⁷ See Nossal, *supra* note 10, at 307-08.

⁸⁸ *Id.*

⁸⁹ Al-Anbari, *supra* note 41, at 372.

⁹⁰ Nossal, *supra* note 10, at 305.

⁹¹ MARGARET P. DOXEY, INTERNATIONAL SANCTIONS IN CONTEMPORARY PERSPECTIVE 4 (Palgrave Macmillan 1987).

to recognize that the ethical justifications of domestic criminal punishment are for the most part aligned with the ethical justifications of sanctions. Of course, the notion that this list is exhaustive must be based upon a series of intuitions which are easy to accept but difficult to articulate. This includes the postulate that sanctions instituted for their own sake are per se unethical. Many commentators have deduced from similar observations that to be ethical, the purpose of a sanction must be instrumental.⁹² This is true, but tautological. It is certainly commonsensical, and for ethical purposes, necessary that the sanction require justification; they must serve some purpose. Economic sanctions will always rely on some greater goal in order to justify themselves, because the sanction is not its own good in the way of, for instance, a generous gift or a warm compliment. A sanction, because it inflicts intentional harm on at least one person or group—or anyway, *attempts* to inflict harm on one person or group—will always be unacceptable when evaluated independently of its instrumental goals.⁹³ All these points match the theoretical ethical treatment of punishment of individuals. It is axiomatic that “since punishment involves pain or deprivation that people wish to avoid, its imposition by the state demands justification.” But, again, this much is tautology.

We ought to contemplate for a moment the question of whether international economic sanctions qualify as a form of “punishment.” In the broadest sense, it seems that any negative treatment of an individual or group, in reaction to the individual or group’s perceived undesirable behavior, would qualify as punishment.⁹⁴ Yet, there has been an etymological and even philosophical creep towards using punishment only in the narrow harm-equal-to-harm sense of retribution. For instance, the *Stanford Encyclopedia of Philosophy* says, “[p]unishment in its very conception is now acknowledged to be an inherently retributive practice, whatever may be the further

⁹² See Nossal, *supra* note 10, at 301-322.

⁹³ The same is true of all punishment. See DAVID C. BRODY, JAMES R. ACKER & WAYNE A. LOGAN, *CRIMINAL LAW* 10 (Jones & Bartlett Publishers 2d ed., 2001).

⁹⁴ The *American Heritage Dictionary* defines punishment as simply “a penalty imposed for wrongdoing.”

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role of retribution as a (or the) justification or goal of punishment.”⁹⁵ Therefore, the UN and other international agencies are loath to use the term when referring to sanctions. Indeed, the term is problematic politically and quite loaded. As Cortright and Lopez note, “some nations began to understand sanctions as instruments of punishment and retribution rather than tools of diplomatic persuasion, which generated cynicism and further criticism of sanctions as a policy instrument.”⁹⁶ Whether sanctions do or do not qualify as punishment is of only tangential interest to this article; the point is only that what sanctions do—whatever they do—must be justified. Thus, we can move to the list.

Altogether, this article submits that there are five potential purposes of the sanction. They match, more or less, the purposes of punishment in the domestic criminal law context. They are deterrence (both specific and general), incapacitation, rehabilitation, retribution, and community norm reinforcement.⁹⁷ Let us address them in turn.

A. Deterrence – Specific and General

The sanction imposes a cost which makes the cost of misbehaving greater than the benefits. Specific deterrence makes the cost greater for the sanctioned state, while general deterrence makes the cost greater for everyone else in the jurisdiction. With UNSC sanctions, that is all other member states. Since sanctions have sometimes functioned as the forerunner to outright war, an important question here is whether that looming prospect of armed conflict may contribute to the perceived cost of sanction.

⁹⁵ STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Entry on “punishment,” available at <http://plato.stanford.edu/entries/punishment/>.

⁹⁶ Cortright & Lopez, *supra* note 66, at 4.

⁹⁷ Nossal’s list of three potential purposes is less central to his argument and not fully developed. Nossal, *supra* note 10, at 307.

B. Rehabilitation

The analytical difference between deterrence and rehabilitation is simple. When deterred, the actor would or might repeat the wrongful behavior but for the possibility of sanction. When rehabilitated, the actor will not repeat the wrongful behavior, even absent the possibility of sanction. The rehabilitated actor thus refrains from the wrongful behavior for some (usually normative) reason other than the imposition of sanction.

Practically, the difference is harder to make out, since one presumes that most people and organizations are inclined to avoid wrongful behavior because of a mixture of both possible sanction and other normative forces. Most practically, specific deterrence probably translates—very broadly speaking—into management of an undesirable regime, while rehabilitation translates into regime change.

C. Incapacitation

Sanctions may aim to render continuation of a certain undesirable behavior impossible. The most obvious example of a sanctions designed to incapacitate is the arms embargo.⁹⁸ The potential incapacitating purposes of arms embargoes are so numerous that the following is an abbreviated list. They may serve:

- (1) to restrict flow of arms to both sides of an ongoing conflict, so as to make more difficult its continuation or escalation (Yugoslavia or Eritrea-Ethiopia);
- (2) to degrade the military capability of a state or group that is or may become involved in fighting with UN-authorized forces or is perceived as a continuing threat to other states (Iraq);
- (3) to constrain the ability of a repressive regime to use military, paramilitary, or police forces to oppress its own population (Haiti and South Africa);
- (4) to decrease the

⁹⁸ See MICHAEL MATHESON, COUNCIL UNBOUND: THE GROWTH OF UN DECISION MAKING ON CONFLICT AND POSTCONFLICT ISSUES AFTER THE COLD WAR 69-70 (2006).

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power of warlords in internal conflict situations (Somalia); and (5) to limit the supply of arms to terrorist groups that might be used to commit acts of terrorism abroad.⁹⁹

Money and travel restrictions may similarly inhibit undesirable behavior.¹⁰⁰

D. Punishment (Retribution)

The UN denies and denounces the use of sanctions for punishment (retribution). The “Supplement to an Agenda on Peace” specifically claims “the purpose of sanctions is to modify the behaviour of a party that is threatening international peace and security and not to punish or otherwise exact retribution.”¹⁰¹ As discussed above, this is not necessarily an honest position. Commentators maintain that whatever the ethical merit of sanctioning to punish, it has been a reality. Al-Anbari writes “in practice sanctions have been used as collective punishment or to achieve objectives other than those for which sanctions were initially imposed.”¹⁰² He continues that this shift occurs especially where initial objectives are fuzzy or impossible, but perhaps we should wonder whether this shift is merely opportunistic or is premeditated. Nossal points out how most political language surrounding the use of sanctions (whether consciously or not) stresses its retributive importance.¹⁰³ This suggests an abashed popularity, or maybe a subliminal popularity, of retributive international justice. Further, Nossal makes an ethical defense of retribution; he rejects the argument that sanctions for mere punishment reflect sadism and contends that punishment is itself instrumental.¹⁰⁴ As opposed to simple hurting, which may be done for no reason whatsoever, punishing must relate specifically to some past act and achieve

⁹⁹ *Id.*

¹⁰⁰ SC Res. 1373 (2001) (freezing assets of terrorists and terrorist organizations).

