

## The Limits of Economic Sanctions under International Law: The Case of Iraq

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*“Let me conclude by saying that the humanitarian situation in Iraq poses a serious moral dilemma for this Organization. The United Nations has always been on the side of the vulnerable and the weak, and has always sought to relieve suffering, yet here we are accused of causing suffering to an entire population. We are in danger of losing the argument, or the propaganda war - if we haven’t already lost it - about who is responsible for this situation in Iraq – President Saddam Hussein or the United Nations.”<sup>1</sup>*

Kofi Annan

### 1. Introduction

For a long time, it was commonly believed that sanctions were a humane alternative to war. Former US President Woodrow Wilson stated in 1919: “A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost life outside the nation boycotted, but it brings a pressure upon the nation which, in my judgment, no modern nation could resist.”<sup>2</sup>

During the last decade, however, sanctions have come under harsh criticism. The experience of the economic sanctions imposed on Iraq by the UN Security Council in 1990, and still in place eleven years later show

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<sup>1</sup> Quoted in V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law* (2001), p. 16.

<sup>2</sup> Quoted in G.C. Hufbauer/J.J. Schott/K.A. Elliott, *Economic Sanctions Reconsidered* (Vol. 1, 1990), p. 9.

the ethical and legal ambiguity of sanctions. In September 1999, the UN Co-ordinator for Iraq, Hans von Sponeck, called for an end to many of the sanctions against Iraq in order to facilitate larger flows of food and medicine.<sup>3</sup> In the same month, several speakers in the UN General Assembly's debate emphasised the need to lift the sanctions in order to end human suffering in Iraq.<sup>4</sup>

This article focuses on the UN sanctions regime imposed on Iraq and its compatibility with international law. After briefly defining sanctions and summarizing the UN sanctions debate, it analyses the Iraqi case and examines the legality of the sanctions regime. The objective is to determine whether the sanctions violate international law, in particular international humanitarian law and human rights law.<sup>5</sup>

<sup>3</sup> D. Jehl, 'UN Official Calls for an End of Sanctions against Iraq', *International Herald Tribune (IHT)*, 21 September 1999, 10.

<sup>4</sup> UN Press Release GA/9618, 30 September 1999.

<sup>5</sup> Lack of space precludes a comprehensive analysis on all aspects of the Iraqi sanction regime and of sanctions generally. A considerable amount of literature on the topic has already been published. See, for example, M. Brzoska, 'Der Schatten Saddams. Die Vereinten Nationen auf der Suche nach zielgerichteten Sanktionen', *Vereinte Nationen* (2001) 56; M. Brzoska (ed.), *Design and Implementation of Arms Embargo and Travel and Aviation Related Sanctions. 'Results of the Bonn-Berlin Process'* (2001); P. Conlon, 'Legal Problems at the Centre of the United Nations Sanctions' (1996) 65 *Nordic Journal of International Law* 73; P. Conlon, 'The Humanitarian Mitigation of UN Sanctions' (1996) 39 *GYIL* 249; D. Cortright/G. Lopez, *The Sanctions Decade. Assessing UN Strategies in the 1990s* (2000); D. Cortright/A. Millar/G.A. Lopez, *Smart Sanctions: Restructuring UN Policy in Iraq* (2001); C.-A. Fleischhauer, 'Wirtschaftliche Zwangsmassnahmen in Recht und Praxis der Weltorganisation. Die Anwendung von Sanktionen durch die Vereinten Nationen in der Golfkrise' (1991) *Vereinte Nationen* 41; W.J.M. van Genugten/G.A. de Groot (ed.), *United Nations Sanctions* (1999); V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law* (2001); R. Göbel/J. Guilliard/M. Schiffmann, *Der Irak – Ein belagertes Land* (2001); S. Graham-Brown, *Sanctioning Saddam: The Politics of Intervention in Iraq* (1999); R.E. Hull, *Imposing International Sanctions: Legal Aspects and Enforcement by the Military* (1997) <http://www.ndu.edu/inss/books/sanctions/contents.html>; C.C. Jonyer, 'Sanctions, Compliance and International Law: Reflections on the United Nations' Experience Against Iraq' (1991) 32 *Virginia Journal of International Law* 1; H. Köchler, *Ethical Aspects of Sanctions in International Law. The Practice of the Sanctions Policy and Human Rights*, <http://i-p-o.org/sanctp.htm>; M. Kulesa, 'Von Märchen und Mechanismen', *Vereinte Nationen* (1996) 89; W.M. Reisman/D.L. Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanctions Programmes' (1998) 9 *EJIL* 86; G. Simons, *The Scourging of Iraq* (2nd ed., 1998); D. Starck, *Die Rechtmäßigkeit von UNO-Wirtschaftssanktionen in Anbetracht ihrer Auswirkungen auf die Zivilbevölkerung* (2000); K. Van Brabant, *Sanctions: The Current Debate* (1999);

## 2. Definition of Collective Sanctions Applied by the Security Council

Collective sanctions can be generally defined as “collective measures imposed by organs representing the international community, in response to perceived unlawful or unacceptable conduct by one of its members and meant to uphold standards of behaviour required by international law.”<sup>6</sup> The UN Charter does not define the term “sanctions”, but sanctions are cited in it as measures that the Security Council may take under Chapter VII against a state in order to restore or maintain international peace and security. Such measures may not include the use of armed force but may include the interruption of economic relations and communications as well as the severance of diplomatic relations.

Economic sanctions are the most contentious types. Economic sanctions may comprise a wide range of measures such as a selective or comprehensive ban on trade, a prohibition on some or all capital and service transactions with the government or nationals of the offending country, an interdiction of transport and communication, and a freezing of assets.

Economic sanctions based on Chapter VII are to be distinguished from economic countermeasures.<sup>7</sup> The latter are bilateral, imposed in peacetime, and generally considered to be lawful unless not prohibited by the national law. Economic sanctions based on Chapter VII are also distinct from economic sanctions recommended by the Security Council or the General Assembly that are not binding on the UN members states.

Unlike individual sanctions, measures taken under Art. 41 of the UN Charter by the Security Council are mandatory i.e. implementation is not left to members’ discretion since member states have an obligation under Art. 25 of the UN Charter to implement the Security Council decisions.

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N.D. White, ‘Collective Sanctions: An Alternative to Military Coercion?’ (1994) 12 *International Relations* 75.

<sup>6</sup> N. Schrijver, ‘The Use of Economic Sanctions by the UN Security Council: An International Law Perspective’ in H.G. Post (ed.), *International Economic Law and Armed Conflict* (1994), p. 125.

<sup>7</sup> L. Boisson De Chazornes, ‘Economic Countermeasures in an Independent World’, *ASIL Proceedings* (1995) 337; on countermeasures see Art. 30 of the International Law Commission (ILC) Draft on State Responsibility in (1979) *Yearbook of the International Law Commission*, Vol. II, 47. Shrijver concludes from the ILC’s Draft on State Responsibility, that collective sanctions imposed by the UN Security Council are subsumed under the word countermeasure as in the heading of draft Art. 30 and in the word measure in the text, N. Shrijver, *supra* note 6, 126.

### 3. Criticism of Comprehensive Sanction Regimes Imposed by the United Nations

The Security Council has imposed sanctions a mere 14 times in 56 years. Prior to 1990, sanctions were only imposed on Southern Rhodesia and South Africa. Since the end of the Cold War, the Security Council has imposed sanctions increasingly often, in the cases of Afghanistan, Angola, Ethiopia and Eritrea, the former Yugoslavia, Federal Republic of Yugoslavia, Haiti, Iraq, Libya, Liberia, Rwanda, Sierra Leone, Somalia and Sudan.<sup>8</sup> In parallel, debate about sanctions has intensified. Sanctions have been criticised for the following main reasons.<sup>9</sup>

#### 3.1. *The Ethical Dilemma*

Sanctions are widely considered to hurt innocent civilians while sparing the political leaders. In the 1995 Supplement to the Agenda for Peace,<sup>10</sup> UN Secretary-General Boutros Boutros-Ghali termed sanctions a “blunt instrument” and questioned whether inflicting suffering on vulnerable groups in the target country is a legitimate means of putting pressure on political leaders. He proposed the establishment of a mechanism to monitor the application of sanctions and to evaluate their impact on the target state.<sup>11</sup>

Similar concerns have been voiced by numerous UN agencies and NGOs.<sup>12</sup> Among them is the International Federation of the Red Cross and Red Crescent Societies, which expressed in its World Disaster Report

<sup>8</sup> Use of Sanctions under Chapter VII of the UN Charter by the Office of the Spokesman for the Secretary General, <http://www.un.org/News/ossg/sanction.htm>.

