

## PART I • SETTING THE SCENE

*[W]e are ushering in an epoch of law among peoples and of justice among nations. The UN Security Council's task is a heavy one, but it will be sustained by our hope, which is shared by the people, and by our remembrance of the sufferings of all those who fought and died that the rule of law might prevail.*

French Ambassador Vincent Auriol, at the inaugural meeting of the  
UN Security Council  
17 January 1946

*We meet at the hinge of history. We can use the end of the Cold War to get beyond the whole pattern of settling conflicts by force, or we can slip back into ever more savage regional conflicts in which might alone makes right. We can take the high road towards peace and the rule of law, or we can take Saddam Hussein's path of brutal aggression and the law of the jungle.*

US Secretary of State James Baker, when the Council authorised the  
use of force against Iraq  
29 November 1990

*This Council has a very heavy responsibility to promote justice and the rule of law in its efforts to maintain international peace and security.*

UN Secretary-General Kofi Annan, at the Council's meeting on justice  
and the rule of law  
24 September 2003

## 1 Introducing UN sanctions

Looking back from an early twenty-first century vantage-point, it is easy to forget that there was once a time when the United Nations Security Council could not easily employ its sanctions tool. From 1946 until the middle of 1990, Cold War politics prevented the Council from imposing the coercive sanctions provided for in Article 41 of the United Nations Charter more than twice. In 1966 the Council imposed sanctions against Southern Rhodesia and in 1977 it applied them against South Africa.<sup>1</sup> By contrast, the post-Cold War period has witnessed a dramatic increase in UN sanctions. Since August 1990 the Security Council has initiated no fewer than twenty-three additional UN sanctions regimes.<sup>2</sup> UN sanctions now form a prominent feature of the international relations landscape.

While the end of Cold War tensions created the preconditions for a sanctions renaissance, two other factors have contributed to the rise of sanctions. First, sanctions can often represent the least unpalatable of the coercive alternatives available to the UN Security Council when faced with the task of taking action to maintain or restore international peace and security. From a political perspective, it can be extremely difficult to garner the support necessary to authorise collective military action under Article 42 of the UN Charter, as the governments which would be expected to shoulder the burden of collective forceful action are reluctant to assume responsibility for the serious financial, political and humanitarian consequences that are likely to flow from the use of military sanctions. The imposition of non-military sanctions, by contrast, is generally thought to entail fewer costs than the use of force. By authorising sanctions, the Security Council can be seen to be taking

<sup>1</sup> See Appendix 3, Table B. <sup>2</sup> *Ibid.*

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strong symbolic action against threats to international peace and security, without having to assume the responsibility for, or incur the costs of, using force. Second, there is the perception that the potential of sanctions to achieve their policy objectives has increased with advances in international technology, communications and trade. Globalisation has fostered a climate of growing interdependence, in which states are increasingly reliant upon trade and communication links with the international community. In such an interdependent economic environment, a stringent UN sanctions regime has the power to devastate a target economy and to rein in target political elites.

The Security Council has employed a broad variety of sanctions, ranging from comprehensive measures which prevent the flow to and from a target of virtually all products and commodities,<sup>3</sup> to simple measures that target specific items, such as arms,<sup>4</sup> timber<sup>5</sup> or diamonds,<sup>6</sup> or particular activities, such as diplomatic relations<sup>7</sup> or travel.<sup>8</sup> UN sanctions have been applied around the globe, from Southern Rhodesia to Yugoslavia and from Haiti to North Korea.<sup>9</sup> They have targeted nations, rebel groups and terrorist organisations.<sup>10</sup> The Council has imposed sanctions for a range of objectives, including compelling an occupying state to withdraw its troops,<sup>11</sup> preventing a state from developing or acquiring weapons of mass destruction,<sup>12</sup>

<sup>3</sup> See Appendix 2, summaries of the 232 Southern Rhodesia, 757 Federal Republic of Yugoslavia (Serbia-Montenegro) (FRYSM), 820 Bosnian Serb and 841 Haiti sanctions regimes.

