VENEZUELA SANCTIONS AND THE CONCEPT OF EXTRATERRITORIAL HUMANITARIAN RESPONSIBILITY

VENEZUELA YAPTIRIMLARI VE SINIRLARÖTESİ İNSANİ SORUMLULUK KAVRAMI

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Abstract

As many as 40,000 people may have died in Venezuela as a result of USA sanctions that made it harder for ordinary citizens to access food, medicine, and medical equipment. Turkey provides food aid to Venezuela by its development agency TIKA as well as medical equipment. The problem of the legality of the unilateral sanctions becomes a black hole in its effects on the health-related problems in the international law and the humanitarian extraterritorial responsibility of States in the world. The main question to be asked is even if any treaty does not codify unilateral sanctions of the States, whether any opinis juris of the United Nations Security Council created any obligations on the humanitarian bases for the States for their unilateral sanctions implementations till this time. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (opinis juris). If we can prove the opinis juris of the United Nations Security Council on sanctions, this can be well defined as erga omnes undertakings to the international community as a whole.

Keywords: Security Council, Unilateral Sanctions, Erga omnes, Opinis Juris, Health

Özet

Venezuela'da, ABD’nin tek taraflı yaptırımları sebebi ile sıradan vatandaşların beslenme, ilaç ve tıbbi tedavilerinde ki yetersizlikler sebebi ile

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As many as 40,000 people may have died in Venezuela as a result of US sanctions that made it harder for ordinary citizens to access food, medicine, and medical equipment, a new report has claimed. The report, published by the Centre for Economic and Policy Research (CEPR) a progressive, Washington DC-based think tank, says those deaths took place following the imposition of sanctions in the summer of 2017. It said the situation had probably worsened since the imposition earlier this year, of tougher sanctions targeting Venezuela’s vital oil industry, as part of the USA sanctions. “The sanctions are depriving Venezuelans of lifesaving medicines, medical equipment, food, and other essential imports,” says the report. (Independent, 2019) CEPR estimated that the estimated 80,000 people with HIV who have not had antiretroviral treatment since 2017; 16,000 people who need dialysis; 16,000 people with cancer and 4 million with diabetes and hypertension, many of whom cannot obtain insulin or cardiovascular medicine.” (Telesurenglish, 2019) The USA Treasury Department, have chosen to freeze legitimate accounts of Venezuela in the USA banks and deny legal transactions, even those associated with actors working to relieve the country’s humanitarian emergency or support a democratic transition. (Wola, 2019)

The United Nations (UN) Office for the Coordination of Humanitarian Affairs (OCHA) Emergency Relief Coordinator Mark Lowcock informed that the health system is on the verge of collapse with many hospitals lacking the most basic water and electricity infrastructure in Venezuela. Hospital patients,
many of whom are already critically ill, are at high risk of losing their lives from new infections they are acquiring while they are in hospital because basic cleaning and disinfection cannot be done. The lack of medicines and medical care workers only exacerbates the situation. Preventable diseases, including malaria and diphtheria are back with a vengeance”, Mark Lowcock added, citing people with chronic health conditions, pregnant and nursing women, infants and those living with disabilities as being “among the most vulnerable”. Mr. Mark Lowcock thanked those who have contributed financial resources for UN-supported humanitarian activities, noting that more than $155 million has been received the year 2019, but he said the $223 million Humanitarian Response Plan1 for Venezuela remains under-resourced and the biggest constraint to delivering humanitarian assistance remains to fund”. “Everyone needs to do more”, he maintained, pointing out that next month's provisional plans for the UN-supported humanitarian response in Venezuela next year is due to be published. “Substantially more financial resources will be needed, and we will seek additional funding from donors”. Mr. Mark Lowcock as the OCHA Coordinator informed the need to find a way to unlock Venezuelan resources to contribute more to humanitarian action” and “place a greater priority on reducing the immediate suffering of the people of this country”. (News.un, 2019)