<sup>9</sup> For more detail, see M. Kulessa/D. Starck, ‘Peace Through Sanctions? Recommendations for German UN Policy’, 4 *International Peacekeeping* (Kluwer Law International, 1998), 144.

<sup>10</sup> Reprinted in 2 *International Peacekeeping* (Kluwer Law International, 1994/95) 21, 24.

<sup>11</sup> Similar concerns have been raised by the current UN Secretary General Kofi Annan, see for example, *Annual Report of the Secretary General Report on the Work of the Organization* UN Doc. A/53/1 (1998), 62; *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa* (1998), 25.

<sup>12</sup> See, for example, Campaign Against Sanctions on Iraq, <http://www.cam.ac.uk/societies/casi/>; The Fourth Freedom Forum, <http://www.fourthfreedom.org/>; International Action Centre, <http://www.iacenter.org/iraq.htm>; Voices in the Wilderness, <http://www.nonviolence.org/vitw/>.

1995<sup>13</sup> a growing misgiving about the humanitarian impact of sanctions.<sup>14</sup> The President of the International Committee of the Red Cross (ICRC) voiced particular concern about the situation in Iraq to the General Assembly on 28 November 1998, noting that the high price paid by the most vulnerable groups of the country's population was apparent.<sup>15</sup>

Almost every sanctions regime contains provisions allowing humanitarian exemptions for essential needs such as food and medicine in order to mitigate the regime's otherwise comprehensive impact. Nonetheless, as a major study on the impact of armed conflict on children pointed out "humanitarian exemptions tend to be ambiguous and are interpreted arbitrarily and inconsistently. ... . Delays, confusion and the denial of requests to import essential humanitarian goods cause resource shortages. While these effects might seem to be spread evenly across the target populations, they inevitably fall most heavily on the poor."<sup>16</sup> Recent statements from various UN committees have also reflected a desire to take the humanitarian impact of sanctions into account. The Subgroup on the Question of UN Imposed Sanctions stressed that unintended side effects on civilians should be minimized by making an appropriate humanitarian exception in the Security Council resolutions.<sup>17</sup>

Likewise, the UN Committee on Economic, Social and Cultural Rights stated in December 1997 that more attention needed to be paid to safeguarding the rights of the vulnerable in target countries and that sanctions might violate basic economic, social, and cultural rights.<sup>18</sup>

Critics of UN sanctions have accordingly suggested that more targeted or smart sanctions be developed which would reduce the unintended adverse consequences of sanctions regimes. Smart sanctions are conceptualised to hurt the political leaders or those responsible for the threat or

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<sup>13</sup> International Federation of Red Cross and Red Crescent Societies (ed.), *World Disasters Report 1995* (1995) 19-27.

<sup>14</sup> For further reading, see, 'The Humanitarian Consequences of Economic Sanctions' in *Principles and Response in International Humanitarian Assistance and Protection*; 26<sup>th</sup> International Conference of the Red Cross and Red Crescent.

<sup>15</sup> See also ICRC, *Iraq: A Decade of Sanctions* (1999).

<sup>16</sup> *Promotion and Protection of the Rights of Children/ Impact of Armed Conflict on Children*, UN Doc. A/51/306, para. 128.

<sup>17</sup> UN Doc. A/52/242.

<sup>18</sup> See UN Committee on Economic, Social and Cultural Rights, *The Relationship between Sanctions and Respect for Economic, Social and Cultural Rights*, UN Doc. E/C.12/1997/8.

breach of the peace, while sparing the civilian population.<sup>19</sup> The concept of smart sanctions was endorsed by the current UN Secretary General Kofi Annan in his Millennium Report.<sup>20</sup>

### 3.2. Lack of Transparency

Once sanctions are in place, they are supervised by a sanctions committee<sup>21</sup> of the Security Council, which operates secretly and cannot be monitored or held publicly accountable. The UN General Assembly demanded that the transparency of the sanctions committees be increased.<sup>22</sup> The Security Council expressed its intention to move in this direction, calling in a presidential statement for a formal mechanism to assess the potential impact of sanctions and to monitor their effect.<sup>23</sup>

### 3.3. Double Standards

Another criticism is that sanctions imposed by the Security Council are based on biased or unevenly applied standards. When sanctions were imposed on Iraq to induce it to withdraw from Kuwait, sceptics pointed out that many invasions and occupations by other countries such as Turkey, Israel, and Indonesia had not resulted in the imposition of sanctions. All existing sanctions regimes except on the former Yugoslavia are targeted at countries of the south.<sup>24</sup>

### 3.4. Missing Legal and Constitutional Concept

The lack of institutional arrangements to objectively address the humanitarian impact of sanctions has limited the United Nations's capacity to respond to the adverse humanitarian consequences of the sanctions regimes

<sup>19</sup> For further information, see *Smart Sanctions – Targeting UN Sanctions*, <http://www.smartsanctions.ch/start.html>.

<sup>20</sup> *Millennium Report*, <http://www.un.org/millennium/sg/report/>, 49-50.

<sup>21</sup> H.P. Kaul, 'Die Sanktionsausschüsse des Sicherheitsrates. Ein Einblick in die Arbeitsweise und Verfahren' (1996) *Vereinte Nationen* 96. See in the case of Iraq, P. Conlon, *United Nations Sanctions Management: A Case Study of the Iraqi Sanctions Committee, 1990 – 1994* (2000).

<sup>22</sup> General Assembly Resolution 242, Annex II (1997), UN Doc. A/52/242.

<sup>23</sup> Notes by the President of the Security Council, Ambassador Celso Amorim, *Work of the Sanctions Committee*, UN Doc. S/1999/92. Another problem is the isolation of sanctions committees from information about the humanitarian situation of countries under sanctions, see Working Group of Sanctions, Draft Report of 14 February 2001, <http://www.cam.ac.uk/societies/casi/info/scwgs140201.html>.

<sup>24</sup> See C. Dias, 'Die Peitsche des Nordens' (2/1996) *Der Überblick* 18.

effectively. The UN Department of Humanitarian Affairs commissioned a study in 1998<sup>25</sup> that recommended that guiding legal principles for the imposition of sanctions be established and clear objectives be defined. A working paper submitted by the Russian Federation stressed that sanctions regimes must pursue well defined purposes, have a time frame, be subject to regular review and provide clearly stipulated conditions for their determination, and not be politically motivated.<sup>26</sup> For its part, the so-called “Bossuyt Report” which was prepared at the request of the Sub-Commission on the Promotion and Protection of Human Rights, recommended a six prong test in order to evaluate a sanctions regime.<sup>27</sup> According to this test, the first issue to be examined is whether the sanctions are being imposed for a valid reason, meaning there must be a threat of or an actual breach of international peace and security. Second, the sanctions must target the proper parties who are responsible for the threat or breach of the peace and not the innocent civilians. Third, only proper goods or objects - not humanitarian goods – may be targeted. Fourth and fifth, sanctions must be reasonably limited by time and effectiveness. Sixth, the protest of governments, NGOs, intergovernmental bodies, scholars, and the general public must be taken into account.

### *3.5. Lack of Effectiveness*

Sanctions’ record in bringing about fundamental changes in the policies of the target countries is poor. Any changes usually took years.<sup>28</sup> A 1991 study calculated that sanctions had proven effective in mere 34 per cent of 115 cases.<sup>29</sup> The cases studied, however, included only two comprehensive sanction regimes imposed by the UN Security Council, namely the ones against Southern Rhodesia and South Africa.

