Ad-hocism and the Rule of Law

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Abstract

The frequent use of enforcement action of a unilateral or multilateral character to protect human rights as well as a growing concern over the detrimental effects of UN sanctions on civilian populations attest, albeit from different perspectives, to the importance of human rights values in the international community. In fact, a process of constitutionalization seems to be taking place in international law. The anomaly is that it materializes in bits and pieces, mainly through the emergence and subsequent consolidation of normative precepts perceived as fundamental. By providing ad hoc solutions, not grounded on any discernible principle of general application, the Security Council has failed to bring this process into an institutionalized framework. The prevailing 'ad-hocism' permeating its action prevents the development and subsequent enforcement of consistent patterns of normative standards and policies and makes it difficult to exercise scrutiny over the conduct of international actors. Eventually, the lack of consistency, predictability and fairness not only undermines its credibility, but also causes one to wonder whether the Security Council can be of any guidance in defining the contours of an international legal order based on respect for the rule of law and the consistent enforcement of shared values and common interests.

The question of human rights protection and monitoring in the context of this symposium compels us to think about the evolving character of the legal order of the international community at a time of transition. In this perspective, I shall put forward some submissions — far short of a synthesis I am afraid — with a view to reconciling the apparently different views presented by Aznar-Gómez and Bennoune in their contributions.

The main theme underlying Aznar-Gómez's paper is a criticism of what he defines as the 'deregulation process' occurring in the international community. In a slightly different connotation to that of its original proponents,[1] Aznar-Gómez takes the expression to mean the 'deliberate and gradual disappearance of the rule of law' and 'its substitution with the rule of power' based on a case-by-case approach to international law. Instances of this are traced to the pragmatism with which the

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[1] See Reisman, 'Unilateral Action and the Transformation of the World Constitutive Process: The Special Problem of Humanitarian Intervention', 11 *EJIL* (2000), at 5; and Dupuy, 'The Place and Role of Unilateralism in Contemporary International Law', 11 *EJIL* (2000), at 29.

Security Council has faced the various crises that have arisen recently in the international community and to its reluctance to specify the normative basis on which its actions were based. This tendency has been almost invariably backed by states obsessed with the fear of setting precedents which sooner or later could backfire on them.

Bennoune's paper, on the other hand, by using such general categories of analysis as human rights and sovereignty, often seen in contradistinction with each other, helps to broaden the perspective and to frame the discourse in the general context of the international legal order and its theoretical foundations. She shares the concerns, voiced by some scholars, that by doing away with the concept of sovereignty one may be left with a 'people-centered legal order which could result in the centralization of power in the international community', with the most powerful states having a firm grip on law-making and law-enforcement processes. State sovereignty, which has increasingly come under attack in Western legal scholarship in recent times, still represents, in Bennoune's view, the best way to protect an individual's rights and to make violators accountable under international law. Furthermore, sovereignty, both as an organizational arrangement and as a tool of legal analysis, would be a crucial factor in preserving the stability of the international legal order.[2]

Although one might be tempted to see these papers as two contrasting perspectives, some similarities emerge upon closer scrutiny. In the first place, they both issue warnings to the international community and express their discontent about the way in which collective functions are currently discharged. On the one hand, Bennoune warns against the centralization of international legal processes and, on the other, Aznar-Gómez underscores the danger inherent in the decentralization of actions taken in response to acts or situations which may prejudice the international legal order. In this respect, the two papers voice similar concerns. The international community is perceived as being unwilling or unable to discharge its functions properly. In response to such shortcomings, Bennoune sees much good in going back to traditional tenets of classical international law, such as the concept of state sovereignty, whereas Aznar-Gómez holds that the current dichotomy between state practice and *opinio juris* may have a negative impact on the efficacy of institutional mechanisms of human rights protection and may, possibly, hamper the formation of a doctrine of humanitarian intervention by the international community.

