

New Approaches of Understanding Human Rights: Paradox of Sanctions at the United Nations

Hamed Hashemi Soughesh¹ & Rohaida Nordin²

University Kebangsaan Malaysia (UKM), MALAYSIA.

¹ hamedhashemi28@yahoo.com, ² Rohaidanordin@yahoo.com

ABSTRACT

Despite extensive documentation of human rights, these rights are being violated by governments every day. In cases of widespread and severe violations on human rights, the Security Council has become unable to make any quick action subject to the Veto right and the conventional sanctions included as embargo, economic and use of force are not much effective and in some cases such as Iraq just add the political and social turmoil. In this article, first, we define and enumerate “sanctions” under UN system and then analyze the electivity of the current sanctions in international law. Among the conventional sanctions of international law, economic sanctions are common and have been widely imposed on member States such as Iraq and Iran. As one may notice, there are gaps in economic sanctions. The second categorization of sanctions is military ones that nowadays are applied in the form of humanitarian intervention. When a government perpetrates mass violations of human rights and genocide, there is an urgent need for the reaction of the international community. Then we contemplate on the challenges on the way of humanitarian intervention. There are also cases that States have applied humanitarian intervention without the resolution of Security Council. It seems there is an urgent need for a new generation of human rights guarantees that are not necessarily part of the UN system, but certainly it is consistent with its purposes. At last, we introduce the new generation of sanctions entitled as Collateral Agreements of Human Rights. We tried to make a comparison between sanctions in contract law and expand the model to international human rights law.

Keywords: Human rights, recognition, veto right, sanctions of international law

INTRODUCTION

States infringe human rights because of various reasons such as getting aid from allies (Vreeland, 2008), maintaining control over population (Conrad & DeMeritt, 2014), ideological concerns, culture maintainability (Security Council, Resolution 2170) and sometimes the inability to uphold their obligations under human rights e.g. impotence to establish organized police or independent judiciary system.

Sanctions are means of law enforcement (Bowden & Farrall, 2007) and are defined as imposition of pressure on the subject(s) of the law in response to its wrongful act(s) (Masaka, 2012). Sanctions are integral part of legal norms (Wintgens, 2012); Kelsen introduces them as “defining element” of the legal rules. In his opinion, a non-binding rule does not deserve to be called “rule of law” (Menendez & Fossum, 2011). Generally, the goals of sanctions are revenge and/or change of the behavior of the wrongdoer (Bammeri & Kiani, 2014). In domestic laws, there is a great spectrum of sanctions from surcharge to capital punishment.

As a legal system, the international law has its own specific sanctions and apparently these sanctions are distinct from domestic laws, since there are fundamental differences between international community and domestic societies (Shimko, 2012). The Charter of the United

Nations provides no definition of sanctions, but according to Articles 39, 40 and 41, the Security Council may impose sanctions against the member States which have endangered the international peace and security. These sanctions include a wide spectrum of actions and strategies from embargo to military confrontation. The Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, introduces the international non-military sanctions as diplomatic, economic, sports, scientific, smart sanctions and exclusion from membership of the international organizations.

In recent years the nuclear activities of some member States (UN Security Council Resolutions No.1887, 1835, 1803, 1696, 1737, 1747, 1929, and 2094), domestic wars and violations of human rights were the causes of imposition of sanctions on States (O`Connell, 2002). One of the main problems is that, the current sanctions are not deterrent i.e. *subsequent to* the violations of law by a State; UN adopts resolutions on the issue and imposes sanctions against the outlaw(s). In spite of the international sanctions, some States continue violating the human rights because their existing hinges on the acts that constitute violations of human rights (Rissel & Borzel, 2012). On the other hand, sometimes it is impossible to sanction the violators due to the political concerns; the law violators try to avoid the sanctions by “bribing” and making collusions with the powerful countries (Okhovat 2011; Toscano 2012).

Human rights are enforced at two international and domestic levels. At international level, human rights are enforced at a global system and regional settlements (Padilla et al., 2005). In this article, we intend to bring about the possibility of considering a new approach on increasing the enforcement of human rights specifically for those States those regional systems do not cover them and to tie the robust sanctions of domestic laws with international norms.

The Deficiencies of the Current Sanctions of International Law

International sanctions are punishments or means of coercion that are imposed to force the target country(s) to change their behavior and follow the rules (Doxey, 1996). Sanctions are applied both collectively (UN sanctions) or unilaterally against one or more States (Peksen, 2009). Sanctions are always deemed as a legal replacement for war; as Wilson, the former U.S. president in 1919 introduced them as a quiet and killer leverage, so that there is no more need to use of force against the law violating States (Sawaya, 2013).

Every sanction has at least one goal, but mostly they are multipurpose (Baldwin, 2000). Change of behavior, imposing difficulty on the target or increasing the costs of perpetrating the wrongful acts are the typical purposes behind sanctions. Moreover, normally the imposers of sanctions by doing so, reiterate on their leading role in fighting terrorism and acquit themselves from denunciation of failure to protect human rights.