### *3.6. Effects on Third States*

Sanctions often cause hardship to the neighbours and major trading partners of the targeted countries,<sup>30</sup> in the case of the sanctions imposed on

<sup>25</sup> C. Bruderlein, *Coping with the Humanitarian Impact of Sanctions*, [http://www.reliefweb.int/ocha\\_ol/pub/sanctions.html](http://www.reliefweb.int/ocha_ol/pub/sanctions.html).

<sup>26</sup> UN Doc. A/AC182/L100 (1998), para. 41-47.

<sup>27</sup> *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights (The Bossuyt Report)*, E/ CN. 4/ Sub. 2/ 2000/ 33 of 21 June 2000.

<sup>28</sup> For further reading, see R.A. Pape, ‘Why Economic Sanctions Do Not Work’ (1997) *22 International Security* 90.

<sup>29</sup> G.C. Hufbauer/J.J. Schott/K.A. Elliott, *supra* note 5, 93-94.

<sup>30</sup> L.L. Martin/J. Laurenti, *The United Nations and Economic Sanctions* (1997), p. 21.

Iraq, 21 countries have claimed losses in their revenues as a result of damage to their economic links with Iraq.<sup>31</sup>

#### 4. Sanctions against Iraq

On 2 August 1990, Iraq invaded Kuwait. Two days later, Iraq proclaimed that Kuwait was an integral part of Iraq. On 9 August 1990, the Security Council declared in Resolution 660<sup>32</sup> that a breach of the peace had occurred and called for Iraq to withdraw immediately from Kuwait. Sanctions were imposed on Iraq on 6 August 1990 by Resolution 661, which required all states to ban imports from and exports to Iraq and Kuwait. It also barred the transfer of funds to both countries and required a freeze on the bank accounts affected. Exceptions were provided for only in the case of “supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs” as well as in the case of “payments exclusively for strictly medical or humanitarian purposes, and, in humanitarian circumstances, foodstuffs.” On 9 August 1990, the Council adopted Resolution 662, declaring the annexation null and void and demanding that Iraq rescind the action. The main objectives of the sanctions, as indicated in particular in Security Council Resolutions 660 and 662, were:

- a) to bring the invasion and occupation of Kuwait by Iraq to an end,
- b) to restore the sovereignty, independence, and territorial integrity of Kuwait,
- c) to restore the authority of the legitimate government of Kuwait, and
- d) to protect the assets of the legitimate government of Kuwait.

Security Council Resolution 661 established a committee to examine reports on the progress of implementation of the resolutions.<sup>33</sup> The Sanctions Committee was not, however, given the task of determining whether Iraq

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<sup>31</sup> These states invoked Article 50 of the UN Charter which provides that any state which is affected with special economic problems caused by preventive or enforcement measures imposed by the Security Council shall have a right to consult the Council regarding the solution of those problems, UN Docs. S/22021 (1990) and S/22193 (1991). See in detail, P. Conlon, ‘Lessons From Iraq: The Functions of the Iraq Sanctions Committee as a Source of Sanctions Implementation Authority and Practice’ (1999) 35 *Virginia Journal of International Law* 632.

<sup>32</sup> S/RES/660 (1990).

<sup>33</sup> See also S/RES/661 (1990).



complied with its obligations under the relevant Security Council resolutions to the degree necessary to ease or lift, partly or wholly, the various prohibitions. Subsequent Security Council resolutions assigned additional monitoring tasks to the Committee. The sanctions were later augmented by Resolution 670, which confirmed that Resolution 661 applied to all types of transport, including aircraft. Exceptions were made where the Council had given prior consent. Resolution 665 adopted on 25 August 1990 endorsed a naval interdiction to ensure the strict implementation of the sanctions imposed by Resolution 661. On 13 September 1990, the Council adopted Resolution 666, which established guidelines to govern international humanitarian assistance. Per Resolution 669 adopted on 24 September 1990, the Council was authorized to review requests for assistance from countries that faced economic difficulties due to the implementation of the sanctions. Convinced of the need to apply even greater pressure on Iraq, the Council adopted Resolution 678, giving Iraq “one final opportunity as a pause of good will to fully implement Resolution 660 and all subsequent relevant Resolutions.” Should Iraq fail to do so, the member states co-operating with Kuwait were authorized “to use all necessary means to uphold and implement the resolutions” and “to restore peace and security in the area.” The deadline of 15 January 1991 passed, and the US-led Gulf-Coalition attacked Iraq. Within 100 days, Kuwait was liberated. A provisional end to the hostilities was brought about by Iraq’s acceptance of Resolution 686, which demanded that Iraq cease hostile actions towards the Gulf Coalition, release detainees and prisoners, accept liability for damages, and implement all twelve previous resolutions.<sup>34</sup> A formal cease-fire was set forth by Resolution 687 on 3 April 1991.<sup>35</sup> The sanctions regime was kept in place after the cease-fire for a different purpose. The regime was henceforth intended to compel Iraq to fulfil its obligations resulting from that resolution, namely:

- a) the respect for the inviolability of the border between Iraq and Kuwait,
- b) the demarcation of the boundary between Iraq and Kuwait,
- c) the deployment of United Nations observer unit to monitor the Khor Abdullah and the demilitarised zone,
- d) the destruction, removal or rendering harmless, under international supervision, of all weapons of mass destruction and ballistic missiles with a range greater than 150 kilometres,

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<sup>34</sup> S/RES/686 (1991).

<sup>35</sup> S/RES/687 (1991).

- e) liability for any direct loss, including environmental damages due to the annexation,
- f) the repatriation of all Kuwaiti and third country nationals,
- g) the requirement not to commit or support international terrorism, and
- h) the return of all property seized by Iraq.<sup>36</sup>

These eight criteria had to be fulfilled by the Iraqi government in order for the sanctions to be lifted. No resolution imposing sanctions since then have had such specific and varied terms. Resolution 687 declared that the full trade embargo would remain in place, pending periodic reviews every 60 days (para. 21) and every 120 days (para. 289) of Iraqi compliance with the obligations of Resolution 687. The sanctions were only slightly modified to allow the import of food and material for certain civilian needs and humanitarian purposes. Resolution 687 formalized the so-called “no-objection” procedure according to which the proving of humanitarian need was no longer required in the Sanctions Committee. The export of food-stuff as well as materials and supplies was permitted as long as the Sanctions Committee was notified.

Resolutions 706 and 712 proposed a partial lifting of the sanctions, which would have enabled Iraq to sell US\$ 1.6 billion of oil worth partly for the purchase of humanitarian supplies. Iraq would in return have been subject to strict UN monitoring of the contracts and distributions of humanitarian goods purchased with the proceeds from the oil sales. For over five years, the programme did not come into effect, at first due to Iraq’s rejection of the terms on which the Council was prepared to authorize limited oil sales and later due to the difficulties of working out for implementation arrangements.

In reaction to the deteriorating humanitarian situation in Iraq, the Security Council passed Resolution 986. Resolution 986 of 4 April 1995 allowed Iraq to sell up to US\$ 1 billion of oil every 90 days and use 66 % of

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<sup>36</sup> On the various aspects of Resolution 687, see for example, B. Graefrath, ‘Iraqi Reparations and the Security Council’ (1995) 55 *ZaöRV* 1; B. Graefrath/ M. Mohr, ‘Legal Consequences of an Act of Aggression: the Case of Iraqi Invasion and Occupation of Kuwait’ (1992) 43 *ÖZöRV* 109; R.B. Lillich, *The United Nations Compensation Commission* (1995); T. Maruhn, ‘The Implementation of Disarmament and Arms Control Obligations Imposed upon Iraq by the Security Council’ (1992) 52 *ZaöRV* 781; S. Sur, *Security Council Resolution 687 of 3 April 1991 in the Gulf Affair: Problems of Restoring and Safeguarding Peace* (1992); F. Tanner (ed.) *From Versailles to Baghdad Post War Armament of Defeated States* (1992); United Nations Department of Public Information, *The United Nations and the Iraq-Kuwait Conflict, 1990-1996* (The United Nations Blue Book Series, Vol. IX).

the proceeds for humanitarian supplies. On 20 May 1996, the UN and Iraq concluded a memorandum of understanding that codified the practical arrangements for the so-called “oil-for-food” agreement. Under the “oil-for-food” programme<sup>37</sup>, Iraq may sell up to US\$ 5.2 billion worth of oil in a six month period. A third of the proceeds is to go to compensate victims of the Iraqi invasion of Kuwait and a fixed amount is set to be aside for aid to the Kurdish regions.<sup>38</sup>

The next turning point came when UNSCOM ascertained in 1998 that Iraq had not fulfilled its obligations under Resolution 687 to disarm all its weapons of mass destruction.<sup>39</sup> In December 1998, UN inspectors were withdrawn prior to the punitive air strikes by the United Kingdom and the United States.<sup>40</sup> After the so-called Operation Desert Fox<sup>41</sup>, the inspectors

<sup>37</sup> For further information, see United Nations Office of the Iraq Programme, <http://www.un.org/Depts/oip/>.