PART I

1. The Proportionality Principle And Unilateral Sanctions

The proportionality principle, as the cardinal principle of international law, includes a necessity and a proportionality test, both of which rest on empirical premises. The necessity test involves an assessment of whether a legal sanction is well suited to achieve its objective. The proportionality test questions the causal link between the sanction and the human rights situation in the country against which the sanction is aimed. (Gutmann &., 2018, 1) The International Court of Justice (ICJ) has specified the somewhat construed term of proportionality in relation to the use of armed force, which can also inform judgments in the context of the collateral impact of economic sanctions on civilians. The ICJ interprets proportionality to prohibit the infliction of unnecessary suffering on combatants, that is, to cause “harm greater than that unavoidable to achieve legitimate military objectives” (ICJ, The Legality of

1 This Humanitarian Response Plan (HRP) targets 2.6 million people, which only represents a limited number of all people in need, and includes 1.2 million girls and boys for the remainder for 2019. The financial requirement to achieve this goal is US$223 million. The HRP builds on the UN scale-up strategy, which was initiated in October 2018 to respond to the most pressing humanitarian needs, and the efforts of other humanitarian partners. It seeks to strengthen the capacity of humanitarian organizations and further open the operational space in country, thus laying the foundation to widen the response and reach a larger target population in 2020. (Reliefweb,2019)
the Threat or Use of Nuclear Weapons, para. 78). This also implies “never [to] use weapons that are incapable of distinguishing between civilian and military targets”. While jurisprudence has not offered a precise “exchange rate” for weighing measure and collateral damage, it still generally imposes limitations on the implementation of sanctions in order to minimize the losses to those not responsible for the initial unlawful act. These restrictions are further manifested in the concept of indiscriminate attacks codified in Article 51.5. (b) of Additional Protocol I, according to which an attack is indiscriminate and hence prohibited if it can be expected to cause incidental loss of civilian life, injury to civilians, or damage to civilians. (Gutmann, 2018, 1)


Special Rapporteur Mr. Idriss Jazairy proposed a Human Rights Impact Assessments test to be conducted before the States apply sanctions unilaterally. According to the Special Rapporteur, the parties implementing unilateral sanctions are under an obligation to conduct a transparent human rights impact assessment of the measures envisaged, and to monitor on a regular basis the effects of the implementation of the measures, including as regards their adverse effects on human rights. (UN General Assembly, 2017, p.13) Human Rights Impact Assessments, in general, are instruments for examining policies, legislation, programs and projects to identify and measure their effects on human rights. The use of comprehensive human rights impact assessments should always be a prerequisite in the design of sanctions measures, all the more so since international sanctions have repeatedly been identified as triggering adverse effects on human rights. Human rights impact assessments of sanctions programs should be conducted ex ante, that is before the measures are enacted, aim to measure the potential future effects of such measures on human rights and possibly adjust or change the sanctions regime with a view to preventing human rights violations. Ex post assessments that measure the actual impact of implemented sanctions through comparisons between the current situation and the situation before the measures were adopted are also important and monitoring should remain in place as long as the sanctions program considered remains in force. (Jazairy, 2019, p.295)

3. The Un Security Council Resolution 2444 On Somali Sanctions and Urgently Needed Humanitarian Assistance

individual targeted sanctions (an arms embargo, including training and financial assistance, on individuals and entities; a travel ban on individuals; and an assets freeze on individuals and entities. Acting under Chapter VII of the Charter of the UN, by its resolution 2444 in its operative paragraph 48, the UN Security Council decided that until 15 November 2019 and without prejudice to humanitarian assistance programs conducted elsewhere, the measures imposed by paragraph 3 of resolution 1844 (2008) shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia, by the UN, its specialized agencies or programs, humanitarian organizations having observer status with the UN General Assembly that provide humanitarian assistance, and their implementing partners including bilaterally or multilaterally funded non-governmental organizations participating in the UN Humanitarian Response Plan for Somalia.

4. The UN Security Council Resolution 2462 and The Obligation To Take Into Account The Potential Effect Of Targeted Sanctions

Acting under Chapter VII of the Charter of the UN, the Security Council in its resolution 2462 (2019) Threats to International Peace and Security Caused by Terrorist Acts: Preventing and Combating the Financing of Terrorism, in the preamble reaffirmed States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular, international human rights law, international refugee law, and international humanitarian law. In the operative paragraph 1, the Security Council reaffirms its resolution 1373 (2001) and in particular its decisions that all States shall prevent and suppress the financing of terrorist acts and refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists. In the operative paragraph 5, the Security Council asks States to act in a manner consistent with their obligations under international law, including international humanitarian law, international human rights law, In the operative paragraph 6, the Security Council demands that States ensure that all measures taken to counter-terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including international humanitarian law, international human rights law, In the operative paragraph.

