

## THEORIZING OR NEGOTIATING THE LAW?: A RESPONSE TO DEVIKA HOVELL

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### *Introduction*

Devika Hovell's article is a very welcome and useful contribution to the debate regarding the "accountability" (whatever the term may mean<sup>1</sup>) of international organizations, and the United Nations in particular. The author argues that scholarship has tended to focus on (descriptive) state practice to the detriment of (normative) theoretical appeal, and so the relevant discussion "has received inadequate theoretical attention."<sup>2</sup> In response, she sets out to tell the story of the United Nations being held to account through a highly theorized (and, if I may venture even at the outset, perhaps a bit stylized) scheme of contrasting "instrumentalist," "dignitarian," and "public interest" approaches to due process. This she applies to two case studies, one regarding targeted sanctions imposed by the UN Security Council, mainly in the context of antiterrorism; and one regarding the cholera outbreak in Haiti, where the United Nations has been implicated. Hovell critiques both the instrumentalist and dignitarian approaches, which correspond in broad terms to legal action at the international, and the domestic/regional level, respectively, and argues in favor of a "public interest" approach as better reflecting a "value-based" due process.

There are always (at least) two ways to tell a story, however, and my way would be rather different than Hovell's, even if "undertheorized." My aim here is not to dispute her account or to question its validity or even usefulness: It is merely to present an alternative way to tell the story which may have less, more, or the same explanatory force. This brief essay begins by reviewing Hovell's criticism of the "instrumentalist" model of due process in the context of sanctions, in order to prepare the ground for the alternative reading of both case studies. The essay concludes with the view that the law is negotiated in practice through contrarian processes, through patterns of resistance and defiance.

### *Instrumentalist Due Process and Sanctions*

In her criticism of the "instrumentalist" model, Hovell comes close to throwing out the baby with the bathwater, essentially considering the Security Council *legibus solutus*. She claims that the legal norms binding on the Council are "limited, vague and, to an extent, undecided. They include (according to the least controversial interpretation) the narrow limitations defined by the UN Charter and those few norms that have attained the status of *jus cogens*."<sup>3</sup> I am not sure how rules can be at the same time limited *and* vague *and*

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<sup>1</sup> On the difficulties with the term, see generally ANTONIOS TZANAKOPOULOS, *DISOBEYING THE SECURITY COUNCIL: COUNTER-MEASURES AGAINST WRONGFUL SANCTIONS*, ch. 1 (2011).

<sup>2</sup> Devika Hovell, *Due Process in the United Nations*, 110 AJIL 1, 48 (2016).

<sup>3</sup> *Id.* at 13.

undecided (unless Hovell meant “or”), and I am even less sure what “undecided” means. But the fact that the law may be at times difficult to ascertain or unclear (as international law most of the time is) is no reason to discard it, far less to go on to argue that the Security Council is not governed by law but “exercises a hybrid of political and legal authority” because it decides “primarily according to political criteria.”<sup>4</sup> Any executive or legislature or even court (viz. Kelsen<sup>5</sup>) does the very same, but has to do so *within* the law. Then Hovell argues that discretion is the “gold standard” in the Security Council.<sup>6</sup> However, this argument ignores the important point that discretion only exists within the law,<sup>7</sup> otherwise it becomes tyranny. Moreover, the role of lawyers is to work to limit “legal uncertainty” rather than use it as a justification for becoming politicians or theorists. Arguments that blur these distinctions can lead one down a very slippery slope.

Hovell’s analysis leads her to argue that the instrumentalist model is ill-equipped to deal with situations where an organ is exercising broad discretionary powers, situations in which “adjudicatory frameworks may need to give way to more broadly political consultative processes that are focused on representing pluralist interests.”<sup>8</sup> While this may be true to some extent, it is—in the context of UN targeted sanctions—also to misread both the law and the historical developments which led domestic and regional international courts (and states) to react. Courts acted with neither “inert deference” nor “overreaching defiance.”<sup>9</sup> They were *first* deferential and *then* defiant, in particular as the years went by and the seemingly “preventative” measures adopted by the Council really ended up being punitive given their indefinite duration and the lack of any remedy.<sup>10</sup> Essentially courts went from (due, let’s say) deference to (justified and principled) defiance as they saw that despite their “shots across the bow”<sup>11</sup> the Security Council would not heed the warning. More importantly, discretion finds its ultimate limit, under the current legal system at least, in internationally protected human rights. Human rights as well established as the presumption of innocence and the right to a remedy, for example, are not up for discussion in “more broadly political consultative processes, focused on representation of pluralist interests.” And indeed it would be quite a scary world if they were, or if it were argued that they should be.