<sup>38</sup> Further Security Council Resolutions regarding the sanctions imposed on Iraq include S/RES/1051 (1996), S/RES/1111 (1997), S/RES/1115 (1997), S/RES/1129 (1997), S/RES/1134 (1997), S/RES/1137 (1997), S/RES/1143 (1997), S/RES/1153 (1998), S/RES/1158 (1998), S/RES/1175 (1998), S/RES/1194 (1998), S/RES/1210 (1998), S/RES/1242 (1999), S/RES/1266 (1999), S/RES/1281 (1999), S/RES/1284 (1999), S/RES/1302 (2000), S/RES/1330 (2000), S/RES/1352 (2001), S/RES/1360 (2001), and S/RES/1382 (2001).

<sup>39</sup> See the letter of 15 December 1998 from the Secretary-General transmitting reports of UNSCOM and IAEA to the Security Council, UN Doc. S/1998/1172.

<sup>40</sup> UNSCOM reported regularly to the Security Council. The reports are available at <http://www.un.org/Depts/unscom/>. For further information on UNSCOM, see the personal accounts of former UNSCOM inspectors R. Butler, *The Greatest Threat* (2000); C. Duelfer, ‘Arms Reduction: The Role of International Organisations, the UNSCOM Experience’ (2000) 5 *Conflict & Security Law* 105; S. Ritter, *Endgame* (1999) and T. Trevon, *Der unsichtbare Tod* (1999). An excellent military analysis of Iraq’s efforts to rebuild its conventional forces, its attempts to proliferate and its struggle to block UN weapons inspections is offered in A.H. Cordesman, *Iraq and the War of Sanctions* (1999).

<sup>41</sup> See on the legality of the use of force N. Krisch, ‘Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council’ (1999) 3 *Max Planck Yearbook of United Nations Law* 59; D. Leurdijk/R. Siekman, ‘The Legal Basis for Military Action against Iraq’ (1998) 4 *International Peacekeeping* (Kluwer Law International) 71; J. Lobel/M. Ratner, ‘Bypassing the Security Council: Ambiguous Authorization to Use Force, Ceasefires and the Iraqi Inspection Regime’ (1999) 93 *AJIL* 124; M. Weller, ‘The Threat or Use of Force in a Unipolar World: The Iraq Crisis of Winter 1997/98’ (1998) 4 *International Peacekeeping* (Kluwer Law International) 63; N.D. White, ‘The Legality of the Threat of Force against Iraq’ (1999) 30 *Security Dialogue* 75; R. Zedalis, ‘Dealing with the Weapon Inspections Crisis in Iraq’ (1999) 59 *ZaöRV* 37; S.M. Condrón, ‘Justification for Unilateral Action in Re-

did not re-enter because the Security Council members could not agree on how to monitor Iraqi weapons and when – or if – to begin lifting the sanctions. Since the establishment of the cease-fire, the issue of lifting the sanctions has been debated at length among the five permanent members of the Security Council.<sup>42</sup> Russia, France, and China have been sympathetic to an immediate lifting of the sanctions. The UN Security Council has come up with several draft proposals on sanctions and inspections but has been unable to agree on new weapons inspections. The United States and United Kingdom have not been able to convince the other permanent members of the Council that strict sanctions should be kept even if Iraq agrees to new inspections. A proposal tabled by the United Kingdom and the Netherlands and supported by the United States provided for an UNSCOM replacement agency to be called the United Nations Commission on Inspection and Monitoring (UNCIM).<sup>43</sup> On 17 December 1999, the Security Council adopted Resolution 1284 replacing UNSCOM with the United Nations Monitoring Verification and Inspection Commission (UNMOVIC).<sup>44</sup> Since then, however, UN weapon inspectors have not been allowed to re-enter Iraq.

New proposals for modifying the sanctions regime were launched by the United Kingdom, France, and Russia in summer 2001.<sup>45</sup> No agreement on them, however, has been reached. The “oil-for-food” programme remains in place as established under Security Council Resolution 1382 of 29 November 2001.<sup>46</sup> It will terminate after 150 days, and the Security Council will have to decide how to proceed with the unsatisfactory situation in Iraq.

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sponse to the Iraqi Threat: A Critical Analysis of Operation Desert Fox (September 1999) 161 *Military Law Review* 115.

<sup>42</sup> R. Zedalis, ‘An Analysis of Some of the Principal Leading Questions Relating to UN Weapons Inspections in Iraq’ (1998) 67 *Nordic Journal of International Law* 249.

<sup>43</sup> The draft is accessible at <http://www.cam.ac.uk/societies/casi/info/uk-dutch.html>.

<sup>44</sup> For updated information on UNMOVIC, see <http://www.un.org/Depts/unmovic/index.htm>.

<sup>45</sup> The drafts are accessible at: <http://www.cam.ac.uk/societies/casi/info/scdeb0105a06.html>.

<sup>46</sup> S/RES/1382.

## 5. The Impact of Sanctions Imposed on Iraq

The humanitarian problems caused by economic sanctions are illustrated best by the example of Iraq,<sup>47</sup> as the regime imposed on Iraq is the most comprehensive in UN history. From 1991 on, an increasing number of reports documenting the adverse impact on the impact of sanctions began to circulate. Humanitarian agencies agree that conditions in Iraq have continued to deteriorate even after the initiation of the “oil-for-food” programme.

Several UN agencies and human rights organizations have produced reports on malnutrition due to the food blockade and on severe health problems due to the absence of medicines and water purification systems.<sup>48</sup> A 1996 study estimated a ten per cent drop in Iraq’s GDP since the imposition of the UN sanctions. A joint UNICEF and Iraqi government survey<sup>49</sup> pointed to a deterioration since the Gulf War and the imposition of sanctions.<sup>50</sup> The mortality rate among children under the age of five doubled from 56 per 1,000 live births between 1984-89 to 131 between 1994-99. The survey’s principal conclusion is that Iraq should be allowed to raise additional proceeds and to spend the proceeds more freely. Various UN agencies have estimated that the sanctions have contributed to hundreds of thousands of deaths. In late September 1998, the UN Humanitarian Co-ordinator for Iraq, Denis J. Halliday, resigned to protest against the continuation of economic sanctions, claiming that these were killing innocent people and children.<sup>51</sup> According to UNICEF, 5,000 to 6,000 children under the age of five die each month. According to UNFP and the ICRC, approximately 70 per cent of women are suffering from anaemia. Malnutrition is partly caused by a massive deterioration in the basic infrastructure, such as water supply and waste disposal systems. Lastly, when evaluating the impact of sanctions one must also take the so

<sup>47</sup> S. Willett, *The Gulf Crisis: Economic Implications* (1990); P. Clawson, *How Has Saddam Survived?, Economic Sanctions: 1990-93* (1993).

<sup>48</sup> See Subgroup on the ‘Question of United Nations Imposed Sanctions’, General Assembly Resolution 242, Annex II (1997).

<sup>49</sup> UNICEF, *Iraq Child and Maternal Mortality Surveys*, <http://www.unicef.org/reseval/iraqr.html>.

<sup>50</sup> See also on this aspect, M.M. Ali/I.H. Shah, “Sanctions and Childhood Mortality in Iraq” (2000) *The Lancet* (2000) 355; R. Garfield, *Morbidity and Mortality Among Iraqi Children from 1990 to 1998: Assessing the Impact of Economic Sanctions* (1999), <http://www.fourthfreedom.org/sanctions/garfield.html>.