Most importantly in the operative paragraph 24, the Security Council urges States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on
exclusively humanitarian activities, including medical activities that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.

PART II

5. The International Covenant On Civil And Political Rights And The Right To Life And General Comment No. 36 On The Right To Life

Adopted and opened for signature, ratification, and accession by a General Assembly resolution 2200 (XXI) in 1966, the International Covenant on Civil and Political Rights (ICCPR) entered into force in 1976. The ICCPR is a legally binding treaty, which means that States, which ratify the treaty, are legally bound by it. Article 6 of the ICCPR recognizes the inherent right of every person to life, adding that this right "shall be protected by law" and that "no one shall be arbitrarily deprived of life". General Comment² No. 36 on article 6 of the ICCPR, on the right to life, replaces earlier general comments No. 6 and 14 adopted by the Committee in 1982 and 1984, respectively. In Paragraph 3 of the General Comment No.36, it is specified that:

The right to life is a right which should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Article 6 guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes.

Most importantly, to prevent any transboundary harm of any State’s unilateral actions reasonably foreseeable impact on the right to life of individuals outside their territory, in paragraph 22 of the General Comment No.36, it is written that:

States parties must take appropriate measures to protect individuals against deprivation of life by other States, international organizations and foreign corporations operating within their territory or in other areas subject to their jurisdiction. They must also take appropriate

²General Comments were not binding legal obligations, they were a highly influential source of norms for the Committee; they guided the work of the Committee and impacted its decisions and those of other international entities such as the International Court of Justice; they eventually shaped State practice and treaty interpretation; and they often evolved into customary international law.” 3400th meeting of the Human Rights Committee, 20 July 2017, paragraph 13, CCPR/C/SR.3400.
legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities taken by corporate entities based in their territory or subject to their jurisdiction, are consistent with article 6, taking due account of related international standards of corporate responsibility, and of the right of victims to obtain an effective remedy.

6. Observations Of The Usa On The Human Rights Committee’S Draft General Comment No.36 On Article 6, The Right To Life

According to Observations of the USA given to the UN Human Rights Committee on their Draft General Comment No. 36 on Article 6 - Right to Life of October 6, 2017 in paragraph 4, any treaty provision, a sound interpretation of Article 6 must be based on established rules of international law regarding treaty interpretation, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). Of primary importance, under Article 31.1: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Furthermore, under these rules, as reflected in Articles 31 and 32, treaties are authoritatively interpreted by the parties themselves through mutual agreement by them all, either in connection with the conclusion of the treaty or subsequently in a manner that establishes all parties’ agreement regarding its interpretation. The Committee has, however, failed to support its views regarding the meaning of the ICCPR with any treaty analysis grounded in VCLT Articles 31 and 32, and no such support exists. (USA Government, 2019)

6.1 Observations Of The Usa On The Human Rights Committee’S Draft General Comment No 36 On Article 6, Right To Life On The Extraterritorial Application Of The International Covenant On Civil And Political Rights

In paragraph 4 of the Observations of the USA, the USA acknowledges the concept of treaty implementation based on the ordinary meaning given to the terms as formulated: As with any treaty provision, a sound interpretation of Article 6 must be based on established rules of international law regarding treaty interpretation, as reflected in Articles 31 and 32 of the VCLT.
In paragraph 13 of the Observations of the USA indicates the non-extraterritorial character of the ICCPR as the United States has previously advised, the Covenant applies only to individuals who are both within the territory of a State Party and subject to its jurisdiction.