<sup>4</sup> See Appendix 2, summaries of the 418 South Africa, 713 Yugoslavia, 733 Somalia, 788 Liberia, 918 Rwanda, 1160 Federal Republic of Yugoslavia (FRY) and 1298 Eritrea and Ethiopia sanctions regimes.

<sup>5</sup> See Appendix 2, summaries of the 1343 and 1521 Liberia sanctions regimes.

<sup>6</sup> See Appendix 2, summaries of the 864 UNITA, 1132 Sierra Leone, 1343 and 1521 Liberia and 1572 Côte d'Ivoire sanctions regimes.

<sup>7</sup> See Appendix 2, summaries of the 748 Libya and 1054 Sudan sanctions regimes.

<sup>8</sup> See Appendix 2, summaries of the 232 Southern Rhodesia, 661 Iraq, 748 Libya, 841 Haiti, 864 UNITA, 1054 Sudan, 1132 Sierra Leone, 1267 Taliban and Al Qaida, 1343 and 1521 Liberia, 1493 DRC, 1556 Sudan, 1572 Côte d'Ivoire, 1636 Hariri, 1718 North Korea and 1737 Iran sanctions regimes.

<sup>9</sup> See Appendix 3, Table B.

<sup>10</sup> The majority of sanctions regimes have targeted states: see Table B. Rebel groups have been targeted in the 820 Bosnian Serb, 864 UNITA, 1132 Sierra Leone and 1493 DRC sanctions regimes. The 1267 Taliban and Al Qaida sanctions regime targets terrorist organisations. See the summaries of these regimes in Appendix 2.

<sup>11</sup> This was the initial objective of the 661 sanctions regime against Iraq: see Appendix 2.

<sup>12</sup> Non-proliferation was an objective of the 418 South Africa, 1718 North Korea and 1737 Iran sanctions regimes, as well as the primary reason for maintaining the 661 Iraq sanctions regime after the conclusion of 1991 Gulf War hostilities. See Appendix 2.

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countering international terrorism,<sup>13</sup> stemming human rights violations<sup>14</sup> and promoting the implementation of a peace process.<sup>15</sup>

The collection of sanctions regimes stacking up in the Security Council's trophy-cabinet is impressive. Yet UN sanctions attract many critics. Some denounce sanctions as ineffective.<sup>16</sup> Others warn that sanctions can be counterproductive, galvanising opposition to UN intervention and strengthening the target government's position of power.<sup>17</sup> At the other end of the spectrum, sanctions are criticised for being too effective due to the devastating impact they can have on innocent civilian populations. Sanctions have been described as 'the UN's weapon of mass destruction',<sup>18</sup> as 'a genocidal tool'<sup>19</sup> and as 'modern siege warfare'.<sup>20</sup>

This book adds another voice to the critical chorus. But the criticism ventured here is designed to be constructive. No matter how ineffective, counterproductive or indiscriminate they might appear, the Security Council is not about to remove sanctions from its peace and security toolkit. As Secretary-General Kofi Annan observed in his 2005 report *In Larger Freedom*, sanctions constitute 'a necessary middle ground between war and words'.<sup>21</sup> Enthusiasm for sanctions may wax and wane, but the Council will continue to resort to its sanctions tool when diplomacy is failing and other policy options are unpalatable or

<sup>13</sup> Preventing and responding to international terrorism was an objective of the 748 Libya, 1054 Sudan, 1267 Taliban and Al Qaida and 1636 Hariri sanctions regimes. See Appendix 2.

<sup>14</sup> Stemming human rights violations has been an objective of the 232 Southern Rhodesia, 418 South Africa, 841 Haiti, 1160 Federal Republic of Yugoslavia (FRY) and 1556 Sudan sanctions regimes. See Appendix 2.