¹⁰¹ *Supplement to an Agenda for Peace*, *supra* note 85, at 16.

¹⁰² Al-Anbari, *supra* note 41, at 374.

¹⁰³ Nossal, *supra* note 10.

¹⁰⁴ *Id.*

something with respect to that act; it is premised on a series of ethical assessments.¹⁰⁵ What is more, once instituted, punishment is always “successful” since it does inflict the justly deserved injury.

E. Community Norm Reinforcement

Lastly, sanctions may actually and symbolically establish (or re-establish) international community norms. The converse of this establishment is the actual and symbolic exclusion from the family of nations of those outside these norms. It would be easy—yet a mistake—to categorize exclusion as but one method of serving one of the above instrumental goals. Indeed, exclusion is a frequent and perhaps even mandatory incidental output of sanctions aimed at one of the purposes outlined above, such as deterring, rehabilitating, incapacitating, and punishing. That is to say, a policy aimed at deterring for instance, may well also have the effect of norm reinforcement. This may or may not be incidental. Indeed, it may be central to the power of the deterrent. By way of example, excommunication is a visible and literal form where exclusion can be a means of deterring. The threat of expulsion may deter a churchgoer from violating church edict, but the exclusion also operates for the sake of the group’s identity. Decisions about whom to include and whom to exclude function to define the group’s identity and normative values. The mere fact of the decision also reinforces group solidarity.

F. Identifying These Purposes

Commentators have, not surprisingly, suggested many different potential purposes for UN (and other) sanctions. While such descriptions vary, by and large they may be catalogued into the above categories. To serve as an example, we can look to Christine Chinkin’s list of potential purposes of UN sanctions, as numbered for reference.¹⁰⁶

¹⁰⁵ *Id.*

¹⁰⁶ Christine Chinkin, *Alternatives to Economic Sanctions*, in UNITED

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[1] to put an end to a state of affairs; [2] to stop or induce change in behaviour; [3] to achieve a particular objective; [4] to ensure respect for and compliance with what the sanctioning body perceives as norms of international law; [5] to limit potential damage (arms embargoes); [6] to warn of further coercive measures to come; [7] to serve as a rallying point in condemnation of certain behavior; [8] to assure domestic audiences that a response is being made to behavior presented as unacceptable (with the added advantage that the cost of this response is unlikely to be heavy for that domestic audience); and [9] to maintain the credibility of the sanctioning institution; to punish.

Chinkin's list is representative of those cited in the literature and therefore offers an opportunity to organize frequently articulated sanction goals into the categories this article presents. Her purposes may be categorized easily. Chinkin's numbers 2 and 6 are deterrence. Number 4 is both deterrence and rehabilitation. Number 5 is incapacitation. Number 10 is retribution. Numbers 7 and 8 are community norm reinforcement. That covers every category, and those remaining qualify under more than one category. Number 9 is both deterrence and community norm reinforcement. Number 1's language ("to put an end to a state of affairs") renders it too broad to know, but such language could potentially include deterrence, incapacitation, or rehabilitation. Lastly, number 3 could include literally every category; they are all "particular objective[s]" to be "achieve[d]."

VI. When UNSC Sanctions Are Justified

This section aims for the heart of the sanctions debate. In section V, we tallied the goals of imposing sanctions. In section IV, we saw that imposing a sanction on a state almost always harms ordinary citizens of that state, and that such harm can be devastating. These previous discussions established the face-off that we now

address: the question of whether the goals we have tallied can justify the harm we have witnessed, the question, “can sanctions be justified?” Furthermore, if they can, when, and under what conditions?

To approach the question, we first address the collective responsibility problem, the issue of whether an individual may fairly share the burden of moral responsibility for actions taken by the group to which he or she belongs. We then evaluate prior moral schemes that purport to justify sanctions. Finding the schemes unsatisfactory for various reasons, this article then attempts to construct its own moral framework.

A. The Collective Responsibility Problem

Comprehensive sanctions, since they affect broad swaths of population, hold groups of people collectively responsible. Many theorists argue sanctions violate the ethics of individual responsibility.¹⁰⁷ They continue usually along the lines that injuring the innocent, or presumptively innocent, is an unacceptable act per se.¹⁰⁸ These arguments are powerful and popular. Altogether they assume that ordinary citizens—or anyway those citizens who will suffer from the sanctions—are not morally responsible for the acts of their governments. But, to what extent is this true?

Scholar David Miller has advocated one vision of collective responsibility in which an individual may share the outcome responsibility¹⁰⁹ of her group’s course of action, even if she voted against the action, and sometimes even if she did not vote at all.¹¹⁰

¹⁰⁷ See, e.g., Hans Köchler, *Ethical Aspects of Sanctions in International Law, The Practice of the Sanctions Policy and Human Rights*, in HANS KÖCHLER, *THE UNITED NATIONS SANCTIONS POLICY & INTERNATIONAL LAW* (1995); see also Hans Köchler, *Democracy and the International Rule of Law. Propositions for an Alternative World Order*, in HANS KÖCHLER, *THE UNITED NATIONS SANCTIONS POLICY & INTERNATIONAL LAW* 117-154 (1995).

¹⁰⁸ See *id.*

¹⁰⁹ Honoré, *supra* note 83, at 29.

¹¹⁰ David Miller, *Collective Responsibility and the International Inequality*, in *RAWLS’S LAW OF PEOPLES: A REALISTIC UTOPIA?* 199-200 (Rex Martin & David

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Under similar reasoning, Miller has concluded that the “collective responsibility of peoples may legitimate international inequality.”¹¹¹ But international inequality is only one part of the story. Could we fairly hold to account the citizens of a wrongdoing state for the state’s international wrongdoing?

To this question, Miller nearly answers yes, with some caveats. In an earlier piece, he addressed this question as it applies to a nation.¹¹² A nation under his conception has (1) a common identity; (2) a public culture about how life should be led and decisions made; (3) citizens who recognize special obligations to each other; and (4) citizens who view the continued existence of the group as a valuable good.¹¹³

Miller presents two models in which individual responsibility might arise by virtue of belonging to a group like a nation. First is the cooperative practice model, where the individual is responsible for the action of the group because she belongs to the group, she benefits from the group’s activities, and she contributes to its future existence. This responsibility remains even if the group action violates her personal beliefs. Miller’s example is that he would be responsible for a decision by Oxford to exclude women, as the university did in its past, even if he voted against this measure.¹¹⁴

There is an important caveat here: the responsibility exists only where the members have access to participation and benefits, and not where, for instance, members are employed on exploitative terms. Thus, two factual questions must be resolved to establish responsibility under the cooperative practice model: (1) to what extent does the group actually distribute the benefits? Also, (2) to what extent does the dissident group share the values of the

Reidy eds., 2006).

¹¹¹ *Id.* at 202. On this point, Miller concurs with John Rawls. See discussion *infra*, section V.B.4.

¹¹² David Miller, *Holding Nations Responsible*, 114 *ETHICS* 240, 245 (2003-04).