The effectiveness of sanctions is measured by the subsequent behavior of the target country and it takes time to find out whether sanctions had been effective. Hufbauer et al. (2008) and Pape (1998) have studied the effectiveness of sanctions and found out that sanctions failed in most cases. In their analysis only 5% of sanctions achieved their goals.

Economic sanctions are among the most effective sanctions but it does not mean they are effective in every case and situation (Murphy, 2011). Moreover, “effectiveness” of sanctions is a relative concept. Through economic sanctions, State or State groups boycott the economy of the target State. These sanctions rarely apply any pressure on the governmental elites and always pose difficulties on innocent civilians (O`Connell, 2002). These sanctions, in order to be more effective, require that the economy of the imposers should be highly prospered and there should be a considerable gap between the economy of the imposer of sanctions and the

target State. These sanctions may be successful when the country does not possess any valuable natural resources such as oil and gas. It's a fact that oil and gas are not sanction able and always there is a good demand for these natural resources (Katzman, 2010). The other problem with these sanctions is that, it is not always possible to monitor the results. The economic sanctions should be imposed in cases that the goal is change of behavior of the target and not changing the entire political system (Takishita, 2005).

The other negative aspect of the economic sanctions is that, they pose difficulties on the economy of the neighboring countries and main economic allies of the target; for example, on the case of sanctions against Iraq, the economy of the 21 States were affected negatively (Lacy & Niou, 2004). From the perspective of the international law, the sanctions are in controversy with "right to development" and in most cases the targets are the poorest members of international society. The classic failure instances of the economic sanctions are the American embargo in 1979 against the former USSR to give up the occupation of Afghanistan; the UN sanction to enforce Iraq to release the occupation of Kuwait in 1990 and, Fidel Castro is still in power since 60s in Cuba, regarding the long-time sanctions against this government (Alastair, 1996).

Furthermore, economic sanctions induce the target State(s) to support their own industries and supply certain groups financially (Proletarian, 2014). Moreover, it takes time for the members of the UN to establish and regulate their related legal, political, social, and economic infrastructures to imply the sanctions (Van Rossem, 2010).

On the other hand, it is not possible to apply both economic and diplomatic sanctions on the target at the same time. The lack of the diplomatic relations hinders applicability of the economic sanctions and monitoring of the emanated results. Economic sanctions bring catastrophe to the civilians. On the case of Iraq, more than 5000 kids lost their lives because of malnutrition so, the international community planned smart sanctions to stop the continuation of humanitarian crisis in Iraq and only put the governmental elites under pressure (Carey, 2012).

Other groups of sanctions that are implemented in recent years are known as smart sanctions. In such cases, the Security Council applies them against a regime, it appoints a committee to monitor and report the effects and the aftermath of sanctions and usually the Security Council provides the list of the target individuals and industries to the committee. The enlisted individuals never find a chance to protest the list directly, even though they are sanctioned wrongly (Van Den Herik, 2012).²³

Military sanctions are the harshest ones. They include a range of arms embargo to full scale war. Some authors believe that, these sanctions are violation of "Right of self-determination" (Coady, 2002 & Acharaya, 2002). Nowadays, the military sanctions are applied in the form of the humanitarian intervention. When a government perpetrates mass violations of human rights; there is an urgent need for the reaction of the international community (Hurd, 2011). "Humanitarian intervention should be legal", even necessary (Dragisic, 2009). There is lots of challenges for the humanitarian intervention (Francioni and Bakker 2013). Hurd affirms that "to a legal formalist", the humanitarian intervention is violation of UN Charter

²³ . Liberia, the Panel noted that it had received a number of complaints from individuals claiming to be improperly listed and thus unfairly subjected to the travel ban. The complainants asserted that they were not guilty, that they lacked information as to why they were put on the list and that the reports from the Panel were not objective. The complainants even threatened to sue the United Nations and the Panel. See, e.g., the Report of the Panel of Experts on Liberia, UN Doc. S/2002/470, 2002.

and explicitly announces that, there is no room for it in the current formation of the international community.

From a positivist perspective, the humanitarian intervention that is based on the chapter 7 of the UN Charter and resolutions of the Security Council is legal (Pattison, 2007). “Veto right” is another hurdle on the way of humanitarian intervention. Veto right is a tool in the hands of permanent members of the Security Council to protect and follow their own, even unfair benefits. For example, U.S vetoed the resolution on condemnation of Israel in 1967 for violating the sovereignty of Uganda; Russia and China vetoed all the resolutions that engage in any military action against Syria (O’Sullivan 2012; Carey 2012). In such a situation, veto right voids all the effective actions to stop atrocities.