<sup>15</sup> Promoting the implementation of a peace process was an objective of the 788 and 1521 Liberia, 864 UNITA, 918 Rwanda, 1132 Sierra Leone, 1493 DRC and 1572 Côte d'Ivoire sanctions regimes. See Appendix 2.

<sup>16</sup> See, e.g., Robert A. Pape, 'Why Economic Sanctions Do Not Work' (1997) 22 *International Security* 90–136.

<sup>17</sup> Johan Galtung, 'On the Effects of Economic Sanctions: With Examples from the Case of Rhodesia', in Miroslav Nincic and Peter Wallensteen (eds.), *Dilemmas of Economic Coercion* (New York: Praeger, 1983), pp. 17–60, 46.

<sup>18</sup> Denis Halliday, 'Iraq and the UN's Weapon of Mass Destruction' (1999) 98 *Current History* 65–68; John Mueller and Karl Mueller, 'Sanctions of Mass Destruction' (1999) 78(3) *Foreign Affairs*, 43–53.

<sup>19</sup> Geoffrey Simons, *Imposing Economic Sanctions: Legal Remedy or Genocidal Tool?* (London: Pluto Press, 1999); George E. Bisharat, 'Sanctions as Genocide' (2001) 11 *TLCP* 379–425.

<sup>20</sup> Joy Gordon, 'Sanctions as Siege Warfare' *The Nation*, 22 March 1999.

<sup>21</sup> A/59/2005 (21 March 2005): *In Larger Freedom: Towards Development, Security and Human Rights for All*.

impractical. The key is thus to reform the Council's sanctions practice so that sanctions are less ineffective, less counterproductive and less indiscriminate.

## 1. Defining UN sanctions

The term 'sanctions' can have many meanings. In the national sphere, sanctions generally represent a range of action that can be taken against a person who has transgressed a legal norm.<sup>22</sup> Thus, a person who has committed the crime of manslaughter might receive the sanction of a term in prison. The nature, scope and length of potential national sanctions are generally determined by legislatures. The sanctions are then applied to concrete cases by judiciaries or juries, and they are then enforced by police forces and penal systems. National sanctions may serve a number of purposes, including defining the limits of permissible behaviour, punishing wrongdoers and deterring potential future wrongdoers.<sup>23</sup> But whatever specific purpose a particular sanction may serve, the essence of national sanctions lies in their nexus with legal norms. This nexus separates sanctions from simple acts of coercion. In the national context, sanctions are imposed in order to enforce the law and they therefore aim to reinforce the rule of law.

In the international sphere, however, the term 'sanctions' is commonly used to describe actions that often bear only a slight resemblance to their domestic relative. Media commentators, diplomats and scholars employ the term to refer to a wide array of actions, taken for a variety of purposes, by a range of actors against a variety of targets.<sup>24</sup> The spectrum of action commonly described as 'sanctions' includes military and non-military action. The term 'sanctions' can be used to describe action which aims to place physical restrictions upon the ability of a target to engage in the use of force itself, or to depict action which seeks to restrict the target's freedom in other respects, such as in relations of an economic, financial, diplomatic or representative, sporting or cultural nature.

<sup>22</sup> Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (London: Steven & Sons, 1951), p. 706.

<sup>23</sup> Margaret P. Doxey, *International Sanctions in Contemporary Perspective*, 2nd edn (New York: St Martin's Press, 1996), p. 7.

<sup>24</sup> Galtung and Doxey both provide useful summaries of the different types of international 'sanctions': Galtung, 'On the Effects of Economic Sanctions', 21; Doxey, *International Sanctions*, p. 15.