¹¹³ *Id.*

¹¹⁴ *Id.* at 253.

majority's beliefs and culture?¹¹⁵ On the first point, if the *group*—not the individual—does not share benefits, it does not share its responsibility either. On the second, a single issue dissenter must be sorted from an across-the-board dissenter.

Applied at the national level, we recognize a couple perplexing issues that Miller fails to address. First, without a liberal democratic government, we cannot assure either condition. The model requires a liberal democracy in order to assure the non-exploitative nature of the group association and to test the extent of shared beliefs. Second, above and beyond the nation's political structure, the cooperative practice model probably requires a (likely impossible) factual investigation into the nation's distributive justice. Lastly, the cooperative practice model functions on an implicit assumption about the nature of group association. It assumes that the association is willful. When we speak about membership in a nation, however, this assumption is troublesome. Citizens are usually born into their citizenship and most have little realistic opportunity to renounce or adjust it. These complexities make the cooperative model all but impossible to apply to a nation, even to a liberal democratic one.

Miller's second model is the like-minded group model. It applies no matter how decisions are made, so long as individuals are actually in agreement with the resulting policies. In Miller's conception of a nation, beliefs and attitudes must be generally held, but they need not be specific.¹¹⁶ With an autocratic ruler, Miller admits there is a much weaker case for like-minded responsibility, but suggests that the ruler might hold power precisely because his views reflect the values of the people, especially where those views are religious.¹¹⁷ The best response to this point is that while the ruler might reflect the people's values, there is no reliable way to verify whether he does, and to assume he does is antithetical to the liberal democratic vision of the political order. This response proves conclusively that collective responsibility may never be assigned to

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 258.

¹¹⁷ *Id.* at 261.

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the entire population in cases of non-democratic states.

Miller agrees. He writes: “What this shows is that the more open and democratic a political community is, the more justified we are in holding its members responsible for the decisions they make and the policies they follow [as like-minded group].”¹¹⁸ Therefore, Miller hesitantly supports collective responsibility for democratic nations.¹¹⁹ Lastly, a person could exempt herself from responsibility under either model, but only with difficulty; she would have to take all reasonable steps to prevent the wrongful act from occurring.¹²⁰ These oppositional acts need not be heroic, only reasonable.

Altogether, that means collective responsibility boils down to Miller’s largely empirical test about the openness and democratic nature of a political community. The more open and democratic, the more justified the UNSC might be in assigning collective responsibility to the members of that community. Under Miller’s reasoning, most of the time, when we speak about democratic *nations*, these criteria are met fully enough to sustain a *prima facie* assumption of collective responsibility.

So, we ask, is the same therefore true of democratic *states*? Unfortunately, Miller’s analysis cheats (admittedly) in two important ways. First, Miller speaks about *nations*, ignoring the collective responsibility question of *states* that are not nation-states. Though some states match national identity, far from all states do so. Undesirable international behavior comes most often—in fact, comes almost exclusively—from states in which we find a disconnect between state power and national identity. The national or religious identities of such states are fractured, and therefore these are the states in which genocide or similar sustained threats to peace are inherently most likely. Sure enough, they are the states in which sanctions are called for and implemented. The proof of this phenomenon is overwhelming: South Africa, Rhodesia, Iraq, and Sudan, to name a few. It is hard to recall a counterexample; quite

¹¹⁸ *Id.* at 262.

¹¹⁹ *Id.* (posing the question of the intergenerational problem: are we responsible for the actions of our forebears?).

¹²⁰ *Id.* at 255.

often the disconnect between state power, cultural, ethnic, or religious identity appears to be the very basis for the problem the UNSC wishes to stop. In this respect, for our attempted collective responsibility project, this conflation of nation and state is incurable.

There is a further problem, too. Miller operates under the fiction that nations have fixed membership. This assumption is troubling, and brings to memory Buchanan's critique of the *Law of Peoples* (hereinafter *LoP*) in which he derides Rawls' hopelessly Westphalian perception that individuals belong irrevocably to one self-sufficient, politically homogeneous nation or another.¹²¹ The perception is untenable in today's global order, because as Buchanan indicates, "the populations of states are . . . collections of different groups, often with different and conflicting views concerning justice and the good, as well as conflicting positions on the legitimacy of the state itself."¹²² An individual's membership within such a state is ill-defined and impermanent from the outset. For all practical purposes, these faults are fatal to our application of Miller's theory.

This conclusion does not, however, preclude sanctions from ever succeeding under a moral framework, but it is a major impediment. Such a framework would need to justify the imposition of sanction (and great harm) on those not morally responsible for the international wrong. Is such justification possible?

B. Prior Moral Frameworks

There have been several attempts to construct a moral framework for the analysis of multilateral economic sanctions.

¹²¹ Allen Buchanan, *Rawls's Law of Peoples: Rules for a Vanished Westphalian World*, 110 *ETHICS* 697, 701 (2000) (describing the term "Westphalian" to depict the international legal order that followed from the Peace of Westphalia in 1648; this order is characterized by two features: describing how states function as economically self-sufficient and distributionally autonomous units and how states are politically homogeneous entities with no consequential internal political dissent).

¹²² *Id.* at 721.

1. Utilitarian Framework

The point is to compare the total human happiness achieved with this sanction against the total human happiness without this sanction. As with most pure utilitarian projects, two problems inevitably arise. The first is that this comparison descends into nightmarishly complex or imponderable factual questions. Data is often unreliable and the counterfactuals impossible to construct. The second is that the project's theoretical answers often conflict with intuitional ethical observations. Most obviously, in certain circumstances, utilitarianism justifies punishing an innocent.

2. Rights-based Framework

Some literature creates an inviolable list of individual rights. Sanctions must always respect them. For instance, we see this tact in the 1999 UN Economic, Social, and Cultural Rights Committee's General Comment on the right to food. The comment asserts that depriving people of food, such as in food embargoes, should never be a tactic of international intervention.¹²³ The strategy is problematic for two reasons.

First, sanction regimes usually attempt to improve such rights ultimately, yet almost always compromise some rights along the way. Particularly vulnerable are the so-called economic rights of individuals, such as the right to food, education, or healthcare. As explained *supra*, at Part IV, if sanctions are not aimed at disrupting access to these goods directly, they still disrupt the critical networks that provide these goods. Therefore, sanction regimes frequently invoke a lesser evil argument; the typical ethical question is not whether some right exists or not, but whether this or that compromise is tolerable.

The rights-based approaches, along with the human rights discourse in general, offer little help in assessing the relative value of

¹²³ Andrew Clapham, *Sanctions and Economic, Social, and Cultural Rights*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 131, 135 (Vera Gowlland-Debbas ed., 2001).

rights or how best to achieve them. Thus, pure fidelity to a rights scheme defeats the implicit balancing of interests with which sanctions are so pragmatically concerned. In theory, relying on a system of individual rights does not strictly require pure fidelity to those rights. One suggestion is that the UNSC could simply report to the Committee on Economic, Cultural, and Social Rights.¹²⁴ More dramatically, in cases where the sanctions violate rights, UN member states might be directly liable for damages caused.¹²⁵ Notice that both solutions still imply a hierarchical ordering and subsequent balancing of rights against each other. Either censure or fiscal liability would require someone somewhere at sometime to decide whether the compromise was rational, honest, or just, and the scheme itself offers no index by which to evaluate.