<sup>51</sup> See Interview with D.J. Halliday, <http://www.globalpolicy.org/security/sanction/dhall2.htm>.

cial costs into account. The sanctions had deep consequences on Iraqi and Islamic family values, according to Denis J. Halliday, Child begging, for example, has become commonplace.<sup>52</sup>

The humanitarian panel, one of three panels set up by the Security Council after the US-UK strikes in December 1998 to find a new basis for Councils policies regarding Iraq, concluded that Iraq had experienced a shift from relative affluence to massive poverty.<sup>53</sup>

The United States blames the Iraqi government and not the sanctions regime for the severe living conditions. Samuel R. Berger, the national security advisor, pointed out in the latest UNICEF report that the child mortality rates were declining in the autonomous region, which is under the same sanctions regime as the rest of Iraq but where the food delivery is organized by the UN.<sup>54</sup> The implications, however, that the different rates are the result of the different implementation arrangements has been dismissed by UNICEF.<sup>55</sup>

Although the extent to which human hardship is attributable to the economic sanctions as opposed to Iraqi government policy is subject of considerable debate.<sup>56</sup> There is no doubt that the economic sanctions have had a severe impact on the country's population. On the one hand, much of the humanitarian suffering could have been mitigated had Iraq accepted the oil-for-food programme in 1991 and not delayed its implementation after the establishment of the oil-for-food programme by Resolution 986 in 1995. On the other hand, the Security Council cannot evade its own responsibility. It has imposed and maintained the current sanctions regime that has been used by the Iraqi government against the most vulnerable groups of its population to generate support for lifting the sanctions. The oil-for-food programme has been not effective enough to alleviate the suffering.

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<sup>52</sup> D.J. Halliday, 'The Impact of The UN Sanctions on the People of Iraq' (2/1999) 28 *Journal of Palestine Studies* 32-33.

<sup>53</sup> UN Doc. Annex II S/1999/356.

<sup>54</sup> S.R. Berger, 'The Iraqis are Victims of Saddam, Not of the Outside World', *IHT*, 20 October 1999, <http://www.iht.com/IHT/TODAY/WED/ED/edberger.html>.

<sup>55</sup> S. Graham-Brown, UNICEF establishes Blame in Iraq, <http://www.igc.apc.org/globalpolicy/security/sanction/iraq1/iraq11.htm>.

<sup>56</sup> B. Crossette, 'Iraq Ignoring UN Call to Use Oil Wind Fall for Children', *IHT*, 11 August 1999, 5; B. Crossette, 'UN Chief Faults Iraq over Aid Programme for Mothers and Children', *IHT*, 25 August 1999, 7; D. Cortright/G.A. Lopez, 'Are Sanctions Just? The Problematic Case of Iraq' (1999) 52 *Journal of International Affairs* 743-45.

## 6. Legal Evaluation

The following paragraphs seek to clarify the legal rules applicable to collective sanctions in times of peace and armed conflict. The analysis then addresses the question whether the Security Council violated international law by imposing and upholding sanctions against Iraq.

### *6.1. The Power of the Security Council to Impose Sanctions*

The power of the Security Council to impose sanctions rests upon Art. 41 of the UN Charter. Before adopting measures under Art. 41, the Security Council must have determined in accordance with Art. 39 of the UN Charter “the existence of any threat to the peace or breach of peace, or an act of aggression” and make recommendations or decide what measures are to be taken “to maintain or restore international peace and security.”

The Council determined in Resolution 660 that there existed “a breach of international peace and security as regards the Iraqi invasion of Kuwait” before adopting sanctions by Resolution 661. Iraq’s was the only case in which the illegal invasion of another country was given as the justification for imposing sanctions. One of the unsettled issues regarding the imposition of sanctions on Iraq is whether the Security Council acted in accordance with international law when it kept the sanctions in place after the main purpose of the Security Council policy, i.e., the liberation of Kuwait, had been fulfilled and whether Iraq could still be seen as a threat to the peace.

It may be argued based on the wording of Resolution 687, that the Council assumed a continuing threat to the peace from Iraq’s possession of weapons of mass destruction (see in particular the preamble to Resolution 687). Although Art. 39 of the UN Charter provides the Council with a wide margin of appreciation, such an argument alone appears to be legally doubtful because international law does not generally prohibit the possession of weapons of mass destruction, except when agreed by sovereign states limiting the amount of armaments.

The wording of Resolution 687<sup>57</sup> also suggests that the Council decided that a continuing threat to the peace existed out of fear of Iraq’s latent tendency to use weapons of mass destruction. The presumption of the Council appears to be reasonable given Iraq’s past aggressive conduct: Iraq had committed an act of aggression against Kuwait and had used poison gas in the First Gulf war against Iran and against the Kurdish population in the 1980s.

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<sup>57</sup> See, for example, paragraphs 4, 8, 14, 23 of the preamble of Resolution 687.

### 6.2. *Legal Limitations to the Security Council's Measures under Chapter VII*

It has been argued that the Security Council can act above international law and therefore no legal limitations exists on measures adopted by it under Chapter VII.<sup>58</sup> This interpretation is based on the wording of Arts. 103 and 25 of the UN Charter. Specifically, Art. 103 states that “in the event of a conflict between the obligation of the Members of the United Nations under the present Charter and their obligation under any other international agreement, their obligation under the present Charter shall prevail.” According to Art. 25 of the UN Charter, the UN Members “agree to accept and carry out the decisions of the Security Council in accordance with the Charter.” This interpretation cannot, however, be accepted for the following reasons:

- a) According to Art. 24(1) read together with Arts. 1 and 2 of the UN Charter the Council's decisions must be in accord with the purposes and principles of the United Nations. Promoting and encouraging respect for human rights and fundamental freedoms are among these purposes, and therefore the Council always has to take them into account when acting under Chapter VII. Since, as argued by some legal commentators,<sup>59</sup> humanitarian law can be perceived as ‘human rights in armed conflicts’, the Council is also bound by rules of international humanitarian law.
- b) Another limitation is imposed by legal norms regarded as *jus cogens*. The doctrine of *jus cogens* was developed in the late 1960s and can be found in Art. 53 of the Vienna Convention on the Law of Treaties, 1969. Norms regarded as *jus cogens* are non-derogable from them and it is generally accepted that these standards also apply to Security Council enforcement measures taken under Chapter VII of the UN Charter.<sup>60</sup> As the hard core of human rights and international humanitarian law constitute *jus cogens*, these norms apply to measures imposed by the Security Council under Chapter VII.

<sup>58</sup> See, for example, G. Oosthuizen, ‘Playing the Devil’s Advocate: The United Nations Security Council is Unbound by Law’ (1999) 12 *LJIL* 549.

<sup>59</sup> L. Doswald-Beck/S. Vite, ‘International Humanitarian Law and Human Rights Law’ (1993) No. 293 *ICRC Review* 94.

<sup>60</sup> T.D. Gill, ‘Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter’ (1995) 26 *NYIL* 33, 79.



This view is also supported by the statement of Justice Weeramantry of the International Court of Justice in the Lockerbie case that “the history of the United Nations ... corroborates the view that a limitation on the plenitude of the Security Council’s power is that those powers must be exercised in accordance with the well-established principles of international law.”<sup>61</sup>

- c) The Security Council, as laid down in Arts. 24-26 of the UN Charter, is to bear responsibility for the maintenance of international peace and security. It would be contrary to its role if the Council disregarded the rule of law<sup>62</sup> since a peaceful world order can only be realized through respect for the rule of law.<sup>63</sup>

*6.3. Legal Limits to Collective Sanctions Under Art. 41 of the UN Charter*  
No international treaty explicitly deals with the issue of the legal limits of economic sanctions. Art. 41 of the UN Charter, which empowers the Security Council to impose sanctions, is silent on the questions regarding the precise scope and duration of sanctions. Moreover, due to the infrequency of sanctions prior to the end of the Cold War, only few scholars commented on the issue. There is nonetheless a scholarly consensus that the non-derogable provisions of human rights law<sup>64</sup> and provisions of international humanitarian law demarcate the limits of the permissibility of economic sanctions.<sup>65</sup>

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<sup>61</sup> *Order with regard to request for the Indication of Provisional Measures in the Case Concerning Questions of Interpretations and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v United States)*, ICJ (1992); 31 *ILM* (1992) 694-696.