In fact, Bennoune's contention that sovereignty and human rights are often presented as the two opposite poles of a spectrum is quite a valid one. Legal scholarship frequently indulges in such a simplification by suggesting more or less directly that the human rights doctrine is incompatible with the notion of state sovereignty and that the latter may represent an insurmountable obstacle for international law in securing adequate protection for the fundamental rights of individuals. One may wonder, however, whether such a polarity between sovereignty and human rights actually exists and whether this is a sufficiently accurate description of reality. While it is in principle true that the state, by exercising its sovereign prerogatives, may indeed be in

[2] Similarly, see Kingsbury, 'Sovereignty and Inequality', 9 *EJIL* (1998) 599.

a better position to secure respect for human rights, as Bennoune argues, it is also undeniably true that external scrutiny of state conduct by international law has been fundamental in fostering human rights and in promoting worldwide the idea that states can no longer disregard universally accepted standards of human rights protection by invoking sovereignty.[3] At a time of increasing perplexity about its role in international law,[4] the present writer is still convinced that the human rights doctrine, despite its Western connotations, has enormously contributed to laying the foundations of an international public order based on a commonality of core values which most people, despite their governments' view, would regard as fundamental.

The problem with presenting human rights and sovereignty necessarily in contrast with each other is reminiscent of other polarities used in legal scholarship to highlight the flaws in international law. It suffices to think of Koskenniemi's criticism of liberal theory as applied to international law to realize that the extreme application of logic and the use of dichotomous categories are hardly conducive to a constructive analysis and to an accurate representation of contemporary legal processes.[5] To hold that international law theories are either utopian or apologetic rests on some simplistic assumption that there can be nothing in between realist theories, excessively grounded on historical contingencies and based on the rule of power, and idealistic constructs, far removed from reality and hinged on the rule of law. Similarly, the contention that the international legal system, being based on the premises of liberal theory, is inherently flawed and doomed to remain essentially indeterminate at its core presupposes the impossibility of reconciling competing claims between equally sovereign states without resorting to some subjective notion of world order which requires a conception of justice and undermines the alleged neutrality of international law. As rightly argued, the pursuance of common interests and values, provided that the relevant decisions are taken by duly authorized persons or bodies in appropriate fora and within the framework of established practices and norms, does not deprive law-making, adjudication and enforcement processes of their legal character.[6] After all, all legal systems are geared towards the accomplishment of certain goals and as such are value oriented. International law is no exception.

The level of complexity attained by international law in recent times, besides attesting to its maturity,[7] compels a more subtle approach to legal analysis. Broad analytical categories and general principles may be instrumental in maintaining the

[3] See the dictum of the ICTY in the *Tadic* case: '[It] would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights.' *Prosecutor v. Tadic*, Decision on Jurisdiction (Appeals Chamber), Judgment of 2 October 1995, 105 ILR 453, at 483.

[4] See, for instance, Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', 42 *HILJ* (2001) 201.

[5] See M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989); and *Idem*, 'The Politics of International Law', 1 *EJIL* (1990) 1.

[6] See R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 9.

[7] See T. Franck, *Fairness in International Law and Institutions* (1995), at 4.

unity of the system,[8] but their content and scope of application need to be constantly revised in the light of the changed demands of the international community. This effort of constantly adjusting the normative content of international legal rules to the underlying social texture, far from jeopardizing certainty and predictability, is better suited to preserving the dynamic character of international law-making processes.

However controversial the notion of sovereignty can be,[9] its contours need to be carefully reassessed. The concept has become too vague and indeterminate to provide any useful guidance. If some provocative speculations about its disappearance have proved wrong, its invocation by some states to justify blatant violations of international law appears anachronistic and totally unconvincing.[10] Henkin's call for the breaking down of the normative content of the principle of sovereignty stands out as the most reasonable approach.[11] What we need to know is what states may do or may not do under contemporary standards of international law. In other words, states' rights and entitlements must be assessed against the background of their international law obligations. Such a functional approach to state sovereignty may indeed be a more flexible and conducive instrument to solving the otherwise inextricable difficulty of reconciling abstract notions of dubious utility. If this is accurately done, there is no need to do away with the concept of sovereignty, which as a normative and organizational principle will stay with us for a long time.[12]

A last point concerns the lack of consideration of other important factors that any sovereignty versus human rights type of analysis inevitably entails. By focusing almost exclusively on the issue of state sovereignty and limits thereto, such an approach ends up disregarding or neglecting the increasing role that both international and non-governmental organizations have recently come to play.[13] No meaningful discourse about protecting human rights can be made if these actors and their activities are not given appropriate consideration and if traditional instruments of legal analysis are not adjusted to this new paradigm.[14] To know whether

[8] For an early warning about the risk of fragmentation of international law, see Brownlie, 'Problems Concerning the Unity of International Law', in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago* (1987), at 153 *et seq.*

[9] Steinberger defines sovereignty as 'the most glittering and controversial notion in the history, doctrine and practice of international law'. See Steinberger, 'Sovereignty', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 10 (1987) 397.