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The fundamental difference between the meaning of sanctions in the national context and the popular understanding of sanctions in the international context is that the action commonly referred to as sanctions in the international sphere does not necessarily serve the purpose of enforcing a legal norm.<sup>25</sup> The term ‘sanctions’ is widely used to refer to action which seeks either to coerce the target into behaving in a particular manner, or to punish it for behaviour considered unacceptable by the sender. The motive for imposing sanctions may be to respond to a breach of a norm or to prevent such a breach, but it may also be to pursue a foreign policy agenda or to gain some advantage over the target.<sup>26</sup> Some commentators have even employed the term ‘positive sanctions’ to refer to acts of a non-coercive nature which seek to induce a particular type of behaviour.<sup>27</sup>

The range of actors who impose sanctions on an international basis includes individual states, groups of states, the international community as a whole, and non-state actors. When one state initiates coercive action, its actions are commonly referred to as ‘unilateral sanctions’. A prominent example of unilateral sanctions is the regime which has been maintained against Cuba by the United States since the Cuban missile crisis.<sup>28</sup> When action is initiated by a group of states, the action becomes ‘multilateral’ or ‘regional’ sanctions. Examples of multilateral/regional sanctions regimes include those imposed against Haiti by the Organization of American States<sup>29</sup> and against the former Yugoslavia by

<sup>25</sup> This can also be the case with UN sanctions, as it is not a requirement that they be applied in response to a violation of Charter obligations. Thus they can be interpreted as ‘political measures’ which the Security Council has the ‘discretion’ to apply in order to maintain or restore international peace and security. See Kelsen, *The Law of the United Nations*, p. 733.

<sup>26</sup> The US sanctions regime against Cuba is one example of a ‘sanctions’ regime imposed in pursuit of a foreign policy agenda. Since it first adopted a resolution on the subject in 1992, the UN’s General Assembly has condemned on an annual basis the continued application of US ‘sanctions’ against Cuba. For the initial resolution, see A/RES/47/19 (24 November 1992). For the most recent resolution, see A/RES/58/7 (18 November 2003). For the annual resolutions in between, see A/RES/58/7 (18 November 2003), preambular para. 6.

<sup>27</sup> Peter A. G. Van Bergeijk, *Economic Diplomacy, Trade and Commercial Policy: Positive and Negative Sanctions in a New World Order* (Brookfield: Edward Elgar Publishing, 1994).

<sup>28</sup> For a comprehensive list of instances of unilateral sanctions, see Gary Clyde Hufbauer, Jeffrey J. Schott and Kimberly Ann Elliott, *Economic Sanctions Reconsidered*, 2nd edn (Washington, DC: Institute for International Economics, 1990).

<sup>29</sup> For a detailed account of the Haiti sanctions, see Elisabeth D. Gibbons, *Sanctions in Haiti: Human Rights and Democracy Under Assault* (Westport: Praeger, 1999), especially ch. 3.

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the European Union.<sup>30</sup> When action is taken by a majority of states, it is referred to as ‘collective’ or ‘universal’ sanctions. These terms have generally been reserved to describe sanctions applied by the League of Nations or the United Nations.<sup>31</sup> Finally, even non-forceful coercive activities initiated by non-state actors, such as citizen-initiated boycotts, are sometimes described as sanctions.<sup>32</sup> The range of actors who could potentially be the target of sanctions generally mirrors the actors who can impose sanctions. In practice, forms of sanctions have been imposed against one state, a group of states, and extra-state entities.

In this study, the focus is upon the ‘collective’ or ‘universal’ sanctions applied by the United Nations. The term ‘UN sanctions’ denotes binding, mandatory measures short of the use of force that are applied against particular state or non-state actors by the UN Security Council, as envisaged by Chapter VII and Article 41 of the UN Charter.<sup>33</sup> As provided in Article 41, ‘UN sanctions’ thus fall within the following description:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.<sup>34</sup>

<sup>30</sup> On the EU sanctions regime against the Former Yugoslavia, see Christine Chinkin, ‘The Legality of the Imposition of Sanctions by the European Union in International Law’, in Malcolm D. Evans (ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe* (Brookfield: Dartmouth, 1997), pp. 183–213; Jean-Pierre Puissechet, ‘The Court of Justice and International Action by the European Community: The Example of the Embargo Against the Former Yugoslavia’ (1997) 20 *Fordham ILJ* 1557–1576.