Second, the general human rights problem of identifying which rights are indispensable human rights, and justifying why, consumes much contemporary human rights literature. The problem is greatly troubling here, for purposes of line drawing. There is virtual consensus that certain treatments, such as torture, are never morally or ethically acceptable. Intentional mass starvation is a relatively easy case, but allowing or disallowing shipments of certain “dual purpose goods” is much trickier. Thus, the rights-based system means some authority would need to enumerate, beforehand, which tactics were and were not acceptable.

Most problematically, the origins dilemma often yields to seductive but illegitimate logical reasoning. The rights-based scheme holds that all rights are inviolable, and if not inviolable, they are not rights. The temptation is to work backwards: ask intuitively if any circumstance might justify a sanction that violates the right in question. If there is such a circumstance, then there is no such right. This approach is based on a logical confusion that shortchanges the right's value. The result, after testing against one's imagination, is a very short, very unhelpful list of rights.

This discussion has demonstrated, one hopes, how neither a

¹²⁴ *Id.*

¹²⁵ *Id.* at 131.

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purely rights based nor purely utilitarian framework is totally satisfactory for working through the intricacies of a sanctions regime. That is why most frameworks hybridize the two.

3. *Framework Co-opted from Military Actions*

Scholars W. Michael Reisman and Douglas Stevick have suggested evaluating sanctions under the same principles as ordinary military action.¹²⁶ Thus, five principles should guide the UNSC when imposing sanctions. A sanction is justifiable to the extent it: (1) is based on lawful contingencies; (2) is necessary and appropriate (meaning, in essence, proportionate); (3) seeks reasonably to maximize the distinction of combatant and non-combatant; (4) is periodically assessed; and (5) provides relief, or a mechanism for relief, to injured third parties.

As commentators identify, this scheme is susceptible to capture by the entrenched hegemon. As with the proportionality test,¹²⁷ the UNSC is the final arbiter here. Who else may determine what is “necessary and appropriate”?¹²⁸ These are all ways of saying that Reisman and Stevick’s scheme is relatively devoid of content. It creates what one might call a rights outline, where the content of the rights is subsequently colored by the power elite.

Consider the relative substancelessness of each point. Point 1 is circular since any sanction, once resolved by the Council, will be based on a lawful contingency—its own.¹²⁹ Point 2 simply assumes the answers to the most central, difficult questions. The very questions we seek to answer are “what is reasonable?” and “what is appropriate?” Point 4 provides for assessment, which sounds terrific, but assessment likewise presupposes the existence of some workable assessment criteria.

¹²⁶ Reisman & Stevick, *supra* note 52.

¹²⁷ See Al-Anbari, *supra* note 41.

¹²⁸ Clapham, *supra* note 123, at 135. This decision is the Security Council’s explicit duty under Articles 39 and Art. 41, as discussed *supra* at Part III.

¹²⁹ Al-Anbari, *supra* note 41, at 371-72. But query the extent to which the SC is bound. See discussion *supra* at Part III.

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Therefore, only Points 3 and 5 provide substance: the need to emphasize the combatant versus non-combatant distinction and the need to provide relief to injured third parties. Point 3 is troubling because in non-military scenarios, the meaning of the term “combatant” is not readily discernable. “Combatant” perhaps translates to a “responsible actor,” but, having already explored responsibility with respect to the collective responsibility problem,¹³⁰ it seems doubtful that any realistic sanctions scheme can maximize the distinction between those who are and those who are not responsible for a state’s actions. Anyway, the translation is unacceptable. A “responsible actor” in the sanctions context is simultaneously broader and narrower than a “combatant.” Combatant status turns on a set of factual issues, but not moral culpability.

Finally, Point 5 raises the reciprocal issue: who is responsible for the collateral damage of UN sanctions? One commentator has floated the idea of holding member states liable for negative consequences of the sanctions.¹³¹ Despite the suggestion’s obvious shortcomings (such as improbability of adoption, difficulty of legal standing and jurisdiction) it is the only of these points capable of affecting the initial decision whether to apply sanctions.¹³²

In any event, note that the others are substantive protections only after sanctions are implemented: the analogous distinction between *jus in bello* and *jus ad bellum*.¹³³ This deficiency suggests these points are more applicable to military action, where there already exists a robust set of goals. In any event, these *jus in bello*

¹³⁰ *Supra* Part IV.A.

¹³¹ Clapham, *supra* note 123, at 140. Clapham seeks to create this brand of liability broadly, but can only find the softest support for this position, concluding that the Case of *Beer and Regan v. Germany* in the European Court of Human Rights suggested a willingness to lift the corporate veil where a state uses an international organization to shield the state from liability for breach of human rights. *Id.* at 140.

¹³² Dubiously assuming that member states may be collectively responsible for the decisions of the member states. Compare Miller’s two models of collective responsibility *supra* at Part VI.A. with this article’s discussion of the political structure of the UNSC *supra* at Part VI.C.6.

¹³³ Sassòli, *supra* note 64, at 245-46.

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answers do little to resolve this article's primary *jus ad bellum* question: when would sanctions be justified in the first instance?

4. Rawls's Law of Peoples Framework

John Rawls's theory, as it relates to sanctions, is perhaps the most comprehensive and influential. It tolerates, ultimately, a factor-based pragmatic approach superimposed on a rights-based approach. Rawls's *LoP* project is similar to his *Theory of Justice* project: it seeks to identify an international order acceptable (or tolerable anyway) to all theoretical negotiators at a fictional first place. The negotiators are each representatives of all the "peoples" of the world, peoples equating very roughly with nations.¹³⁴ What they would choose, what Rawls predicts they would choose, is a system in which the only bases for international intervention (read: sanctions) are self-defense and well-documented, sustained human rights violations.¹³⁵ But curiously, Rawls list of "human rights" is very short. Principally, it provides for three rights. They are those rights minimally necessary (1) for a material subsistence; (2) to be secure (as from religious persecution); and (3) to be free from gross violations of physical liberty (such as slavery).¹³⁶ The exclusions from such a list are glaring and numerous. Briefly, the list excludes the right to distributional justice and the right to equality under the law. Most conspicuously, the list affords no protection of political liberties, such as the right to free speech and thought, the right to assemble, and the right to vote.

As the scholars Wilfred Hinsch and Markus Stephanus explain, Rawls tempers his rights list because of concerns about (1)

¹³⁴ See JOHN RAWLS, *THE LAW OF PEOPLES* (1999).

¹³⁵ *Id.* at 34 n.37, 169 n.81 and 176 n.93; see also Wilfried Hinsch & Markus Stephanus, *Human Rights as Moral Claim Rights* in RAWLS'S LAW OF PEOPLES: A REALISTIC UTOPIA? 117 (Rex Martin & David A. Reidy eds., 2006). Conversely, restraint from invasion and fulfillment of the baseline of human rights excludes a country totally from the threat of "forceful intervention," by which Rawls almost certainly means sanctions. See RAWLS, *supra* note 134, at 80; see also Hinsch & Stephanus, at 117.