[10] Among the numerous contributions concerning the need to reconsider the concept of sovereignty in contemporary international law, see Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?', 4 *EJIL* (1993) 147; and Schachter, 'The Decline of the Nation-State and its Implications for International Law', 36 *Columbia Journal of Transnational Law* (1997) 7. For an interesting insight into the role and meaning of sovereignty within the context of the European Community, see MacCormick, 'Beyond the Sovereign State', 56 *Modern Law Review* (1993) 1.

[11] Henkin, 'The Mythology of Sovereignty', in Macdonald (ed.), *Essays in Honor of Wang Tieya* (1994) 351–358.

[12] See Schrijver, 'The Changing Nature of State Sovereignty', 70 *BYbIL* (1999) 65.

[13] Particularly, on the role of non-state actors, see Bianchi, 'Globalization of Human Rights: The Role of Non-State Actors', in G. Teubner (ed.), *Global Law without a State* (1997) 179.

[14] See Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization', 8 *EJIL* (1997) 435, calling on international lawyers to pay due heed to the process of change in contemporary international law.

international law rules, shaped by and adjusted to states' conduct, are applicable to international organizations is one of the most compelling questions needing to be broached.[15] For instance, in the specific case of the UN action against Iraq, the main issue is whether the Security Council acted in conformity not only with the law of the Charter but also with general international law, assuming it was bound by it. In fact, the latter issue ought to be taken up more carefully to see what particular human rights or humanitarian law norms the Security Council, and, more generally, international organizations, are bound to respect and what the legal basis of their obligations actually is. Clarification of this point would help shed light on what otherwise seems to be a fairly inconclusive discussion on the limits which would allegedly coerce the action of the Security Council as regards the protection of fundamental rights.[16]

In assessing the legacy of 10 years of management of the Iraqi crisis, there are perhaps some other fundamental questions which are worthy of consideration. Most notably, one may wonder whether international law is undergoing a process of constitutionalization. By this, reference is made to the possibility that an organic and fundamental law of the international community is emerging, laying down the basic principles to which all the actors which participate in international legal processes should conform. This question, carefully avoided by many scholars, presumably still inhibited by Hart's equation of the international legal system with a primitive one,[17] has mainly been addressed with reference to the role of the United Nations.[18] Undoubtedly, the UN has greatly contributed both to establishing a sense of an international community, not least for the widespread participation in its constitutive instrument, and to establishing a consensus on a number of general principles of coexistence and cooperation among states. However, not even its most enthusiastic supporter would look any longer at the UN as an institution capable of satisfactorily discharging collective functions on behalf of the entire international community. In particular, the piecemeal approach of the Security Council to issues concerning Chapter VII of the Charter has partly undermined the Security Council's credibility as the ultimate guarantor of international peace and security, and has drawn criticism from a variety of sources.

[15] In this respect, it is interesting to note that the UN Committee on Economic, Social and Cultural Rights has directly asserted the applicability of the Charter's human rights provisions to sanctions (see UN Committee on Economic, Social and Cultural Rights, General Comment No. 8, 'The Relationship between Sanctions and Respect for Economic, Social and Cultural Rights', UN Doc. E/C.12/1997/8 of 5 December 1997) as well as the responsibility of state and non-state actors, including NGOs and international organizations, to ensure the realization of the right to health (UN Committee on Economic, Social and Cultural Rights, General Comment No. 14, 'The Right to the Highest Attainable Standard of Health', UN Doc. E/C.12/2000/4 of 11 August 2000, at para. 142).

[16] See Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions', 95 *AJIL* (2001) 851.