<sup>62</sup> Other authors have also suggested that the principle of good faith constitutes a limit to the enforcement powers of the Security Council. See V. Gowlland-Debbas, ‘Security Council Enforcement Action and Issues of State Responsibility’ (1994) 43 *ICLQ* 93-94.

<sup>63</sup> H.-P. Gasser, ‘Collective Economic Sanctions and International Humanitarian Law - An Enforcement Measure under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals’ (1996) 56 *ZaöRV* 880-881.

<sup>64</sup> As the non-derogable provisions of human rights apply in times of peace and of an armed conflict, the relevant rules are discussed in the section relating to legal limitations during times of peace.

<sup>65</sup> H.-P. Gasser, *supra* note 63, 871; R. Normand, *Iraqi Sanctions, Human Rights and Humanitarian Law*, <http://www.merip.org/mer/mer200/normand.htm>; A. Reinisch, ‘Developing Human Rights and Humanitarian Accountability of the Security Council for the Imposition of Economic Sanctions’ (2001) 95 *AJIL* 851-872; D. Starck,

### 6.3.1. Legal Limitations in Times of Armed Conflict

International humanitarian law can be defined as “those international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international and non-international armed conflicts and which for humanitarian reasons, limit the right of the parties to a conflict to use methods and means of warfare of their choice or protect persons and property that are or may be affected by the conflict.”<sup>66</sup>

Although international humanitarian law does not directly address the legality of sanction regimes imposed by the Security Council in the course of an armed conflict, it is widely agreed that specific rules can be found in the four Geneva Conventions, the Protocols thereto, and relevant customary international law. The purpose of these instruments is to provide civilians with a minimum protection from the effects of armed conflict. They define certain population groups as particularly vulnerable and specifically mentions sectors exempt from blockades. The lack of addressing collective sanctions in the Geneva Conventions and the Additional Protocols can be explained by the fact that the drafters at that time did not anticipate that non-military measures such as collective sanctions could contribute to thousands of deaths. This fact, however, does not preclude the application of international humanitarian law, since this area of international law is highly adaptive and widely interpreted in a dynamic way. It would otherwise be also impossible to apply international humanitarian law to new types of weapons. As the former Senior Legal Advisor of the ICRC, H.-P. Gasser convincingly argues, “while the safeguards of international humanitarian law have been established primarily to protect the civilian population against the effects of military operations in an armed conflict between the two belligerents, considerations of humanitarian policy clearly suggest that they also apply to enforcement measures based on Chapter VII of the UN Charter.”<sup>67</sup> This holds true at least for sanctions adopted in the course of an armed conflict.<sup>68</sup>

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*supra* note 5, 227-370; P.C. Szasz, ‘Das kleinste Übel’ (2/1996) *Der Überblick* 27-29.

<sup>66</sup> H.-P. Gasser, *International Humanitarian Law* (1993), p. 16.

<sup>67</sup> H.-P. Gasser, *supra* note 63, 885.

<sup>68</sup> The view that international humanitarian law is directly applicable to economic sanctions has not been followed by D. Starck due to the non-military character of the sanctions. The author does, however, apply international humanitarian law to economic sanctions by analogy. See in detail, D. Starck, *supra* note 5, 235.

### 6.3.1.1. *Prohibition on Starvation as a Method of Warfare*

As food is essential for the human survival, starvation has been used as a method of warfare for centuries. Starvation can be defined “as an effect, the condition or process of perishing from insufficient food intake, a state of extreme malnutrition, which may be caused by physical inability to eat or insufficient food supplies.”<sup>69</sup> Under international humanitarian law, starvation as a method of warfare is prohibited. This rule is embodied in Art. 54 of the Additional Protocol I and Art. 14 of Additional Protocol II. It can be regarded as *jus cogens*.<sup>70</sup> No collective sanctions may be imposed in such a manner as to cause the civilian population to starve. If a significant segment of a civilian population falls below subsistence level economic sanctions violate the prohibition on starvation.

It may be questioned whether a subjective element must be shown for the crime of starvation to be established. According to Art. 54 of the Additional Protocol I, starvation is prohibited “as a method of warfare.” The word “method” suggests that the party whose actions cause starvation has the knowledge and the will to act in this manner. According to Art. 8 (2)(b)(xxv) of the ICC Statute starvation as a method of warfare is a war crime only if the perpetrator intended to starve a civilian population as a method of warfare. On the basis of these two regulations, it may be concluded that the prohibition on starvation requires a subjective element.

### 6.3.1.2. *Right to Humanitarian Assistance*

If starvation is strictly forbidden as a method of warfare, the provisions dealing with the regulation of relief actions must also be considered to be absolutely binding. Under international humanitarian law, civilians enjoy a right to humanitarian assistance, though different rules apply to international and non-international armed conflicts.

#### 6.3.1.2.1. *Right to Humanitarian Assistance in International Armed Conflicts*

Art. 23 of the Fourth Geneva Convention obligates states during an international armed conflict to authorise and facilitate the free passage and distribution of the following relief goods:

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<sup>69</sup> G.A. Mudge, ‘Starvation as a Means of Warfare’ *International Lawyer* 4 (1969/1970) 236.

<sup>70</sup> D. Starck, *supra* note 5, 282.

- medical supplies for the benefits for all civilians;
- religious objects for the benefits for all civilians; and
- essential foodstuffs, clothing and tonics intended for children under 15, expectant mothers, and maternity cases.

Art. 70 of Additional Protocol I has extended the right to receive relief goods to all members of the civilian population. It adds goods that constitute the minimum necessary for the survival of persons in war times with the consent of the state concerned.

According to Arts. 9/9/9/10 of the four respective 1949 Geneva Conventions, the ICRC and other impartial humanitarian organizations may be subject to the consent to the parties to the conflict to undertake humanitarian activities for the protection and relief of protected persons.

#### 6.3.1.2.2. Right to Humanitarian Assistance in Non-international Armed Conflicts

According to Art. 3 common to the 1949 Geneva Conventions humanitarian and relief actions should be undertaken, subject to the consent of the parties concerned.

Pursuant to Art. 18(2) of Additional Protocol II, relief societies may offer their services and if necessary provide impartial humanitarian relief, again subject to the consent of the parties concerned.

#### 6.3.1.2.3. Relief Assistance in Naval Blockades

Art. 23 of the Fourth Geneva Convention and Art. 70 of Additional Protocol I also apply to naval blockades. An exception to naval blockades must be granted if the civilians of the blockaded country are threatened by starvation or severe shortage of medical supplies.<sup>71</sup>

#### 6.3.1.2.4. Relief Assistance to Occupied Territories

Arts. 55 and 59 of the Fourth Geneva Convention establish a regime to protect civilians in an occupied territory. Art. 55 sets out the principle that the occupying power assumes on the responsibility of insuring the supply of food and medicine to the occupied territory. Art. 69(1) of Additional Protocol I extends that responsibility to the provision of clothing, bedding, means of shelter, other essential supplies and religious objects.

In contrast to Art. 23 of the Fourth Geneva Convention, Art. 55 applies to the civilian population as a whole. Art. 59 requires that if the occupying

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<sup>71</sup> H.-P. Gasser, *supra* note 63, 886.

power cannot provide the necessary supplies, it must authorize third parties, like the Protecting Power or the ICRC, to carry out relief actions.<sup>72</sup>

#### *6.3.1.3. Rule of Distinction*

Under the rule of distinction, which is one of the fundamental principles of international humanitarian law, belligerents are required to distinguish between civilians and combatants at all times and to direct their attacks only against military targets.<sup>73</sup>

Collective sanctions cannot therefore be aimed at the entire population, in an attempt, to influence the regime without being a clear violation of the principle of distinction.