¹³⁶ RAWLS, *supra* note 134, at 50; see also Buchanan, *supra* note 121, at 707.

“importance testing,” the question of whether the violation will truly justify intervention, and the assumption that some rights are not important enough to justify intervention;¹³⁷ and (2) “wide acceptability,” the fear that a broader list would not produce consensus at the bargaining table.¹³⁸ To appeal to everyone, the rights must be subjected to “quite drastic pruning.”¹³⁹ However, scholars have frequently wondered why Rawls attempts to settle this issue of wide acceptability (the “decent” versus the “liberal” society) in his ideal theory. Instead Rawls could, as some have suggested, assign acceptability to the realm of the non-ideal, and confront it as an enforcement or a practical concern.¹⁴⁰

Altogether, we should note two things. First, although sustained violations of human rights may justify intervention, they do not necessitate it.¹⁴¹ There may be other factors to consider, such as proportionality or preservation of democratic representation. Second, and contrarily, the sustained violation of human rights *does* provide a pro tanto impulse for intervention because such rights create a general auxiliary duty to protect the rights in a third person (the UNSC or another state).¹⁴²

The further consequences of Rawls’ position are enormous. For instance, when the Rawlsian society of peoples intervenes to prevent such abuses, it is not for the sake of individuals. Rather, the society aims to bring the target people (as a united body) up to the threshold of legitimacy, and thereby allow the people to play their due role in

¹³⁷ See Hirsch & Stephanius, *supra* note 135, at 127-128; see discussion about rights-based system at *supra*, section VI.C.2.

¹³⁸ James W. Nickel, *Are Human Rights Mainly Implemented by Intervention?*, in *RAWLS’S LAW OF PEOPLES: A REALISTIC UTOPIA?* 266 (Rex Martin & David Reidy eds., 2006); see also Amartya Sen, *Elements of a Theory of Human Rights*, 32 *PHIL. AND PUB. AFF.* 315, 319 (2004) (discussing two human rights tests: 1) importance, and 2) political influenceability).

¹³⁹ Alistair M. McLeod, *Rawls’s Narrow Doctrine of Human Rights*, in *RAWLS’S LAW OF PEOPLES: A REALISTIC UTOPIA?* 137 (Rex Martin & David Reidy eds., 2006).

¹⁴⁰ *Id.* at 145.

¹⁴¹ Hirsch & Stephanius, *supra* note 135, at 128.

¹⁴² *Id.*

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international society.¹⁴³ Under this fiction, the people are an individual unit; there is no “trickle down” ideal, nor ultimate cosmopolitan outlook.¹⁴⁴ Thus, Rawls assumes that people “are indifferent to wealth after a certain baseline” of acceptability.¹⁴⁵

Intervention becomes incompatible with pure cosmopolitanism, just as the laws of war are incompatible with cosmopolitanism. In war, the right not to be killed is tempered and threatened by inclusion in a certain state; if war exists, one cannot discuss individuals’ rights without reference to territorial states.¹⁴⁶ So it is with sanctions. Here we see Rawls drift away from a legal order defined by individual rights. Yet strangely, the sanctions under the scheme *are* predicated on violations of individuals’ rights. Other than self-defense, sustained human rights abuses are the only circumstances that justify intervention. Yet, in a peculiar twist, to determine whether this or that right qualifies as a human right under *LoP*, one asks whether its violation would justify international intervention.¹⁴⁷ Resurfacing here is the same seductive, and illegitimate, logic. Rawls goes about the problem backwards, as those advocating purely rights-based sanctions frameworks have. Like those frameworks, Rawls ends up with the truncated list of “human rights” described above. Notably absent from the list is the right to political participation.

Thus, Rawls bases his “human rights” on a misunderstanding between absolute values and legal claims of action. For this reason, *LoP* is more compelling if we conceive of Rawls’s theory as a legal strategy rather than a moral framework. Here is what Rawls’s theory should conclude: there is an international legal cause of action that we call non-forceful international intervention. In order to sustain this action, there are several elements that must be fulfilled; among them the sustained violation of any of certain specified rights. Remember: these certain specified rights are narrower than the rights

¹⁴³ Leif Wenar, *Why Rawls is Not a Cosmopolitan Egalitarian*, in RAWLS’S LAW OF PEOPLES: A REALISTIC UTOPIA? 95 (Rex Martin & David Reidy eds., 2006).

¹⁴⁴ *Id.* at 104.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 108.

¹⁴⁷ *Id.*

more commonly called human rights. Most prominently, these certain specified rights do not include the right to democratic participation or the right to free speech.¹⁴⁸

Under this legal analysis, Rawls' mistake is "importance testing." He has not tested the importance of, for example, free speech; he has tested whether the violation of free speech meets the standards for this particular legal cause of action called non-forceful international intervention. The confused conclusion is that if a right cannot sustain non-forceful intervention, then the right is not a human right. As Nickel rightly points out, there are many other "causes of action" for which the "right" might suffice, and it is silly to wed oneself to Rawls's simplistic intervention/no-intervention dichotomy.¹⁴⁹ These "actions," many of which are extralegal or quasi-political, include "a mixture of nagging, encouragement and sanctions."¹⁵⁰ Nickel suggests 14 valuable uses of human rights in the international community. Only three of them involve the kind of non-forceful intervention that Rawls discusses, but they are all important for "jawboning," a gentler way of preserving a human rights discourse.¹⁵¹ Chinkin, likewise, lists a number of alternatives to non-forceful international intervention.¹⁵² Why balance the fate of each potential human right on the issue of whether or not violation of this particular "right" would satisfy the elements of a particular claim of action?

To conflate these ideas—the contents of "human rights" with the legal parameters of non-forceful intervention—is impermissible. It is akin to conflating, in the domestic setting, the substance of a citizen's right to be free from harm with the elements of a specific cause of action under tort law. It is axiomatic that violations of a right demand legal recourse, but, to extend the analogy, a single tort claim is not the only recourse available for asserting one's right to be

¹⁴⁸ This much is not problematic; actually, this article argues *infra* that it is an excellent observation and is strictly necessary, though for reasons different than Rawls's.

¹⁴⁹ Nickel, *supra* note 138, at 268-69.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 270

¹⁵² Chinkin, *supra* note 106.

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free from bodily harm, and it would be wrong to stake the strength of this entire right on the strength of this one cause of action.

C. Towards a Goal-Sensitive Moral Framework

Assessing all of these approaches, we see that simple cherry picking will not work. The framework must be more sensitive to the purpose of the sanction. In consideration of the above developments, that is what the following discussion attempts.

1. a. Specific Deterrence

As a threshold matter, we might accept that sanctions aimed at deterring a state's behavior are acceptable only under Rawls's set of conditions, what we have re-dubbed the non-forceful international intervention cause of action. For simplicity's sake—and because this issue is slightly beyond the reach of this article—let us simply adopt all of Rawls's circumscribed behaviors. However, to avoid Rawls's rights confusion, we will not define these behaviors in human rights language, but will instead, refer to the circumscribed behaviors merely as elements of a particular legal action. Thus, to state a cause of action, in the target state there must be significant, well-evidenced, and ongoing violation of one of the minimal rights to subsistence, security, or liberty. Rawls would consider these elements alone sufficient for a *prima facie* cause of action, but our above exploration suggests that we should add another element in order to justify intervention.