[17] See H. L. A. Hart, J. Raz and P. A. Bulloch, *The Concept of Law* (1961), at 3 and 208 *et seq.*

[18] See B. Simma *et al.* (eds), *The Charter of the United Nations. A Commentary* (1995); MacDonald, 'The Charter of the United Nations and the Development of Fundamental Principles of International Law', in B. Cheng and E. D. Brown (eds), *Contemporary Problems of International Law. Essays in Honour of Georg Schwarzenberger on His Eightieth Birthday* (1988) 196 *et seq.*

Although human rights protection has been the motivation inspiring many actions undertaken under Chapter VII, the Security Council and its member states have carefully avoided setting precedents by clearly acknowledging human rights as the principal foundation for their action. No consistent, let alone comprehensive, doctrine of human rights intervention has ever been formulated by the Security Council, whose ancillary use of human rights motivations is too constant to be regarded as coincidental.

Such institutional flaws notwithstanding, one may still pose the question whether a notion of international public order can be based on a commonality of interests and/or values, short of any reliable institutional framework of a general character. Interests and values may coincide at times, or they may diverge. But it is on this sense of commonality coming to the surface in a variety of ways[19] that the existing gap must be bridged between what states and large sectors of the transnational civil society perceive as fundamental values or shared concerns and what those same states do to ensure their enforcement. This is the central issue in the present form of organization of the international community. Only if such common ground can be found and clear legal parameters protecting common interests and values can be established could one speak of a process of constitutionalization taking place in international law. An accurate evaluation of whether this is the case implies a marked departure from traditional ways in which constitutional law-making processes materialize.[20] Rather than occurring through the creation of new universal institutions capable of discharging functions in the interest of the community as a whole or by enhancing the efficacy of the existing ones such as the United Nations, such a process seems to be taking place mainly through the emergence and subsequent consolidation of normative precepts perceived as fundamental.[21] This is particularly true as regards human rights and humanitarian law, whose main underlying values are almost universally accepted.[22]

[19] The emergence of such normative categories as *jus cogens* and obligations *erga omnes* as well as the protracted coming into being of international crimes (now characterized as serious breaches of obligations under peremptory norms of general international law: see the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the Drafting Committee of the International Law Commission on second reading, UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001, particularly Articles 40 and 41) are all manifestations of such a sense of commonality, in which ethical underpinnings are undoubtedly present.

[20] The existence of 'new conceptions being grafted upon universal international law without support through, and serious attempts at, adequate institution building' and the risk that 'the concept of legal obligations in the common or public interest ... is left to the play of individual auto-determination of duties and self-enforcement of rights' are underlined by Simma, 'From Bilateralism to Community Interest', 250 *RdC* (1994-VI), at 249.

[21] The opinion that 'community values have made progress at the conceptual and, to a lesser extent, at the normative levels' and that such conceptual advances need to be strengthened and deepened and go hand in hand with parallel effective mechanisms is expressed by Pellet, 'Brief Remarks on the Unilateral Use of Force', 11 *EJIL* (2000) 385, at 391.

[22] The particular emphasis on human rights as being at the very core of community interests as perceived in contemporary international law is well justified, according to Simma, 'because there is no other "community interest" so far detached from individual state interests as that of enforcing human rights worldwide'. Simma, *supra* note 20, at 242.

The universalization of normative values goes hand in hand with other phenomena which contribute to establishing a sense of commonality. On the one hand, law-making techniques have evolved to the effect of favouring multilateralism on a very broad basis.[23] Numerous treaty-based arrangements, either of a regional or of a sectoral character, have attained a remarkable level of institutionalization. The above developments, despite their fairly heterogeneous character, are clearly inspired by the existence of common interests and values which act as a catalyst in the process of fostering international cooperation and integration, depending on the particular context in which they occur.

The anomaly is that the process of constitutionalization of the international community materializes in bits and pieces. Although few would deny that a common thread exists, and that a hierarchy of normative values has already crystallized, no coherent and well-coordinated system has yet emerged. This should hardly be surprising if one is willing to admit that international law is undergoing a transition. The inevitable aura of uncertainty which surrounds any such period favours all sorts of speculations concerning its future development,[24] and prompts scholars to devise new analytical tools to keep up with the pace of change in social and legal processes.[25] The reality is, crude as this may sound, that, apart from intellectually stimulating doctrinal constructs, backed up by a few strands of practice, we do not have much in terms of conceptual systematization. Be that as it may, Abi Saab's Darwinian metaphor can hardly be questioned: the contemporary international legal system may be less coherent and reassuring than the old one based on the positivistic paradigm of a community of equally independent states, yet it is several steps up the evolutionary ladder.[26] Its complexity and emerging vertical structure point to an evolutionary process, which, though far from being fully achieved, is well under way. The Security Council could have brought this process into an institutionalized framework, thus strengthening its role as the guarantor of community values. By providing ad hoc solutions, not grounded on any discernible principle of general application, the Security Council has failed to fulfil its task and has often paved the way for states to act unilaterally. If one were to indulge the temptation of coining a