But even on the theoretical level the critique of the instrumentalist model seems to me misplaced. Hovell argues that adherence to the model leads to “stagnation of values” in a situation where the only thing we are concerned about is legal accuracy, without defining a normative basis on which to “differentiat[e] between acceptable and unacceptable aspects of [the otherwise applicable] law.”<sup>12</sup> There’s an inherent contradiction here, to begin with: How can the law binding on the Security Council be limited and vague and undecided (see above) and at the same time so fixed and immutable that we are only concerned with legal accuracy and we cannot engage in any critique of the law and its more or less unacceptable aspects? The law is uncertain and thus constantly negotiated between the relevant actors, who engage in constant battle to tilt the law towards their political preferences, even when that battle is presented as concerned simply with legal accuracy. And the “instrumentalist” model is just another, indeed the primary, ground for the waging of that battle. Further, this critique seems to me to undersell the significant contribution of courts in developing the law

<sup>4</sup> *Id.* at 13.

<sup>5</sup> HANS KELSEN, *REINE RECHTSLEHRE – MIT EINEM ANHANG: DAS PROBLEM DER GERECHTIGKEIT* (2d ed., 1960) 242 ff.

<sup>6</sup> Hovell, *supra* note 2, at 13.

<sup>7</sup> See Ian Brownlie, *The Decisions of Political Organs of the United Nations and the Rule of Law*, in *ESSAYS IN HONOUR OF WANG TIEYA* 91, 95 (Ronald SJ Macdonald ed., 1994).

<sup>8</sup> Hovell, *supra* note 2, at 14.

<sup>9</sup> *Id.* at 11.

<sup>10</sup> Which may well explain the UK Supreme Court’s position criticized *id.* at 12.

<sup>11</sup> In cases where Hovell dismisses their critical comments as “nonbinding” and “subsidiary,” *id.* at 14.

<sup>12</sup> *Id.* at 14.

applicable to the Security Council in the sanctions context. It appears to assume that the courts are accurately applying fixed law rather than developing it, which in turn would lead to questions as to why some of them are deferential and others defiant (on which see above). What in fact the courts have done, in a decentralized manner, is to clarify and develop the law, or at least to start the process of doing so, forcing their states to defy or put pressure on the Council, and essentially achieving the institutionalization of at least one form of remedy, namely the establishment of the Office of the Ombudsperson.<sup>13</sup> Indeed the preamble to Resolution 1904 (2009) which first established the Office of the Ombudsperson makes special reference to the legal (and other) challenges to the sanctions regime. Once it was in place, the continued pressure from courts (and also their states who found themselves between the rock of defying their courts or the hard place of defying the Security Council) led to further tightening of the Ombudsperson procedure, with its “recommendations” being given quasibinding character through the introduction of a reverse consensus procedure in Resolution 1989 (2011) (though still with important escape routes). The interesting thing is that some of these aspects of the decentralized reaction of courts, and their impact on the development of the Ombudsperson procedure, is later recognized in the discussion of the “dignitarian approach,” before Hovell goes on to conclude that the “public interest approach” embodied in the Ombudsperson procedure is the best for dealing with the issue of due process in the context of UN Security Council sanctions. An alternative to this strict separation of “approaches,” and an alternative narrative, is offered in the next section.

### *An Alternative Reading*

Just after September 11, 2001, individuals and legal entities subject to UN Security Council antiterrorist sanctions had virtually no remedy, no way to challenge their “blacklisting” which led to an asset freeze and travel ban, among other deprivations. Their only hope would be to lobby their state of nationality to lobby the Security Council to remove them from the list, with rather dismal prospects of success. Fifteen years later, those targeted by antiterrorist sanctions may directly challenge their blacklisting before the Office of the Ombudsperson, whose report is all but binding on the relevant Sanctions Committee. How did this come about?

In view of the lack of any direct avenue through which to challenge the relevant Security Council sanctions, targeted individuals and legal entities resorted to challenging the sanctions (or their domestic implementing acts) before national and regional courts, as well as before quasijudicial human rights treaty monitoring organs. These organs, primarily domestic and regional courts, were at first particularly cautious. They would either reject the relevant claims on various bases, including UN immunity; (indirectly) review the Security Council sanctions but take a rather deferential position; or provide a “harmonious interpretation” which was but a thinly veiled form of defiance, as for example in *Abdelrazik*. As time went by and the admittedly draconian sanctions remained in place, and as the Security Council kept ignoring the mounting disquiet and the increasingly serious warnings of the regional and domestic courts, the courts started becoming more brazen, even belligerent, and the Security Council started responding. The Security Council first established a Focal Point where those targeted could at least directly petition the Sanctions Committee for delisting; it created the requirement that some information as to reasons for listing be released to those targeted; and, finally, it established (and later strengthened) the Office of the Ombudsperson, an independent and impartial

<sup>13</sup> See generally, Antonios Tzanakopoulos, *Domestic Court Reactions to UN Security Council Sanctions*, in CHALLENGING ACTS OF INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 54 (August Reinisch ed., 2010); and on the role of domestic courts in the development of international law see generally Antonios Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 LOY. L.A. INT'L & COMP. L. REV. 133 (2011).

organ that receives and considers delisting requests and presents recommendations to the Sanctions Committee which by now are all but binding.