The above factual and empirical evidence is enough to conclude that sanctions are unethical to the extent that they destroy political liberties in the target state, and to the extent that those political liberties already have been destroyed. If the purpose of the sanction is to deter the state from engaging in undesirable behavior by raising the price of that behavior, this depends on a causal link between sanction sufferer and political decision-making. In a non-democratic state, the link is weak or non-existent. Worse, the sanctions themselves, by further disenfranchising the poor, may destroy the mechanism by which the deterrence would have operated. Not only

is the lack of political liberties not a basis on which to sanction, as Rawls holds, but it is the primary reason not to.

Generally, the broader the political franchise, the broader the range of tolerable economic sanctions. Therefore, it is true that in theory deterrent sanctions may be effective (and ethical) when used against non-democracies so long as they strike at the decision-making segment of the society. That is, the more elite the sanctions-sufferers, the less stringent the need for a democratic target. The pinnacle of such rationale is that sanctions directed at a pure authoritarian dictatorship could be ethical to the extent the sanction limited its effect, as practically as possible, to the authoritarian dictator alone. But, of course, this is not a sanction; it is criminal liability. We have seen that, with rare exceptions,¹⁵³ targeted sanctions go beyond criminal liability, striking at a state's core economy, and the negative consequences pervade all strata of political life.

Unfortunately, the well-tread argument that there is an enforceable international right to democratic governance—backed by penalty of intervention—is very popular.¹⁵⁴ This position has also been the heart and soul of the American neo-conservative movement, which holds that even if not guaranteed in international law, the intervention is required morally. But this argument fails under this article's schematic not because of importance testing, as it does in Rawls's *LoP*; rather the right to democratic principles may well be of highest importance. Nor does it fail because of the problem of wide acceptability, as it does in Rawls's *LoP*. Rather, it fails because of its fated ineffectiveness. Sanctions will be counterproductive, especially when compared to the jawboning supported by Nickel, Tesón, and Buchanan or the more robust criminal liability supported by Sassòli.

¹⁵³ Sports boycotts on South Africa appear to have been an effective, if slow-burning, exception. See Audie Klotz, *Making Sanctions Work: Comparative Lessons*, in *HOW SANCTIONS WORK* 271 (Neta Crawford & Audie Klotz eds., 1999).

¹⁵⁴ See, e.g., Alyssa Bernstein, *A Human Right to Democracy? Legitimacy and Intervention*, in *RAWLS'S LAW OF PEOPLES: A REALISTIC UTOPIA?* 279 (Rex Martin & David Reidy eds., 2006).

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We can see that in conducting this abstract test, the extent of the democratic nature of a target state is a reliable index for the damage a given sanction will wreak. However, this conclusion is in some ways a resignation to the inevitable balancing test; the greater good abstraction we wished to avoid, and the question of whether the ends justify the means.

b. General Deterrence

Insofar as the purpose of the sanction is to deter generally, the analysis is the same as above, but rather than inquiring into the democratic character of the target state, we would want to explore the democratic character of those other states the UNSC wishes to deter. The sanction will be effective in deterring only insofar as the political decision makers will suffer, or could be expected to suffer, disutility. By this point, the already tangled empirical questions about democracy are so compound and abstract that it becomes ridiculous. This is not even to include the empirical questions related to the value of this deterrence, the likelihood the states would offend absent the deterrent. Indeed, these problems are so grave that one could never seriously sustain sanctions on the basis of this element alone.

2. Rehabilitation

Insofar as the purpose is to rehabilitate, we preserve the deterrence rationale. Interestingly, the difference between deterrence and rehabilitation becomes more and more important the further we drift from a powerfully enforced sanction regime. This much is simple. As the threat of sanction grows dimmer, so does its deterrent effect. Meanwhile, a rehabilitative effect remains undiminished. Therefore, the distinction between the two grows greatest as the power of sanction dims. This power might dim because of poor enforcement, poor information, or a weakness in the imposing body. The places where all these seem most likely, where there is the greatest potential zone of immunity for wrongdoers, as we have

already explored, are marginalized states under international law¹⁵⁵ or where the imposing body is weak.

Thus, an important difference between deterrence and rehabilitation emerges where sanctions are imposed by organizations that are ad hoc (such as the “coalition of the willing”), poorly defined, fractured, or amorphous. Such groups are likely to be weak, temporary, or both. They are inherently more likely to fail, to reverse course, or to grow obsolete. The UNSC is, by comparison, highly stable, consistent, and relevant. This means the UNSC enjoys the power to rehabilitate on a broader range of undesirable behaviors than would a weaker international body; but note that the list of unacceptable behaviors is related to but not commensurate with that list for deterrent purposes, and it must be contemplated independent of a rights discourse. It is certainly plausible that the UNSC will not remain stable, consistent, and relevant. Rotating membership on the Council, rotating leadership of the Council, and the possibility of a sea change in international law could threaten such consistency, and rehabilitative sanctions must be sensitive thereto.

3. Incapacitation

Insofar as the purpose is to incapacitate, the same rationale holds, but we return to the abstract balancing test. Some point to, for instance, the relative success of Apartheid embargoes, which successfully debilitated South Africa’s air industry.¹⁵⁶ But much evidence since suggests that embargoes are ineffective. The UNSC’s recent, and first, study of arms embargoes found them to be remarkably ineffective.¹⁵⁷ Still, to be fair, and to deepen the abstraction, we should question whether the ineffectiveness with respect to guns, which are globally plentiful and easy to transport, predicts ineffectiveness with respect to, say, the development of nuclear arms technology for which expertise, raw materials, and

¹⁵⁵ See McGillivray & Stam, *supra* note 74, at 160-161.

¹⁵⁶ Klotz, *supra* note 153, at 267.

¹⁵⁷ Laura Trevelyan, *UN arms embargoes 'ineffective,'* BBC NEWS, Nov. 27, 2007, available at <http://news.bbc.co.uk/2/hi/7114323.stm>.

necessary machinery are much scarcer.

4. *Retribution*

It is tautological that, where sanctions aim to inflict justly deserved harm, they are unethical to the extent the harm is not justly deserved. Thus sanctions based on retributivist values are unethical to the extent that they violate fair notions of collective responsibility. Collective responsibility requires actual representation (democratic or proto-democratic), and Miller's criteria (like-minded or cooperative). Since we noted that even the like-minded criteria are all but impossible for a state to satisfy, we see that the UN is right to denounce sanctions for this purpose.

Note here the most important paradox of sanctions regimes. In the two most important potential purposes, specific deterrence and retribution, sanctions are most likely to be called for where there is a lack of democratic representation, yet sanctions are least likely to be ethically acceptable (or effective) where there is a lack of democratic representation. There is little wonder sanctions "don't work" generally, and that they are impotent counter efforts against especially abusive rights violators.