[23] See Charney, 'Universal International Law', 87 *AJIL* (1993) 529.

[24] See P. Allott, *Eunomia: New Order for a New World* (2nd ed., 2001).

[25] See T. Franck, *The Power of Legitimacy among Nations* (1990); and Franck, *supra* note 7. See also the interesting concept of interstitial norms elaborated by Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?', in M. Byers (ed.), *The Role of Law in International Politics* (2000) 207 *et seq.*

[26] See Abi Saab, 'Cours général de droit international public', 207 *RdC* (1987-VII), at 460: '*Si nous regardons un poisson coloré nager dans l'eau sans effort ou en se modulant, il nous paraît très beau et élégant, notamment si on le compare avec un reptile maladroit et disgracieux tel l'iguane. Or, sur l'échelle de l'évolution, l'iguane est plus avancé, car si le beau poisson n'avait pas essayé de sortir de l'eau et devenir reptile maladroit, nous ne serions pas là aujourd'hui . . . il en est de même pour ce qui est du système juridique international dans son état actuel d'évolution. Il reflète une étape intermédiaire, passant d'un état invertebré — un ensamble sans structure définissable ni différenciacion de fonction entre ses composantes — vers un système à structure émergeante — avec une colonne vertébrale, peut-être encore molle, mais en voie de solidification par une différenciacion et une hiérarchisation cellulaire. Cette structure n'est peut-être pas très cohérente ni clairement décelable, car elle n'est pas encore sortie de la phase dynamique de la mutation. Mais cela ne signifie pas qu'elle n'existe pas déjà.*'

new term, the present writer believes that 'ad-hocism' could properly describe the decision-making policy adopted by the Security Council in its recent practice.

Unfortunately, 'ad-hocism' may over time become an almost invincible enemy, as it prevents the development and subsequent enforcement of consistent patterns of normative standards and policies. The main lesson to be learnt from the decade of measures against Iraq is that, rather than establishing a precedent for collectively sanctioning acts of aggression and, more generally, threats to international peace and security, the international community and the UN in particular have preferred to treat the matter as an exceptional one and to resort to measures often characterized as unique. Had those decisions been grounded and justified on a clear set of principles and objectives, their efficacy and their impact on international law would have been much greater. In this respect, the handling of the Iraqi crisis has been a lost opportunity. Similar considerations apply also to the recent practice of the Security Council which, by its failure to act at the height of the Kosovo crisis, abdicated its responsibility in the maintenance of international peace and security and favoured unilateral action by states based on dubious interpretations of the principle of humanitarian intervention. In fact, consistency in identifying principles and objectives, and coherence in their implementation, is not such a daunting task, nor would it seem to require particular efforts in certain circumstances. It suffices to think of the lack of coordination between the various sanctions committees to realize that even minimal and informal communication and consultation would help a great deal both in providing uniform solutions to similar problems and in promoting a sense of legitimacy and fairness in proposed actions.[27] Similarly, human rights monitoring systems for the enforcement of sanctions should have been built into every sanction regime rather than being episodically used and shyly implemented.[28]

Furthermore, 'ad-hocism', by preventing the emergence and consolidation of normative standards, makes it difficult to exercise scrutiny over the conduct of international actors, be they states, international organizations or individuals. Indeed, the issue of accountability will become crucial for the emergence of an international public order based on a commonality of values.[29] This is yet another lesson to be drawn from the decade of sanctions against Iraq. There can hardly be any perception of fairness of these measures if no external or built-in mechanism of control over the legitimacy of the Security Council's action is established and if remedies are not devised and made available to potential victims. This consideration should not be confined to the long-debated issue of whether the exercise of any power of judicial

[27] It is worthy of mention that this problem has finally been tackled by the Security Council with two Notes of the President. See UN Doc. S/1999/92 and UN Doc. S/2000/319.