#### *6.3.1.4. Proportionality*

Collective sanctions are also limited by the principle of proportionality, which is an essential element of the law of armed conflict. Examples of its application can be found in Arts. 51 and 57 of Additional Protocol I. Art. 57 (b) of Protocol I prohibits any “attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects ... which would be excessive in relation to the concrete and direct military advantage anticipated.” For example, “a remote advantage to be gained at some unknown time in the future would not be a proper consideration to weigh against civilian losses.”<sup>74</sup> This principle applied to a sanctions regime means that the goal intended to be achieved by the sanctions must justify the humanitarian hardship they cause.

### 6.3.2. Legal Limitations During Times of Peace

The application of the above-mentioned rules of international humanitarian law either directly or by analogy to economic sanctions has been proposed even outside the context of an armed conflict. Direct application is based on the idea that as long as the consequences of an armed conflict are felt in peacetime, the Security Council is bound by the rules of international humanitarian law. It remains unclear, however, when and on which basis the effects of an armed conflict can no longer be felt. Such a vague approach also finds no foundation in customary international law. Application by analogy of international humanitarian law to sanctions during

<sup>72</sup> See also Art. 70 I of Additional Protocol I and, Art. 18(2) of Additional Protocol II.

<sup>73</sup> See Art. 47 of Additional Protocol I.

<sup>74</sup> W.A. Solf in M. Bothe/K.J. Partsch/W.A. Solf, *New Rules for Victims of Armed Conflict* (1982), p. 365.

peacetime is proposed on the grounds that the sanctions are always the same measures having the same effects regardless whether there is an armed conflict in the target state. Following “*a maiore ad minus*” reasoning this view argues that the rules of international humanitarian law restricting the lawfulness of sanctions during times of war should apply all the more in times of peace.<sup>75</sup>

Application of international humanitarian law by analogy during peacetime must, however, be rejected for two reasons. Firstly, international humanitarian law has been expressly developed to protect the vulnerable in armed conflicts and not to protect civilians during peacetime. Secondly, the application of norms by analogy requires that a given situation is not sufficiently regulated by the existing legal rules. However, civilians are sufficiently protected from the adverse effects of sanctions during peacetime by human rights law and the genocide convention, as elaborated in the following paragraphs.

#### 6.3.2.1. *The Right to Life*

The right to life is incorporated in numerous international human rights instruments, such as Art. 6 of the International Covenant on Civil and Political Rights, 1966; Art. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; and Art. 4 of the African Charter of Human Rights, 1981.

It is disputed whether the right to life should be interpreted narrowly or broadly. According to a narrow interpretation, the right to life applies only to cases where life is arbitrarily taken through execution, torture and the like but not through starvation and hunger.<sup>76</sup> The UN Human Rights Committee rejects such a narrow interpretation and argues that the right to life requires that states adopt positive measures.

In order to resolve this legal dilemma, one must consider the right to life together with the human rights provisions guaranteeing the right to food and the right to be free from hunger. Most important among these provisions is Art. 11 of the International Covenant on Economic, Social and Cultural Rights, 1966, which states that:

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<sup>75</sup> See, for example, M. Sassòli, ‘Sanctions and International Humanitarian Law’ in V. Gowlland-Debbas (ed.), *supra* note 5, 244; D. Starck, *supra* note 5, 241-245.

<sup>76</sup> Y. Dinstein, ‘The Right to Life, Physical Integrity and Liberty’ in L. Henkin (ed.), *The International Bill of Rights* (1981), p. 115.

- “1. The State Parties ... recognize the right of everyone to an adequate standard of living ... including food ... . The State Parties will take appropriate steps to ensure the realization of this right ... .
2. The States Parties ..., recognize the fundamental right of everyone to be free from hunger.”

It can be concluded from this article that states are obligated to provide essential goods to those in need. If this interpretation cannot be accepted, it is at least prohibited to deliberately acting as to deprive human beings of food and to cause hunger and starvation.<sup>77</sup>

#### *6.3.2.2. The Rights of the Child*

One of the groups most vulnerable to the adverse consequences of sanctions are children. The rights of children are laid down in the United Nations Convention on the Rights of the Child, 1989, which currently stands as the most widely ratified international agreement. Most relevant in the context of sanctions are Arts. 6 and 24 of the Convention, according to which every child has the inherent right to life and the right to the highest attainable standard of health and access to medical services.

#### *6.3.2.3. The Prohibition on Genocide*

Another limitation can be also drawn from the prohibition on genocide,<sup>78</sup> which may be viewed as a “collective right to life”. According to Art. 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, genocide is prohibited both in times of peace and war.

Pursuant to Art. 2 a), b), and c) of the Convention, genocide is, *inter alia*, “killing members of the group”, “causing serious bodily, or mental harm to members of the group”, or “deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part”, committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such. Collective sanctions can accordingly constitute genocide, if they amount to the deliberate starvation of a group, committed with the intent to destroy it.

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<sup>77</sup> A. Segall, ‘Economic Sanctions: Legal and Policy Constraints’ (1999) No. 836 *ICRC Review* 763.

<sup>78</sup> Recent incorporation of the prohibition on genocide as an international crime are found in Art. 6 of the Statute of the International Criminal Court, Art. 4 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 2 of the Statute of the International Criminal Tribunal for Rwanda.

#### 6.3.2.4. *The Principle of Proportionality*

The principle of proportionality also represents as a criterion in determining the legality of collective sanctions imposed during peacetime. It is not only well established under international humanitarian law, but it can also be found in almost all branches of international and national law.

Proportionality in the context of collective sanctions requires that a careful balance be struck between the United Nations interest in attaining the goal of a sanctions regime and its interest in avoiding unacceptable harm to the civilian population.<sup>79</sup>

### 7. Legal Assessment of the Sanctions Imposed on Iraq

From a legal perspective, the Iraqi sanctions regime can be divided into two distinct phases: the first from the adoption of sanctions by Security Council Resolution 661 on 6 August 1990 until the end of Operation Desert Storm and the second from the establishment of the cease-fire by Security Council 687 on 3 April 1991 to the present. In the Second Gulf War, international humanitarian law became applicable on 2 August 1990 when Iraq invaded Kuwait.<sup>80</sup> Concerning the first phase it may be argued that the Security Council Resolution 661 was not in conformity with the prohibition on starvation (see 6.3.1.1.) since it allowed the payments for food-stuffs only in humanitarian circumstances. In practice, allowance was rarely given until the adoption of Security Council Resolution 666 on 13 September 1990.<sup>81</sup> Resolution 661 established therefore an almost complete food embargo. The mere existence of a food embargo does not, however, automatically violate the prohibition on starvation. It must be shown that the sanction regime had such an effect on a significant part of the Iraqi population that its standard of living fell below a subsistence level. The lack of objective reports prior to the end of the armed conflict regarding food availability makes it impossible to ascertain the extent to which the

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<sup>79</sup> J. Delbrück, 'Proportionality' in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Instalment 7 (1984), p. 396.

<sup>80</sup> Kuwait is a party to the four Geneva Conventions 1949 and to both Additional Protocols. Although Iraq has only ratified the four Geneva Conventions, all the rules applicable here are rules of customary international law, which are binding on all belligerents, irrespective of which treaty they are party to, including the UN.

<sup>81</sup> R. Provost, 'Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait' (1992) 30 *Columbia Journal of Transnational Law* 584.



food shortage can be attributed to the military campaign as opposed to the sanctions. Even if there were clear evidence that the Council's sanctions caused starvation among the Iraqi population, the specific intent on the part of the Security Council to starve the Iraqi people cannot be proven, since there is little information available regarding the motives and reasons behind the Security Council's and the Sanctions Committee's actions.<sup>82</sup> Furthermore, the Council's decision to exclude "supplies strictly intended for medical purposes" and "in humanitarian circumstances, foodstuffs" from sanctions as well as the Sanctions Committee's practice of allowing the food shipments after the adoption of Security Council Resolution 666 indicates that the Council did not intend to starve the Iraqi people.

Security Council Resolution 661 nonetheless violates the rules of international humanitarian law governing relief to the civilian population (see 6.3.1.2.). The civilian population of any territory has the right to receive relief goods such as essential foodstuffs and medical supplies in times of armed conflict. No exceptions to these rules are permissible under international law. Resolution 661 was in conformity with the above mentioned rules in respect of medical supplies as these items were exempted from the ban, but foodstuffs were only exempted from the embargo in humanitarian circumstances, which can be regarded as a clear violation of international humanitarian law. According to Art. 23 of the Fourth Geneva Convention, religious objects for the benefits for all civilians; and clothing and tonics intended for children under 15, expectant mothers, and maternity cases should have been exempted from the sanctions regime as well.