6.2 Observations Of The Usa On The Human Rights Committee’S Draft General Comment No 36 On Article 6, Right To Life And The Health-Related Rights Of The International Covenant On Economic, Social And Cultural Rights

In paragraph 7 of the Observations of the USA, the distinction between the right to life in Article 6 of the ICCPR and the right to the enjoyment of the highest attainable standard of physical and mental health in Article 12 of the International Covenant on Economic, Social and Cultural Rights3 (ICESCR) indicated as:4

State Party obligations with respect to health-related rights, for example, are set forth in the ICESCR, which establishes in its Article 12 the right to the enjoyment of the highest attainable standard of physical and mental health. Given that ICESCR was negotiated and concluded in parallel with the ICCPR specifically to address such rights separately and that States party to ICESCR agreed, pursuant to Article 2 of that Covenant, to take steps “with a view to achieving progressively the full realization” of such rights, there is no basis to infer that the negotiators would have considered such measures to be required or necessary to also give effect to the right to life within the meaning of Article 6. Thus, in the context of the right to health

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3The USA signed the International Covenant on Economic, Social and Cultural Rights on 5 October 1977 but not ratified. Where the signature is subject to ratification, acceptance or approval, the signature does not establish the consent to be bound. However, it is a means of authentication and expresses the willingness of the signatory state to continue the treaty-making process. The signature qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty. (Arts.10 and 18, Vienna Convention on the Law of Treaties 1969)

4What is also apparent from the debates throughout the negotiation of Article 6 is that the deprivation of life under discussion was generally understood to refer to actual killings of one person by another, whether attributable to State actors or private actors. Even among delegations that advanced the concept that the State had a duty to protect the life of the individual against anything that endangered it, the distinction was recognized between the danger coming from other men, with “protection against crime . . . inherent in the notion of civil and political rights,” and a danger coming from natural or social phenomena, with “the protection of life against accidents, sickness or poverty . . . inherent in the notion of economic and social rights.” ( UN Document , 1957, p,14)
contained in the ICESCR, which is the proper lens by which to examine rights characterized as health-related human rights, there is no obligation as part of that right to give effect to the right to life. The right to the enjoyment of the highest attainable standard of health is not commensurate with a right to be healthy or a right not to succumb to the disease. It is, instead, oriented toward the progressive realization, in accordance with a State’s available resources, of the right for an individual to enjoy the highest attainable standard of health. For these reasons, and bearing in mind the history of the negotiations of the two Covenants, any issues concerning access to abortion (paragraph 9 of the Committee’s draft) are outside the scope of Article 6.

6.3 Observations Of The Usa On The Human Rights Committee’s Draft General Comment No 36 On Article 6 Right To Life-Related With The Object And Purposes Of The Human Rights Treaties

In paragraph 46 of the Observations of the USA, it is written that under the rules of treaty interpretation reflected in the VCLT, it is the treaty that has an object and purpose of a treaty to be interpreted in light of the Covenant’s object and purpose, reference to the Covenant’s object and purpose cannot create new conditions not specified in the text.

7. The Binding Character Of The Observations Of The Usa On The International Covenant On Civil And Political Rights And The Un Security Council Resolutions 2462 And 2462

Obligations cannot be imposed by a State upon another State without its consent as well there is no reason why this principle should not also apply to unilateral declarations; the consequence is that a State cannot impose obligations on other States to which it has addressed a unilateral declaration unless the latter unequivocally accept these obligations resulting from that declaration. In the circumstances, the State or States concerned are in fact bound by their own acceptance. (ILC, 2006, p.370) The Permanent Court of International Justice (PCIJ) Justice has held that declarations of intention made before the court are binding. In the German Interests in Polish Upper Silesia Case of 1926, PCIJ stated that: (PCIJ, 1926, p.13)

The representative before the Court of the respondent Party, in addition to the declarations above mentioned regarding the intention of his Government not to expropriate certain parts of the estates in respect of which notice had been given, has made other similar
declarations which will be dealt with later; the Court can be in no doubt as to the binding character of all these declarations.