[28] The most remarkable experience with built-in control mechanisms is that of the sanctions against Afghanistan: see 'Report of the Secretary-General on the Humanitarian Implications of the Measures Imposed by Security Council Resolutions 1267 (1999) and 1333 (2000) on Afghanistan', UN Doc. S/2001/241 of 20 March 2001.

[29] On the relevance of individual accountability as a factor inducing stability, see Bianchi, 'Individual Accountability for Crimes against Humanity: Reckoning with the Past, Thinking of the Future', 19 *SAIS Review* (1999) 97.

review over Security Council resolutions, either by the International Court of Justice or by other international judicial bodies, can be exercised.[30] Although the issue of judicial control remains topical, other forms of control and accountability are conceivable. In a recent report submitted to the UN Sub-Commission on the Promotion and Protection of Human Rights, some suggestions were aptly made as to how to promote such forms of control.[31] Given the paucity of fora in which international organizations as such can be held accountable for violations of fundamental human rights, preventive action should be pursued as a priority. Quite apart from the difficulty of triggering judicial remedies against international organizations and their organs,[32] the current malaise concerning the effects of sanctions on civilian populations demands an overall reassessment of the use of comprehensive long-term sanctions regimes as a tool to bring about compliance with international obligations.[33]

At this point, one may legitimately wonder whether it is a proper task for the Security Council to foster the rule of law in international relations.[34] By contrast, it could be argued that the Security Council simply ought to address and possibly solve situations which may endanger or have actually breached international peace and security. The adjudication and enforcement of international law rules should be left to other fora, particularly judicial bodies, and indeed the Security Council has been criticized for allegedly exercising quasi-judicial functions. As a political organ, the Security Council is heavily influenced by political contingencies, and its smooth functioning is always dependent on the concurring will of its permanent members. While the latter qualification is certainly true and should be borne in mind by those who place too much emphasis on the practice of the Security Council for the formation of general international law, a higher level of consistency in decision-making would certainly favour the political credibility of the organ and would eventually help

[30] See, among others, Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of the Decisions of the Political Organs of the United Nations?', 46 *ICLQ* (1997) 309; Alvarez, 'Judging the Security Council', 90 *AJIL* (1996) 1; Gowlland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case', 88 *AJIL* (1994) 643; and Franck, 'The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?', 86 *AJIL* (1992) 519.

[31] See the Working Paper on 'The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights', UN Doc. E/CN.4/2000/33 of 21 June 2000, prepared by Marc Bossuyt. As for remedies, see the Final Report to the Sub-Commission by T. van Boven, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms', UN Doc. E/C.4/Sub.2/1993/8.

[32] As regards the difficulties of suing international organizations before municipal courts, see the comprehensive analysis undertaken by A. Reinisch, *International Organizations Before National Courts* (1999). See also Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns', 36 *Virginia Journal of International Law* (1995) 53.

[33] In a system which has formally outlawed the use of force and in which the art of persuasion is hardly ever apt to bring wrongdoers to comply with international law, sanctions should not be abandoned, but simply transformed into a more flexible and targeted instrument of coercion. The current debate on so-called 'smart sanctions' can be a step in the right direction.

[34] See Gowlland-Debbas, 'The Functions of the United Nations Security Council in the International Legal System', in Byers, *supra* note 25, at 277 *et seq.*

establish a sense of predictability and fairness, which are essential elements of any international legal system based on the rule of law.[35] Only if like cases are treated alike, if clear objectives are set and their achievement pursued consistently, can one look with optimism at the future development of the Security Council as the ultimate guarantor of certain fundamental interests of the international community. Pragmatism is a short-term strategy which is not likely to pay off in the long run. Ten years of sanctions against Iraq and other instances of recent practice, while attesting that human rights have become one of the cornerstones of the international legal system, clearly show that the Security Council can hardly be a guide in defining the contours of an international legal order based on respect for the rule of law and on the consistent enforcement of shared values and common interests.

[35] See Watts, 'The International Rule of Law', 36 *GYIL* (1993) 15.