The Council acted in accordance with the principle of distinction (see 6.3.1.3.). There is no evidence that the sanctions were targeted at the entire Iraqi people. The sanctions were imposed only to change Iraqi government policy, i.e., their main aim was to end the occupation of Kuwait.

International humanitarian law in the Iraqi case generally ceased to have effect when the armed conflict was ended with the cease-fire established by Resolution 687. International humanitarian law still remained to the pending issues from the Second Gulf War, such as the repatriation of the prisoners of war.<sup>83</sup> Military operations have, however, been launched against Iraq on several occasions following the cease-fire<sup>84</sup>, and one may

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<sup>82</sup> R. Provost, *ibid.*, 584.

<sup>83</sup> H.-P. Gasser, *supra* note 66, 23.

<sup>84</sup> See, for example, C. Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force' (1994) 65 *BYIL* 135.

argue that there is an armed conflict and international humanitarian law is still applicable. In 1991 and 1992, the coalition forces established the northern and southern no-fly zones in response to Iraqi efforts to suppress the Shiites and Kurds, respectively.<sup>85</sup> A year later, the United States launched air strikes against Iraq, suspecting that it was behind a conspiracy to assassinate former US President George Bush during a visit to Kuwait.<sup>86</sup> In the aftermath of Operation Desert Fox, the United States and the United Kingdom continued strikes in the no-fly zones.<sup>87</sup> In view of these military operations, it may be argued that there is still an armed conflict and international humanitarian law applies.<sup>88</sup>

Settlement of this issue hangs on the definition of armed conflict. The Geneva Conventions do not provide such a definition. According to the ICRC Commentary, an armed conflict is “any difference arising between two States leading to the intervention of members of the armed forces ..., even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.”<sup>89</sup> For its part, the Appeals Chamber in the *Tadic* case<sup>90</sup> held that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached ... .” Both definitions are formulated very generally and lack clarity. It appears, however, to be clear that fighting must reach a certain degree of intensity as to amount to an armed conflict. Many isolated events, such as naval incidents or border clashes, do not

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<sup>85</sup> See in more detail, H. Cook, *The Safe Haven in Northern Iraq* (1995); P. Malanczuk, ‘The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War’ (1991) 2 *EJIL* 114.

<sup>86</sup> W.M. Reisman, ‘The Raid on Baghdad: Some Reflections on its Lawfulness and Implications’ (1994) 5 *EJIL* 120.

<sup>87</sup> R.J. Zedalis, ‘The Quiet, Continuing Air War Against Iraq: An Interpretative Analysis of the Controlling Security Council Resolutions’ (2000) 55 *ZöR* 181; ‘Breite Kritik am Angriff der USA im Irak’, *Neue Züricher Zeitung*, 19 February 2001, 1.

<sup>88</sup> See, for example, *The Bossuyt Report*, *supra* note 27, para. 73.

<sup>89</sup> J. Pictet, *Commentary on the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), p. 20.

<sup>90</sup> *The Prosecutor v Tadic*, Appeal Chamber Judgement, IT-94-1-AR72, at para 70.

constitute an armed conflict.<sup>91</sup> In the case at hand, it is arguable that the US-UK military attacks after Operation Desert Storm have never reached such a degree of intensity as to amount to an armed conflict. If so, that the sanctions since the adoption of the cease-fire the sanctions would no longer have to conform to the standards of international humanitarian law but to the non-derogable provisions of human rights law (see 6.3.), which are also applicable during the times of an armed conflict, as well as the principle of proportionality (see 6.3.1.4. and 6.3.2.4.) and the prohibition on genocide (see 6.3.2.3).

As to possible human rights violations, in particular violations of the right to life (see 6.3.2.1.) and the rights of the child (6.3.2.2.), it has to be taken into account that the sanctions have clearly contributed to the human suffering in Iraq (see 5.). Some observers claim, that the Iraqi government bears sole responsibility for the situation and therefore for the human rights violations. This claim is based on the failure of the Iraqi government to comply with the provisions of Resolution 687, regarding the disarmament of Iraq and its partial use of the proceeds from the oil sale to purchase on dubious items instead on food and medicine. It is arguable, that, there would be no longer sanctions in place if Iraq had completely complied with all terms of the cease-fire resolution. Even so, Iraq's irresponsible behaviour would not entitle the Security Council to breach its independent obligation to promote and respect the human rights of the Iraqi people. The Council should have taken a far less drastic approach towards Iraq after it had become apparent that the Iraqi people were severely suffering under the sanctions and that the "oil-for-food" programme had not sufficiently alleviated their plight.<sup>92</sup> From that moment on, that Council has violated the human rights of the Iraqi people.

The next question to be answered regarding the collective sanctions on Iraq is whether they are proportional. The regime is now in place for over 11 years, and its success, as measured by Iraqi compliance with the cease-fire resolution, has been mixed.<sup>93</sup> However, the major problem that is the

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<sup>91</sup> C. Greenwood, 'Scope of Application of Humanitarian Law' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (1995), p. 42.

<sup>92</sup> R. Normand, *supra* note 64.

<sup>93</sup> Iraq fulfilled several obligations imposed by Resolution 687 for example in respect of the boundary demarcation, compensation payments and no further acts of aggression have been committed against Kuwait. But Iraq did not comply fully with its obligation to return missing Kuwaiti persons and property. See in more detail, K. Katzman, *Iraq: Compliance, Sanctions, and U.S. Policy*, CRS Issue Brief for Congress, updated 29 November 2001.

disarmament of Iraq remains unresolved. It is disputed whether Iraq's weapons of mass destruction have been eliminated. No UN inspections took place in Iraq since winter 1998 and therefore no objective data is available whether Iraq still poses a threat to international peace and security. One may question whether this objective can be achieved at all as long as Saddam Hussein remains in power and as long as some of these weapons can be readily produced. Since too many Iraqi people have suffered and died as a result of the sanctions, and only insufficient progress has been made in disarming Iraq, the sanctions regime in its present form cannot be considered proportional.

It has been claimed that the sanctions on Iraq amount to genocide (see 6.3.2.3.).<sup>94</sup> None of the commentators accusing the Security Council of committing the crime of genocide can, however, prove a specific intent by the Council to destroy the people of Iraq in whole or in part. The Council's mere awareness that sanctions contribute to the human hardship cannot be equated with the intent required to qualify the sanctions as genocide. The Bossuyt Report concludes that the current sanctions regime raises questions under the genocide convention. In this context, Bossuyt quotes from an 1996 interview of the former United States Ambassador to the UN, Madeleine Albright. Asked whether the half-million deaths caused by the sanctions were worth it, she answered "I think it's a very hard choice, but the price, we think is worth it." Even if this were the official opinion of the US government<sup>95</sup> the intent to destroy the Iraqi people cannot be deduced from the policy of one Security Council member: the motives and intentions of all members of the Council would have to be taken into account. In addition, the calls of Russia and France to modify the current sanction regime in order to mitigate the suffering of the Iraqi people contradict an alleged intent of the Council to commit genocide.

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<sup>94</sup> See Ramsay Clark's Letter to the Security Council, <http://www.transnational.org/features/sanctionsIraq.html>; E. Davidsson, *The Economic Sanctions Against the People of Iraq: Consequences and Legal Findings*, <http://www.aldeilis.net/jus/econsanc/sanctioned.pdf>, 34-35; D. Halliday/P. Bennis, 'Die Auswirkungen der Sanktionen und die US Politik' in R. Göbel/J. Guilliard/M. Schiffmann, *supra* note 5, 64; G. Simons, *supra* note 5, 242.

<sup>95</sup> See also the US Reactions to the Bossuyt Report by Ambassador George Moose, US Representative to the UN and Other International Organizations in Geneva of 17 August 2000, <http://www.us-mission.ch/press2000/0817moose.htm>.