States are bound their unilateral declarations during the Security Council debates as a source of law within the principle of maxim allegans contraria non est audiendus, same as the binding character of the declarations made before the PCIJ. The ICJ has bound a state by its previous actions on different occasions with references to good faith, consistency, or intent to be bound, the language that supports an estoppel theory. In the Mavrommatis Palestine Concessions Case of 1925, the PCIJ referred to a declaration made by “The British Government, through its Representative” before the Court: “… That explicit declaration I, as such authorized representative of H.M. Government, and a member of it, here repeat that we intend to carry out whatever obligations, if any, the Court says are imposed upon us by the terms of the Lausanne Protocol.” The Court said: “After this statement, the binding character of which is beyond question …” (Rubin, 1977, p.6) In the Nicaragua case, the ICJ reaffirmed the reliance requirement: (Wagner, 1986, p.1189)

Estoppel may be inferred from the conduct, declarations and the like made by a State which... [has] caused another State or States, in reliance on such conduct, detrimentally to change position or suffer some prejudice.

At its simplest, estoppel in international law reflects the possible variations, in circumstances and effects, of the underlying principle of consistency which may be summed up in the maxim allegana contraria non audiendus est. Linked as it is with the device of recognition, it is potentially applicable throughout the whole field of international law in a limitless variety of contexts, not primarily as a procedural rule but as a substantive principle of law. Estoppel is not dependent for its authority on the acceptance of the principle of good faith. It has itself been accorded substantial recognition by States and by tribunals. (MacGibbon, 1958, p.513) Unilateral declaration can be addressed to the international community as a whole, containing erga omnes undertakings. Egypt’s declaration regarding the Suez Canal was not addressed only to the States parties to the Constantinople Convention or to the States members of the Suez Canal Users’ Association, but to the entire international community. Similarly, the Truman Proclamation, and also the French declarations regarding suspension of nuclear tests in the atmosphere, although the latter were of more direct concern to Australia and New Zealand, as well as certain neighboring States were also made erga omnes and, accordingly, were addressed to the international community in its entirety. (ILC, 2006, p.375)
8. Article 12 of The International Covenant On Economic, Social And Cultural Rights

The right to life has been described as the supreme or foundational right. Efforts to ensure other rights can be of little consequence if the right to life is not protected. The right to life is a well-established and developed part of international law, in treaties, custom, and general principles, and, in its core elements, in the rules of jus cogens. Its primacy and the central features of the prohibition on arbitrary deprivations of life are not contested. (Heyns and Probert, 2016)

The Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No 14 “The Right to the Highest Attainable Standard of Health Article. 12”, indicated that the right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health. In drafting article 12 of the Covenant, the Third Committee of the UN General Assembly did not adopt the definition of health contained in the preamble to the Constitution of WHO, which conceptualizes health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”. However, the reference in article 12.1 of the Covenant to “the highest attainable standard of physical and mental health” is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.

The ICESCR elaborates that the right to health includes “access to health facilities, goods, and services.” In General Comment 14 on the right to health, the CESCR interprets the normative content of article 12 of the ICESCR. Although the ICESCR only requires the progressive realization of the right to health in the context of limited resources, there is a core set of minimum obligations, which are not subject to progressive realization, including access to essential medicines. (Hhrguide, 2019) The CESCR also clarified the meaning of state party “core obligations” (to provide minimum levels of essential health and healthcare) and outlined how governments could
“progressively realize”, this right for all citizens, especially those most vulnerable. As part of a country’s “core obligations”, the Committee was unequivocal that this right’s achievement depended on shared responsibility among developed and low- and middle- income countries and other actors for implementation. (Brolan, 2017)

9. Extraterritorial Application Of Article 12 Of The International Covenant On Economic, Social, And Rights

Article 29 of the VLCT implementation of a treaty is codified as:

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

However, the travaux préparatoires of the VCLT indicate that Article 29 was not intended to restrict the extraterritorial application to treaties. Accordingly, the plain language of Article 29 “merely prescribes a minimum scope of application – the entire territory of the State. Therefore, Article 29 does not envision a presumption against extraterritorially. Rolf Kunneman argues that the territorial scope of treaties is as qualified in Article 29 of the VCLT, claims “does not establish that the ICESCR, which is a treaty not explicitly restricted to be binding for each State party only in its territory, would automatically not be binding outside and would need for its extraterritorial obligations a specific statement to its effect. (2004, p.201) Article 2.1 of the ICESR sets out the expectation that States parties will take collective action, including through international cooperation, in order to help fulfill the economic, social and cultural rights of persons outside of their national territories.