<sup>31</sup> M. S. Daoudi and M. S. Dajani, *Economic Sanctions, Ideals and Experience* (London: Routledge, 1983), pp. 56–90 (ch. 2).

<sup>32</sup> For further discussion, see Hersch Lauterpacht, ‘Boycott in International Relations’ (1933) 14 *BYIL* 125–140; Maged Taher Othman, *Economic Sanctions in International Law: A Legal Study of the Practice of the USA* (Ann Arbor: University Microfilms International, 1982), pp. 19–25.

<sup>33</sup> Like the general term ‘sanctions’, the term ‘UN sanctions’ can also be used to refer to a variety of measures. Without further qualification, UN sanctions may denote: military or non-military action; action that is authorised by the Security Council or the General Assembly; and action that is requested and thus ‘voluntary’ or action that is binding and thus ‘mandatory’.

<sup>34</sup> Article 41, UN Charter. Article 41 was designed to be read in concert with Article 39, such that UN sanctions should be applied to maintain or restore the peace once the Security Council has determined the existence of a threat to the peace, breach of the peace or act of aggression.

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Since the birth of the United Nations, the Security Council has acted upon its Article 41 sanctions powers to create twenty-five UN sanctions regimes.<sup>35</sup> In addition to its actions establishing and modifying those twenty-five sanctions regimes, the Security Council has at times requested states to impose measures that might be described as ‘voluntary sanctions’. In the cases of Southern Rhodesia and South Africa, prior to the eventual imposition of mandatory sanctions the Council requested states to take certain action against Southern Rhodesia and South Africa, without requiring the application of such measures under Chapter VII.<sup>36</sup> Similarly, in the case of Cambodia, the Council requested states bordering Cambodia to prevent the import of timber products from Khmer-Rouge controlled areas.<sup>37</sup> These instances are not covered as part of the current analysis, as the measures requested were neither imposed under Chapter VII nor framed in mandatory language.

The Security Council has also taken some other initiatives that might be interpreted to fall within the scope of Article 41, due to the fact that they involved action short of the use of military force taken under Chapter VII and after the Council had determined the existence of a threat to the peace. These initiatives include the creation of two international criminal tribunals,<sup>38</sup> which have in fact each determined that their establishment falls within the scope of Article 41.<sup>39</sup> The Council has also applied wide-ranging measures short of the use of force in an

<sup>35</sup> See Appendix 3, Table B.

<sup>36</sup> For the Southern Rhodesian instance, see: SC Res. 217 (20 November 1965), para. 8. For the South African instance, see SC Res. 181 (7 August 1963), para. 3. The status of the measures called for in the South African instance as ‘voluntary’ is clear with the benefit of hindsight: see SC Res. 418 (4 November 1977), preambular para. 8.

<sup>37</sup> See SC Res. 792 (30 November 1992), para. 12. For further details of that case, see David Cortright and George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder: Lynne Rienner, 2000), pp. 135–145. Unfortunately, however, Cortright and Lopez do not distinguish between the non-mandatory character of the measures requested in the Cambodian instance and the mandatory nature of the other examples of UN sanctions to which they refer, which are all imposed under Chapter VII of the UN Charter.

<sup>38</sup> In May 1993 the Council established the International Criminal Tribunal for the former Yugoslavia (the ICTY): SC Res. 827 (25 May 1993), paras. 1–2, annex. In November 1995 the Council established the International Criminal Tribunal for Rwanda (the ICTR): SC Res. 955 (8 November 1995), para. 1.

<sup>39</sup> *Prosecutor v. Dusko Tadić*, Case IT-94-1-AR72, Appeals Chamber, (2 October 1995), para. 36; *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction (18 June 1997), para. 27.