5. *Community Norm Reinforcement*

Curiously, community norm reinforcing sanctions operate, in some respects, at cross purposes with the sanctions envisioned in Rawls' *LoP*. Recall that the purpose of international intervention under Rawls' theory, as Leif Wenar describes it, is the equivalent of the purpose of medical intervention for a single person.¹⁵⁸ The treatment aims to cure the misbehavior of a people, as a single entity, and reinstate the rehabilitated entity to the society of peoples, where it may resume its work as a contributing member.¹⁵⁹ Note that the community norm objective often achieves the opposite; it excludes from the society of liberal democracies.

¹⁵⁸ Wenar, *supra* note 143, at 104.

¹⁵⁹ *Id.*

Yet possibly these two uses are intertwined, in that a sanction, or indeed, threat of sanction, is a sort of litmus test for membership in the community. The sanction will quickly “cure” members, but not outsiders. Indeed, we expect a true member to cooperate, to a greater or less degree, with sanctions imposed by other members for two different but compatible reasons. First, the structure of member governments (proto-democratic) makes them generally accountable for harm to their citizenries. Policy that invites sanction, and therefore harm to its citizens, will receive harsh rebuke, and is likely to change. This is to say that member states are politically accountable. Second, as a member of the community, the target-member state shares the norms that the community seeks to enforce. Even if the state does not currently embrace those norms, it is at least likely to respect the opinions and judgments of other community states that do. This is to say that member states shared normative values.

Consider that the converse may also be true. A non-democratic state will not share the community’s political structure or democratic norms. Much in the way that the impact of gossip presumes inclusion in a particular social network, the impact of sanctions presumes inclusion in the same cultural, political, and economic sphere. Of course, in the complex current international order, inclusion is measured on a sliding scale. To the extent a state is excluded, it is immune to sanctions’ pressures.

What we would expect to see is simple. Sanctions imposed on member states would be brief at worst and never escalate past threat at best. Moreover, they would usually cause the target state to change its objectionable policy. Conversely, sanctions imposed on non-member states would be lengthy, nasty, and fail to induce change. For the most part, this is exactly what happens.¹⁶⁰ Second, because multi-lateral sanctions rely on cooperation of many other countries, they reveal which other countries are and are not in the family. Of course, one expects the litmus test to work swiftly or

¹⁶⁰ Bolks & Sowayel, *supra* note 75. Again, sports boycotts against South Africa are a vivid exception.

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even immediately.¹⁶¹ There is no purpose for a protracted sanctions campaign, unless its purpose is to ostracize.

6. *Is the UNSC a Democratic Body?*

This discussion necessarily leads to a discussion of democratic peace theory. Under this theory, we expect that democratic states never go to war with one another.¹⁶² The two factors necessary for sanction success under the community norm enforcement also form the basis of democratic peace theory: (1) structural accountability; and (2) shared normative values.¹⁶³ The reciprocal implication of this theory is that either: (1) such states do not have disputes; or (2) such states resolve their disputes by other means. The first is easily refuted both empirically and commonsensically.¹⁶⁴ Therefore, democratic states must successfully and reliably resolve disputes by means other than armed force. One of those means is sanctions. What this article has shown is that sanctions are much more effective and ethically defensible when deployed against liberal democracies, and conversely, ineffective and indefensible when deployed against non-democracies. We have based these conclusions on similar notions of political accountability and shared norms. However, these conditions operate in both directions. The sanction-sending body must share them.

This suggests a prickly question: is the UNSC a broadly democratic entity? If not, is it similar enough to a democratic entity to preserve the prediction of democratic peace theory? More simply, if sanctions are to be imposed, is the UNSC the right entity to impose

¹⁶¹ See McGillivray & Stam, *supra* note 74.

¹⁶² See SPENCER WEART, *NEVER AT WAR: WHY DEMOCRACIES WILL NOT FIGHT ONE ANOTHER* 13 (Yale University Press 1998).

¹⁶³ Christopher F. Gelpi & Michael Griesdorf, *Winners or Losers? Democracies in International Crisis, 1918–94*, 95 *AM. POL. SCI. REV.* 633–637 (2001).

¹⁶⁴ For instance, we have seen democratic states threaten to sanction each other, as the U.S. threatened to sanction Israel. See e.g. Chris McGreal, *Israel's fence draws threat of US sanctions*, *THE GUARDIAN*, Aug. 6, 2003, available at <http://www.guardian.co.uk/world/2003/aug/06/israel>.

them? There are compelling reasons to say the answer is no.

In answering, we first must define democracy. Broadly, an ideal democracy will be dedicated to both the rule of law and to majority rule.¹⁶⁵ The UNSC struggles on both counts, even when we divide the investigation between a primary inquiry into the democratic nature of its constituents, and a secondary inquiry into the democratic nature of the UNSC as an organization.

As for the UNSC's constituents, two of the five permanent members, Russia and China, have tenuous and at times tendentious relationships with democracy, in both rule of law and the majoritarian rule.¹⁶⁶ This particularly affects the shared political norms perspective. Since it is not entirely comprised of nations with strong democratic histories or current policies, we can hardly sustain the argument that the UNSC shares political normative values with other democracies.

Turning to the political character of the UNSC itself, we see problems on both fronts. With respect to the rule of law, the UNSC has an extraordinary power that is sometimes ill-defined. As one scholar noted, the discretion under Article 41 may be so wide that sanctions under Chapter VII violate the general criminal law

¹⁶⁵ DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 6 (Charlotte Ku & Harold K. Jacobson eds., 2003).

¹⁶⁶ With respect to Russia: *Exit, Russian Democracy*, N.Y. TIMES, Nov. 27, 2007, available at <http://www.nytimes.com/2007/11/27/opinion/27tue2.html>; see generally, Clifford Levy, *Russia's Knockoff Democracy*, N.Y. TIMES, Dec. 16, 2007, available at <http://www.nytimes.com/2007/12/16/weekinreview/16levy.html> (arguing that Russian democracy is a "vener"); see generally, James Goldgeier & Michael McFaul, *Russia's No Democracy. So What?*, WASHINGTON POST, April 9, 2006, available at http://www.cfr.org/publication/10414/russiasnodemocracy_sowhat.html; see also Daniel Treisman, *Is Russia's Experiment with Democracy Over?* speech at the UCLA International Institute, Oct. 21, 2004, available at <http://www.international.ucla.edu/article.asp?parentid=16294> (arguing that under Putin, Russia has not become undemocratic, just democratic in a much more centralized and less liberal way). With respect to China, see Ying Ma, *China's Stubborn Anti-Democracy*, POL'Y REV., No. 141, Hoover Institution at Stanford University (2007), available at http://www.hoover.org/publications/policy_review/5513661.html; see generally, *Nipped in the Bud: The Suppression of the China Democracy Party*, HUMAN RIGHTS WATCH, Vol. 12, No. 5, (C) (Sep. 2000).

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principle of specificity.¹⁶⁷ This problem could be alleviated with, as described at *supra* part IV.C.1, a shift away from the human rights discourse to a plainer, predetermined list of circumscribed behaviors.