Despite its provision in binding international instruments, disagreement persists as to the legally binding nature of the obligation of international cooperation as expressed in the ICESCR. Neither the drafting history of the Covenant nor subsequent state practice provides a definitive answer. When negotiating what came to be Article 2.1 of the ICESCR, the drafters agreed that international cooperation and assistance was necessary to realize economic, social, and cultural rights, but they disagreed whether it could be claimed as a right. (Alston & Quinn, 1987, p.188-190) The ICESCR does not mention territory or jurisdiction as delimiting criteria for the scope and application of the treaty. Instead, it refers to the international or transnational dimensions of the realization of economic, social and cultural rights. Therefore it is suggested that a certain extraterritorial (in the sense of international) scope was intended by the drafters and is part of the treaty. This
is also clear from the Preamble of the Covenant, which contains a reference to “the obligation of States under the Charter of the UN to promote universal respect for, and observance of, human rights and freedoms”. There was consequently no need to limit explicitly the protection of ESC rights to those people resident in the territory of a State Party only. (Coomans, 2011, p.24) The CESCR has repeatedly included explicit and implicit references to “international assistance and co-operation” and “international obligations” in its General Comments and in the questioning of and concluding observations to State reports. However, an overall discussion on the issue by the CESCR from a legal perspective has not taken place so far. (Hassanli, 2014, p.95) From the drafting process of the Optional Protocol to the ICESCR it has become clear that states, in particular Western states, were not willing to approve of international cooperation and assistance as a legal concept, giving rise to extraterritorial human rights obligations. This means that in the view of (Western) states the idea that the realization of human rights has an extraterritorial normative dimension is indeterminate at the least. The indeterminacy of a normative standard makes it not only easier to deny that a rule exists and to ignore what is expected from states but to justify non-compliance. This relates to a crucial aspect of the international scope of the ICESCR, which is the broader meaning of the notion of international cooperation and assistance. (Coomans, 2011, p.35)

10. The Meaning Of “To Take Steps…………… To Be The Maximum Of Its Available Resources” In Article 2.1 Of The International Covenant On Economic, Social And Cultural Rights And The Vienna Convention On The Law Of Treaties

Resources are the critical point for the achievement of the realization of economic and social rights. Article 2.1 provides that “each State party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”. According to the CESCR General Comment No 3 on the Nature of States Parties’ Obligations according to Article 2.1 of the Covenant in paragraph 10, it is said that Article 2.1 obligates each State party to take the necessary steps “to the maximum of its available resources” in order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate
that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

In paragraph 12 of the General Comment No. 3, the CESCR underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programs. The CESCR notes that the phrase “to the maximum of its available resources” was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.

International co-operation and assistance pursuant to the Charter of the UN (Articles 55 and 56) and the Covenant shall have in view as a matter of priority the realization of all human rights and fundamental freedoms, economic, social and cultural as well as civil and political. In the Draft General Comment on State Obligations under the ICESCR in the Context of Business Activities of the CESCR, (2016, p.8) in paragraph 32, it is specified that:

In Article 56 of the Charter of the UN, “All Members pledge themselves to take joint and separate action in cooperation with the Organization...” to achieve to take joint and separate action in cooperation with the Organization...” to achieve purposes set out in Article 55 of the Charter, including: “... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” This duty is expressed without any territorial limitation and should be taken into account when addressing the scope of States’ obligations under human rights treaties. Also in line with the Charter, the ICJ has acknowledged the extraterritorial scope of core human rights treaties, focusing on their object and purpose, legislative history and the lack of territorial limitation provisions in the text. Customary international law also prohibits a State from allowing its territory to be used to cause damage to the territory of another State, a requirement that has gained particular relevance in international environmental law.