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effort to prevent and suppress terrorism<sup>40</sup> and to prevent non-state actors from acquiring weapons of mass destruction and their means of delivery.<sup>41</sup> These instances are not treated as examples of UN sanctions regimes for the purposes of this study, however, as they do not possess the key characteristics of UN sanctions regimes, which are applied traditionally against states or particular, readily identifiable groups of non-state actors.

## 2. Central contention and key objectives

The central contention of this book is that sanctions have been applied in such a way that they have undermined the rule of law, thus weakening the authority and credibility of the UN Security Council and its sanctions tool. As a consequence, states are less likely to have full confidence in the UN sanctions system and are thus less likely to comply fully with their obligation under Article 25 of the UN Charter to implement sanctions. The end result is that sanctions are less effective than they could be. Until the UN Security Council's sanctions practice can be reformed so that there is widespread confidence in its integrity, sanctions are unlikely to serve as an effective tool for resolving international conflict. Without such reform, the UN sanctions system will remain a destabilising influence upon, rather than a symbol of, the rule of law in international society.

The challenge is therefore to reform the UN Security Council's sanctions practice so that the Council and the UN sanctions system command such respect and inspire such confidence that states both desire and feel compelled to comply with sanctions regimes and thus implement sanctions effectively. This book proposes a pragmatic model of the rule of law that is designed to be used in the context of Security Council decision-making on sanctions. If followed, this model would help to reassure the broader community of states that the Security Council is genuinely committed to the rule of law. By ensuring that

<sup>40</sup> In the wake of the 11 September 2001 terrorist attacks in the United States, the Council established a collection of mandatory counterterrorism measures to be taken against terrorists and terrorism and created a Counterterrorism Committee to monitor the implementation of those measures. See SC Res. 1373 (28 September 2001).

<sup>41</sup> In April 2004 the Council adopted resolution 1540 (2004), requiring states to take a range of measures designed to prevent non-state actors from acquiring weapons of mass destruction and their means of delivery. The Council also established the 1540 Committee to administer the measures. See SC Res. 1540 (28 April 2004).

its sanctions practice reinforces, rather than undermines, the rule of law, the Council could induce greater compliance with its sanctions regimes.

This book has two major objectives. The first is to trace the evolution of the UN sanctions system. For the uninitiated, it is no easy task to identify the parameters of a single UN sanctions regime, let alone to distil themes of sanctions policy that emerge across dozens of instances of sanctioning. The official story of sanctions is scattered across thousands of identical-looking UN documents that are differentiated simply by their UN serial number. Finding even one short chapter of that story requires painstaking forensic examination of Security Council resolutions, correspondence between the Council and UN member states, and technical reports prepared by a variety of UN bodies charged with sanctions administration and monitoring. This book aims to save other readers from the need to engage in such forensic forays. If it serves as a useful guide to the UN sanctions system, then it will have achieved its first objective.

The second major objective is to explore the relationship between sanctions and the rule of law. This objective has three subsidiary goals. The first is to construct a pragmatic model of the rule of law that can be used to analyse the UN Security Council's sanctions practice. The second is to demonstrate how UN sanctions have undermined the rule of law. The third is to provide pragmatic policy proposals designed to ensure that UN sanctions can reinforce the rule of law in future.

### 3. The path ahead

Analysis in this book is divided into four Parts. Part I sets the stage for subsequent analysis. This chapter has introduced UN sanctions and explained the book's central contention and key objectives. Chapter 2 examines the relationship between the UN Security Council and the rule of law. It explains the Security Council's reliance upon law and describes the increasing influence of the concept of the rule of law upon the Council's activities. It explores the meaning of the rule of law, charting the many ways in which the concept can be interpreted and criticised. The chapter concludes by constructing a pragmatic model, according to which the primary aim of the rule of law is to prevent the misuse or abuse of power. It proposes five basic principles of the rule of law that seek to prevent the misuse or abuse of power: transparency, consistency, equality, due process and proportionality.