What this alternative reading points to is the organic emergence and evolution of a remedy through a pattern of defiance, threats, and ultimately negotiation between the Security Council and the states, pushed on by their courts, primarily, and also by public opinion or relevant engaged interest groups. Interestingly, however, this pattern of defiance, threats, and negotiation was not based on any sort of deep theorizing about due process, or accountability, or values, or whatever other term whose definition is a matter for constant debate. It was brought about through pragmatic considerations about using the law creatively and flexibly in order to vindicate legally and internationally protected human rights. Notably, those regional and domestic courts which defied the Security Council and imposed disobedience of the sanctions on their states (parties) did so by relying on universally protected human rights, such as the right to a remedy and the right to a fair trial, even if at times they located these in domestic constitutional or regional international law.<sup>14</sup> Some of the courts did indeed directly draw the analogy between domestic and internationally protected human rights. Indeed, the two are difficult to distinguish in their substance, given the constant feedback loop between domestic and internationally protected human rights (which may be considered “consubstantial norms,” i.e. norms stemming from allegedly separate legal orders but having the same or very similar substance). States were then forced to engage the Security Council in seeking to resolve the impasse, and finally managed to negotiate the establishment of an Office of the Ombudsperson, an alternative remedy that is increasingly becoming judicialized (and becoming more acceptable as an alternative remedy the more it approximates a process offering guarantees of judicial protection).

The cholera outbreak in Haiti can be read in a similar manner: Faced with the stringent UN interpretation of its own immunities, victims and their lawyers resorted to domestic courts in order to force a more nuanced interpretation of the relevant law. In particular, the tort actions are combined with human rights or functional immunity arguments in order to “open up” the domestic court to the tort actions, and in turn the United Nations to negotiation. It is not argued here that these tort actions are the best way to achieve a remedy—just as actions for review of UN sanctions in domestic and regional courts are not the best way to achieve a remedy in the context of sanctions—but rather that forcing more nuanced interpretations of the relevant law on the part of domestic courts will in turn force the United Nations to engage in the negotiations required to put in place an appropriate and effective remedy. The United Nations will be forced to do so for fear of compromising its ability to operate effectively. It should be remembered in this connection that similar approaches against other international organizations (though not necessarily the United Nations per se, yet) have borne fruit, forcing these organizations to establish processes offering equivalent protection of workers’ rights for fear of having their immunity denied or ignored by domestic and regional courts.<sup>15</sup> The form of the remedy or process that will eventually emerge, and which may well take the form of a public inquiry,<sup>16</sup> is up for negotiation. But the point here is that the most appropriate mechanism will emerge through negotiations seeking a viable balance of the conflicting interests, rather than through theorizing in *abstracto* about models, approaches, publics, and values.

<sup>14</sup> This was done in order to avoid a direct clash between the protected right and the (often misinterpreted) provision of Article 103 of the UN Charter, see generally Antonios Tzanakopoulos, *Collective Security and Human Rights, in* HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS 42 (Erika de Wet & Jure Vidmar eds., 2012).

<sup>15</sup> See generally, Cedric Ryngaert, *The Immunity of International Organizations before Domestic Courts: Recent Trends*, 7 INT’L ORG. L. REV. 121 (2010).

<sup>16</sup> A public inquiry is sometimes only the first step towards securing remedies; for example, the much delayed Chilcot inquiry on the Iraq war of 2003 which reported in July 2016 led to claims by those directly affected by the decision to go to war that they will now seek legal remedies on the basis of the inquiry’s report.

*Conclusion*

It may well be important to speak truth to power; but sometimes it is more important to speak power to power, and sometimes the only power that the weak can wield against the powerful is the power of law. In both the case studies the United Nations emerges as a rather powerful organization and it is only by using the law, and through creative legal argument, that the United Nations may be forced to make concessions and to put in place mechanisms to afford redress. And the United Nations is forced to do so by the decentralized interpretations of that law by domestic and regional courts. These courts are the organs of states, and states are, in the final analysis, the law-makers in the international legal system. Of course domestic courts do not develop the law single-handedly; but in the occasions discussed in the paper, they have mounted resistance in a manner that has led to important developments in international law. They have forced a powerful institution to negotiate the law, and this is leading to tangible results. All this suggests that perhaps we should not be too quick to dismiss the law and the (descriptive) focus on state practice in favor of (normative) theoretical appeal. Both have a role to play, and different views on these issues can end up being quite complementary.