11. Article 18 Of The Vienna Convention On The Law Of Treaties

Article 18 of the VCLT sets out an obligation for those States that have committed themselves in a formal way to a treaty but are not yet bound

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5 Article 18: A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b)
by that treaty itself. The provision thereby protects the negotiated agreement between the (future) parties to the treaty so that, when the time comes for ratification, the rationale of the agreement is still in place, to become the valid object of expression of consent to be bound. Together with the object of consent, Article 18 protects the legitimate expectation of the other participants in the treaty-making process that a State, which has expressed its acceptance of the treaty, albeit not yet in binding form, would not work against the object of its acceptance. This protection is of particular significance in the period between signature and ratification and between ratification and the entry into force of the treaty, since at those points the States have used formal acts of treaty-making to express their acceptance of the treaty. The formality of that expression creates a basis for reliance and trust on part of the other participants, which Article 18 protects by creating an interim obligation for every State having expressed its acceptance in that manner. That obligation does not give full effect to the substance of the treaty, which could, pending the entry into force, only be done by the instrument of provisional application. Instead, Article 18 creates an autonomous obligation, taking the purpose of the treaty as a point of reference and protecting it by means of a reduced obligation: the States concerned are not bound to comply with the treaty, but not to destroy its very essence, thus not to render its entry into force de facto meaningless. (Dörr, 2012, p.219-220)

The ILC regarded the interim obligation as being a legal duty and introduced our provisions on the subject in his first report in 1962. In his view, the interim obligation was to arise in four situations: first, upon adoption of the treaty text, second, for treaties subject to ratification in the time between signature and the decision on ratification or acceptance, third, for treaties not subject to ratification that were to come into force upon a future date in the time period between the consent to be bound and the entry into force, and fourth, for ratifying States for the time pending the entry into force of the treaty unless the entry into force is unduly delayed.32 In those situations, a State was to refrain from any action “calculated to frustrate the objects of the treaty or to impede its eventual performance”. (Dörr, 2012, p.224)

The essential criterion for shaping the interim obligation according to Article 18 is the object and purpose of the treaty object and purpose” refers to the reasons for which the States concluded the treaty and to the general result,

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It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.
which they want to achieve through it. The ICJ’s Reservations to the Genocide Convention advisory opinion stated that (Gragl and Fitzmaurice, 2019, p.713):

The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.

In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d’être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation, and measure of all its provisions.

12. Conclusion

It is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people”. As a standard of conduct, it defines the extent of states’ responsibility, for example, for infringements of human rights, damage to foreign property and transboundary pollution. (Bonnitcha and McCorquodale, 2017, p. 916) The obligation to prevent significant transboundary (extraterritorial) harm is generally recognized as due diligence and is an evolving principle of international law. This concept of due diligence is defined by the UN as follows: (OHCHR, 2012, p.4)

Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person or enterprise] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case. In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size, and similar factors) to meet its responsibility to respect human rights.

From the drafting process of the Optional Protocol to the ICESCR, it has become clear that states, in particular, Western states, were not willing to approve of international cooperation and assistance as a legal concept, giving rise to extraterritorial human rights obligations. This means that in the view of (Western) states the idea that the realization of human rights has an
extraterritorial normative dimension is indeterminate at the least. This approach of the Western States includes the unilateral sanctions as well as the USA's approach for the Venezuela sanctions. On the other hand, the proportionality principle, as the cardinal principle of international law, includes a necessity and a proportionality test, both of which rest on empirical premises whether a legal sanction is well suited to achieve its objective. Special Rapporteur Mr. Idriss Jazairy proposed Human Rights Impact Assessments test to be conducted before sanctions implementing unilaterally and to monitor on a regular basis the effects of the implementation of the measures, including as regards their adverse effects on human rights. Human rights impact assessments of sanctions programs should be conducted ex ante, that is before the measures are enacted, aim to measure the potential future effects of such measures on human rights and possibly adjust or change the sanctions regime with a view to preventing human rights violations.

In fact, the UN Security Council in its resolutions 2444 and 2462, acting under Chapter VII of the UN Charter on implementing sanctions for Somali and measures in combating terrorism made clear that any and sanction’ negative effect should be prevented under the State’s responsibility originating from the international humanitarian law, international human rights law and etc.

In its operative paragraph 48, the UN Security Council resolution 2444 decided that without prejudice to humanitarian assistance programs conducted elsewhere, the measures imposed by paragraph 3 of the resolution 1844 shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia, by the UN, its specialised agencies or programmes, humanitarian organisations having observer status with the United Nations General Assembly that provide humanitarian assistance, and their implementing partners including bilaterally or multilaterally funded non-governmental organisations participating in the UN Humanitarian Response Plan for Somalia.