There are also instances that States have applied humanitarian intervention without the permission of Security Council.²⁴ For example on the case of Kosovo, according to the Independent International Commission on Kosovo, the intervention was illegal yet legitimate.

To avoid this legal mire, the different authors provided various solutions, such as referring to the theory of “just war” (O’Sullivan, 2012) and resorting to morals and natural law (Francioni and Bakker, 2013). The primary responsibility for protection of civilians rests on governments. If a government cannot or would not protect their people from mass atrocities, the responsibility transfers to the Security Council. If the Security Council is paralyzed on making any decision due to veto right, the responsibility rests on the States (O’Sullivan, 2012). As one may notice, these are justifications that resort to philosophical theories are far from realities. Moreover, the legality of international sanctions always is protested by the target State(s) and none of the current sanctions in international law has prophylactic effect.

COLLATERAL AGREEMENTS OF HUMAN RIGHTS

Compared to international law, the domestic legal systems warrant more effective sanctions, since the law enforcement is guaranteed by superior authorities and these systems embed some measures, i.e. “assurance”, that the international law lacks them.

There are cases, especially on extradition, of “diplomatic assurance” made by some States according to which, they make a commitment to respect the fundamental rights of the extradited individual(s). In *Saadi Case*, the European Court of Human Rights (ECHR) announced that, deportation of Saadi (and therefore violating the diplomatic assurance) is violation of Article 3 of the European Convention on Human rights. The ECHR, in both cases of *Saadi v. Italy* and *Chahal v. UK* doubted the reliability of these “diplomatic assurances”. Here the questions arises is that, how about the possibility of backing these “assurances” by bilateral legal agreements? What if these assurances go beyond a simple “promise” and are enforced by law?

One may notice such a concept in security agreements such as the Security Agreement U.S and Iraq (2011) and between U.S and Afghanistan (2012). These agreements delineate the obligations and responsibilities of the occupants but keep quiet on the issue of imposition of sanctions *against* the host country in cases of violations of human rights because, it is far from reality that a government adopts an agreement according to which, expresses its consent on possibility of imposing sanctions against itself.

One may consider the fact that, when a government is overthrown through an internal war, various factions and political elites try to come to power and establish a de facto authority in the State. In this stage, the very existence of these new de facto authorities directly depends

²⁴. For example the cases of Kosovo and Iraq. (Hahn, 2008).

on their recognition as the legitimate government of the State by other States and the international society. Recognition by the international community and giving the seat of the State at the General assembly of UN to the new government(s) as what we saw on the case of the National Transitional Council of Libya, is a great privilege, which shouldn't be given to the new regime for free. The international recognition of de facto authorities makes a chance for the international community to take "assurances" about the subsequent actions of the regime and to guarantee a successful transitional justice. Upon this vantage point, it is possible to enforce the new established regimes to sign up the "Collateral Human Rights Agreements" (CHRAs) according to which, mass violations of human rights automatically will bring about serious consequences.

In our opinion, CHRAs are one step forward to enhance enforcement of human rights specifically on the regions that are not covered by regional human rights system such as ASEAN and EU. Lapse of a considerable amount of time between the wrongful act(s) and punishment decreases the effectiveness of sanctions. CHRAs address specific regimes and, their contents might be exceedingly flexible and consistent with the unique geo-political, cultural, religious, and economic position of the contracting parties. CHRAs are suitable tools of enhancing enforcement of human rights in regions that lack regional human rights settlements. Moreover, depending on the position of the ratified treaties at the constitution of the State, the CHRAs may convert to domestic legal rules and enjoy the sturdy sanctions of domestic laws.

CHRAs send a direct message to the new regime that it has a "duty to protect" its population from and any serious violation of human rights may endanger its continuation. They catalyze the process of imposition of sanctions and might have a prophylactic effect on enforcement of human rights. The ratification of a CHRA might be the primary part for the foreign investment and the advancing the State developments. CHRAs may include an international social consensus between a government and the international community. The Arab Spring provided a golden chance for the international community to guarantee transitional justice in long run.

Republic of Czech (Act No.69/2006 Coll.) and Republic of Kosovo (Law No.03/L) were two States that passed laws on imposition of international sanctions and invigorated the enforcement of sanctions through legislations but these laws are far from the concept of CHRAs because these laws ban violations of international sanctions in the territory or conducted to their nationals. Furthermore, it is not clear if the international sanctions are imposed against Czech or Kosovo, how much these legislations were applicable.

CONCLUSION

The effectiveness if international sanctions are doubted by scholars. In the cases of atrocities and mass violation of human rights, if civilians suffer, the veto rights of permanent member of Security Council may abandon any immediate action. Some authors have tried to solve this problem by providing interpretations on the current rules and theories of law. We made effort to "personalize human rights obligations" for States through CHRAs to fill the gap between the international layer of human rights enforcement and domestic level. CHRAs are tools to improve enforcement of human rights in those States that no regional system covers them.

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