De-Regulating Humanitarian Aid: The Need for New Norms and Interpretations

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I. Introduction

When food and medicine are used as part of an economic weapon against a regime in a particular country, such as North Korea, who is most likely to suffer, the political elite that the weapon is designed to influence or the poorest of the poor in such a country? If the United States and private aid groups wish to send food, medicine, and humanitarian aid workers to help ease the desperate plight of some three and one half million displaced persons and refugees in Darfur, Sudan, are there inhibiting laws and security restraints that need to be corrected? Should private individuals and corporations with purely humanitarian intentions be able to supply food, medicine, and medical services even to known terrorist organizations? During actual war, should food, like medicine, be neutral property that cannot be lawfully targeted and that must be allowed to reach even enemy combatants?

These questions raise merely some of the important concerns implicated when states seek to control or inhibit humanitarian aid. In my view, there is one overarching and compelling concern from a religious, political, and humanitarian perspective – that food and medicine should never be used as part of an economic weapon. The harshest consequences from their denial are often felt by women and children, especially those who least enjoy the sharing of power or wealth.

II. Sanctions Against North Korea

Sanctions against North Korea and the humanitarian crisis in the Sudan have both implicated significant and necessary powers of the United Nations Security Council under Article 39 of the United Nations Charter to make decisions concerning ‘threats to the peace’ and to authorize or mandate sanctions, including economic sanctions under Article 41 and military sanctions under Article 42 of the Charter. With respect to North Korea, the Security Council has mandated several types of economic sanction, including a ban on luxury goods;¹ but the flow of food and medicine are not directly impacted,² nor should they be.

² See ibid., para. 9(a). The freezing of financial or other assets or resources in para. 8(d) does not apply to those deemed ‘necessary for basic expenses, including payment for foodstuffs, [...] medicines and medical treatment [...]’.
More generally, the United Nations and each organ of the UN have an obligation under Article 55(c) of the UN Charter that mirrors a major conditioning purpose of the UN process in Article 1, paragraphs 2 and 3, to respect and to observe self-determination of peoples and human rights. For example, Article 55 of the United Nations Charter sets forth two relevant mandates for the United Nations and its organs in the following terms:

'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'

Thus, the obligation in Article 55 requires respect for self-determination of peoples as well as universal respect for and observance of human rights. The need to respect such precepts also finds expression in the fundamental purposes and principles of the United Nations proclaimed in Article 1, paragraphs 2 and 3 of the United Nations Charter – which are declared more precisely as follows:

'(2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,' [and]

'(3) To achieve international co-operation ... in promoting and encouraging respect for human rights and fundamental freedoms for all [...].'

Indeed, the International Court of Justice has recognized that 'a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.' The Court has also recognized that the need to secure the right of a people to self-determination is an obligation erga omnes, or a customary international legal obligation owing by all of humankind.

Since relevant human rights instruments, such as the Universal Declaration of Human Rights, identify the right of every person to an adequate 'standard of health and

3 Cf. 1945 Charter of the United Nations, art. 55(c) with ibid., art. 1(3).
4 Ibid., art. 55 (emphasis added).
5 Ibid., arts. 1(2)-(3).
8 UN General Assembly Res. 217A, UN Doc. A/810 (1948), at 71. The Universal Declaration has often been used to provide authoritative identification and clarification of human rights guaranteed to all persons through arts. 55(c) and 56 of the United Nations Charter. See, e.g., M. S. McDougal/H. D. Lasswell/L.-C. Chen, Human Rights and World Public Order 274, 302, 325-327 (1980); Filartiga v. Pena-Irala, 630 F.2d 876, at 882 (2d Cir. 1980); see also UN General Assembly Res. 59/191, UN Doc. A/RES/59/191(2005), preamble: 'Stressing that