The UN Security Council, in its resolution 2462 in paragraph 24, urges States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law in its resolution 2462 in paragraph 24.

States are bound their unilateral declarations during the Security Council debates as a source of law within the principle of maxim allegans contraria non est audiendus, same as the binding character of the declarations made before the PCIJ and the ICJ. The approval of the member States of the
UN Security Council resolutions also creates unilateral declarations as a source of law. Comments from the USA on the ILC’s Draft Conclusions on The Identification of Customary International Law As Adopted by the Commission in 2016 on First Reading, January 5, 2018 with a diplomatic note given by the USA Mission to the UN New York also is a legal document of approval of the USA accepting the principle of maxim allegans contraria non est audiendus, as:

It is axiomatic that customary international law results from the general and consistent practices of States followed by them out of a sense of legal obligation. This basic requirement has long been reflected in the jurisprudence of the ICJ. It is also reflected in the practice of States in their own statements about the elements required to establish the existence of a customary international law rule.

The Observations to the UN Human Rights Committee on their Draft General Comment No. 36 on Article 6, also creates a unilateral declaration and obligations for the USA as well. In paragraph 46 of the Observations of the USA, it is written that under the rules of treaty interpretation reflected in the VCLT and a treaty should be interpreted in light of the Covenant’s object and purpose, reference to the Covenant’s object and purpose cannot create new conditions not specified in the text. In paragraph 7 of the Observations of the USA, the distinction between the right to life in Article 6 of the ICCPR and the right to the enjoyment of the highest attainable standard of physical and mental health in Article 12 of the ICESCR was indicated. The ICESCR does not mention territory or jurisdiction as delimiting criteria for the scope and application of the treaty. Instead, it refers to the international or transnational dimensions of the realization of economic, social and cultural rights. Therefore it is suggested that a certain extraterritorial (in the sense of international) scope was intended by the drafters and is part of the treaty. This is also clear from the Preamble of the ICESCR, which contains a reference to “the obligation of States under the Charter of the UN to promote universal respect for, and observance of, human rights and freedoms”. The ICESCR and extraterritorial obligations should be analyzed in the light of Articles 55 and 56 of the UN Charter. In Article 56 of the Charter of the UN, “All Members pledge themselves to take joint and separate action in cooperation with the Organization...” to achieve to take joint and separate action in cooperation with the Organization...” to achieve purposes set out in Article 55 of the Charter, including: “... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” This duty is expressed without any territorial limitation and should be taken into account when addressing the scope of States' obligations under Article 12 of the ICESCR. The essential criterion for shaping the interim obligation according to Article 12 of the ICESCR creates an obligation as a signatory to the Covenant to the USA under Article 18 of the VCLT.
18 VCLT sets out an obligation to the USA not to defeat the object and purpose of Article 12 of the ICESCR, in the light of the Articles 55 and 56 of the UN Charter.

In total, the U.S. Government provided more than $56 million in Fiscal Years 2018-2019 to meet emergency needs inside Venezuela (USAID, 2019) which is not enough to cover the right to health crises in Venezuela, which is not enough as proved by the OCHA for the humanitarian crises in Venezuela. This Humanitarian Response Plan of OCHA for Venezuela is under the definition of the UN specialized agencies or programs, the same as the UN Humanitarian Response Plan for Somalia. Under the principle of *maxim allegans contraria non est audiendus*, the USA government has a binding obligation with reference to UN Security Council resolutions 244 and 2462 to free to necessary equal frozen sum of the funds of the Venezuela government for the Humanitarian Response Plan of OCHA for Venezuela as well cannot prevent taking steps on any transfer of any funds by the humanitarian organizations having observer status with the UN General Assembly that provide humanitarian assistance, and their implementing partners including bilaterally or multilaterally funded non-governmental organizations participating in the UN Humanitarian Response Plan of OCHA for Venezuela as formulated in Article 2.1 of the ICESCR.

References


Human Rights Committee General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Document, CCPR/C/GC/36.

Human Rights Committee Summary record of the 3386th meeting, UN Document, CCPR/C/SR.3400.