With respect to majoritarian rule, the simplest and strongest point is that, while the UNSC may bind all member states, most states do not have a say in its decisions.¹⁶⁸ Furthermore, the unalloyed veto power of each of the permanent members makes the process vulnerable to capture. Its decisions must often cater, to the brink of unacceptability, to the whims of a single permanent member. As we have just seen, these members themselves are not necessarily subject to democratic pressures. Indeed, this is often cited to explain why economic sanctions were so infrequently adopted during the Cold War; acrimonious divisions within the UNSC meant few resolutions could be passed.¹⁶⁹ During this period, the UNSC was stubbornly anti-majoritarian. Despite a healthier post-Cold War political climate today, the same is largely true. Although the shifting seats of the Council may ensure that a wide variety of states do have input at some point or another, the vagaries and procedural safeguards of this rotation, along with the special status of the permanent members, serve only to underline its anti-majoritarian principle.

Nevertheless, some glimmers of democracy show themselves in the UNSC. As to the rule of law, the UNSC may be bound by international humanitarian and customary law.¹⁷⁰ Whatever these precise legal limits, The UNSC has never breached them too egregiously. As to majoritarian rule, Council decision-making is (somewhat) contingent on international public opinion.¹⁷¹ Of course, measuring public opinion is imperfect; it is overly reliant on individuals' and states' access to expression and power. It is biased to wealthier states and individuals and towards the current

¹⁶⁷ Al-Anbari, *supra* note 41, at 372.

¹⁶⁸ U.N. Charter art. 25, 50.

¹⁶⁹ MATHESON, *supra* note 98, at 12.

¹⁷⁰ See discussion *supra*, at II.

¹⁷¹ HILAIRE, *supra* note 4, at I; see also James Traub, *Who Needs the UN Security Council?* N.Y. TIMES MAGAZINE, Nov. 17, 2002, at 47.

distribution of wealth, but these difficulties are not unique to the international context; they are the (somewhat) tolerable evils of a liberal democracy generally.

It is tempting to conclude that if the UNSC is not a democratic body for purposes of the democratic peace theory, and good reasons to think so abound, then UNSC sanctions cannot reliably resolve conflicts, even with democratic states. However, this is not what all our empirical data has shown. Instead, a UN sanction may reliably resolve conflicts with democratic states, and in so doing, the UNSC need not mimic a democratic state. What matters is only that its sanction enjoys the backing of democratic states, and that the democratic target state's problem behavior is roundly disapproved by other democratic states. Whether other non-democratic member states also disapprove—though perhaps embarrassing to the target state—, makes little ultimate difference. And whether a fundamentally non-democratic international organ like the UNSC ratifies this aggregate disapproval, though perhaps embarrassing as well, makes little ultimate difference. What matters most is the disapproval of the truly liberal democratic nations. They are the states whose (bilateral) democratic disputes are being resolved with the democratic target state. Since the UNSC cannot establish the sanction without the support of a large swath of liberal democracies or even all of them, the UNSC sanction has, at minimum, the guaranteed backing that the democratic peace theory requires. In this respect alone, the legal contingency of the UN sanction *is* meaningful, and is more powerful than any unilateral approach. As we have explained, UN sanctions derive deterrent power from the UNSC's relative stability and power in a way that unilateral sanctions almost never can. More importantly, community norm is much more powerfully enforced if it is the "community," though roughly assembled, that reinforces them.

VII. CONCLUSION

A sanctions framework must avoid invoking human rights as its basis for UNSC sanctions for three reasons. First, the invocation is often circular and counterproductive. The absence of political proto-democratic liberties in a target state actually inhibits sanctions from achieving most of their potential purposes. That is to say, the goal of a human-rights based sanction (such as to establish political rights) may also be a prerequisite to its success.

Second, and more perniciously, the theorist usually recognizes the circularity, and accounts for it. She accounts for it, as Rawls does, by stripping political rights from her list of human rights. Yet this step does not bolster her sanctions framework; if it achieves anything, it diminishes the analytical power of human rights.

Third, and most practically, the invocation of human rights compels the UNSC to overstep its legal authority by exceeding its simple duty to preserve the peace. We have seen that peace is not co-extensive with law. Likewise, we have seen that the law is not co-extensive with human rights. We should conclude that, peace is certainly not co-extensive with a human rights discourse, and to imagine otherwise is to compromise the integrity of both.

The more difficult task comes in defining what values we ought to invoke in justifying sanctions. Even after we escape the orbit of human rights, any framework constructed to justify UNSC sanctions is inextricably dependent on abstract ethical notions of collective justice and incalculably compound empirical musings on the greater good. Nevertheless, these calculations can be made more productive when they are immediately sensitive to the goals of the sanction. This article has shown that these goals track quite closely the goals of criminal punishment in general.

Furthermore, the Security Council is not a broadly democratic entity. Its veto system permits an undemocratically governed state to deny unilaterally a sanction. Even so, the UNSC cannot establish any sanction without the support of perhaps all liberal democracies, and in this respect alone, the legal contingency of the UN sanction is meaningful, and much more powerful than unilateral or ad hoc joint sanctions.

In this sense, sanctions find the best footing when grounded by the pragmatic ideals of democratic accountability and legitimacy. One may argue that these are procedural, not substantive, ideals. Yet, they are necessarily achieved in large proportion from honest and transparent proto-democratic appeal to the underlying purpose of the sanction (whether deterrence, incapacitation, rehabilitation, retribution, community norm reinforcement, or some combination thereof). If the Security Council does not do so now, it is amply capable of doing so in the future.

Thus, on the one hand, the UNSC appears at least potentially effective in its role as international sanctioner. On the other hand, it seems fair to conclude that the circumstances which justify sanctions under this rubric are narrower than those circumstances in which the Council has actually imposed them. This is no great surprise. The Council's overreaching implicates one of international law's greatest frustrations: that states where *something* must be done are also those states where *sanctions* are the least appropriate.¹⁷²

The frustration is not inherently paradoxical, but simply reflective of a narrow-minded legal imagination, a failure to comprehend that, where *something* must be done, there are plenty of *somethings* other than sanctions. This is a tepid suggestion, but perhaps sanctions, though effective here and there, simply should not be, as they undoubtedly are now, at the heart of international law.

It is this tepid suggestion that informs the article's greater one. Human rights ought to be at the heart of international law. It is our intuitive sense of these rights that animates our conviction; it incites the refrain that *something* must be done. This intuition is just fine, but then comes the misstep, the cognitive leap to sanction, as if not to

¹⁷² Sanctions directed at non-democratic targets are inherently less likely to achieve their goals than are those directed at democratic targets. See CORTRIGHT & LOPEZ, *supra* note 66; see also DREZNER, *supra* note 70. Yet, democratic states "are five and a half times more likely to sanction non-democracies than democracies." Avia Pasternak, *Sanctioning Liberal Democracies*, 57 POL. STUD. 54, 67 (2009); but see Emilie M. Hafner-Burton & Alexander H. Montgomery, *The Hegemon's Purse: No Economic Peace Between Democracies*, 45 J. PEACE RES. 111, 116 (2008) (finding that only the U.S. is more likely to sanction non-democratic regimes).

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sanction is to do nothing. Our ethical framework, though regrettably dependent on abstractions, must avoid employing this greatest abstraction, that to sanction is good because it is anything. The sanctions debate must remain subordinate to the broader human rights debate, and not the other way around.