

Some Legal Aspects of the Economic Sanctions Against the People of Iraq

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Abstract

The sanctions against the Iraqi people are still in force but have undergone changes as the U.N. - facing the dire consequences of its policies - is slowly retreating from its initial brutality and "permitting" Iraqis to survive. The aim of this paper is not to provide evidence about the situation in Iraq, but to shed light on the implications of the sanctions under international law. Assessments of the humanitarian situation in Iraq can be found in numerous U.N. reports, including those compiled by UNICEF, the WHO, FAO and UNDP, periodical reports by the Secretary General to the Security Council, and accounts by journalists and human rights workers who have visited Iraq.

While the immorality of the sanctions has been long recognized and is currently undisputed, there are a number of reasons why opposition to the sanctions on moral grounds has not been an adequate response. Moral opposition to the sanctions is based on the rejection of acts that harm innocents. Such an opposition is commendable but far from adequate to capture the full humanity of the victims. By limiting the denunciation of the sanctions to the moral level, no consideration is given to the fact that the victims of the sanctions possess rights under international law. The violation of these rights entails not only immorality but also illegality. While governments possess discretionary powers to determine what is moral and what is not, they do not have the right to violate their international obligations. The breach of an international obligation gives rise to the responsibility of the offending state(s) which in turn obliges the offending state(s) to repair the harm done and punish those responsible for the offence when such an act is deemed criminal.

A normative approach, based on international law, provides victims, as individuals and as communities, the tools to uphold their rights under an objective regime which transcends their current governments. Nations who act in defiance of international norms can be held responsible for generations to come.

Having considered a great deal of evidence and legal sources, it is the conviction of the author that the sanctions against Iraq and its population are not only criminal but that the reluctance to deal with their criminal consequences undermines the authority of international law and of the United Nations Organization. A legal approach to economic sanctions can be regarded as both a contribution to the dignity of the victims of such measures as well as an attempt to uphold universal principles of justice and the primacy of law over might in the international order.

I Introduction

The economic sanctions against Iraq were first imposed by the Security Council by Resolution 661 (1990) a few days after Iraq invaded Kuwait in August 1990. The decision was preceded by a unilateral sanctions by the United States, imposed only a few hours after the invasion. The Security Council resolution ordered U.N. member States to prohibit within their own jurisdictions all imports from Iraq as well as all exports to Iraq with the exception of supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs.

By Resolution 687 (1991), that is after 42 days of relentless bombing of Iraq and its civilian infrastructure, and after the restoration of Kuwaiti sovereignty, the Security Council modified slightly the sanctions regime. Iraq was now allowed to import foodstuffs notified to the U.N. Sanctions Committee and materials and supplies for essential civilian needs (as determined by the Secretary General of the United Nations in his letter of 20 March 1991, or by the Sanctions Committee). The Sanctions Committee was empowered to determine the necessary resources needed by Iraq for purchasing the above products and approve exceptions to the ban on Iraqi exports.

Under Resolutions 706 (1991) and 712 (1991), the Security Council authorised the sale by Iraq of \$1600 million worth of oil over a six-month period to enable the import of food, medicines and other material and supplies essential for civilian needs. The net proceeds that would have been available to Iraq after all U.N. deductions¹, were approximately \$900 million for a six-month period. The provisions of these resolutions not only infringed on Iraqi sovereignty but conditioned fundamental humanitarian rights of the Iraqi civilian population, such as the right to food, to political and extraneous conditions.² These resolutions were rejected by the Government of Iraq. A similar proposal was renewed later and again refused by the Government of Iraq, which considered the conditions attached to these authorisations as infringing on Iraqi sovereignty and creating a de facto U.N. tutelage over Iraq.

By banning commercial air travel to and from Iraq, the Security Council effectively isolated the Iraqi people from the outside world. Communications with the outside world, with the exception of illegal border crossings, were limited to the highway between Amman and Baghdad. The U.N. sanctions regime and the U.S.-enforced ban on air travel have been maintained since 1990. Since 1998 the severity of the sanctions has been reduced. The sanctions are enforced by a multinational naval force, operating in the Persian Gulf, acting under the command of the United States.

The U.N. sanctions against Iraq are regarded as the most stringent economic sanctions imposed on any single nation since World War II. As Iraq was heavily dependent on food and medicine imports, paid by oil exports, the ban on oil exports and the effective ban on food had immediate effects on the well-being of the civil population in Iraq. The sanctions have effectively impaired efforts by Iraq to rebuild the country's infrastructure and productive capacity, intentionally damaged by the allied forces during the bombing campaign of January and February 1991. The sanctions may thus be viewed as a direct continuation of a war against Iraqi civilian society.

¹ The main deductions would have been 30 percent for imposed war reparations to Kuwait and funds used to pay for UN monitoring of Iraqi compliance with Security Council decisions. In other words, Iraq was asked to fund infringements of its own sovereignty!

² The requirement for Iraq to accept the seizure of 30 percent of its oil exports for war reparations and its funding of UN activities infringing upon its sovereignty, as conditions for permitting the survival of the Iraqi population is a blatant perversion of principles of humanity enshrined in international law.

It is noteworthy that apart from a handful of short studies originated from the Sub-Commission of the U.N. Human Rights Commission³, the U.N. main organs, such as the Security Council and the General Assembly, have not mandated any study on the legal underpinnings or the legal consequences of economic sanctions in general, or the Iraq sanctions in particular. In fact, the Security Council has not even recognized any obligation to consider human rights norms when imposing economic sanctions.

In the present paper no attempt is made to examine the political and strategic factors that led to the imposition and maintenance of sanctions on Iraq; nor does this paper include a presentation and assessment of the humanitarian tragedy caused by the sanctions. References to publications addressing these issues are provided in the attached bibliography. The purpose of this paper is throw light on questions of legality and responsibility with regard to the economic sanctions imposed on Iraq. These factors will be examined under the following headings:

- (a) *Legality*: Was the Security Council acting legally when deciding to impose conditions of life on the Iraqi population that would foreseeably cause widespread death and injury to health? Was it acting legally when maintaining the sanctions after being informed of the lethal consequences? Were member States acting legally by implementing the resolutions of the Security Council regarding the sanctions?
- (b) *Characterization* of sanctions as a violation of international norms: In view of the death of one million or more civilians in Iraq as a result of the sanctions, how should the acts that led to these deaths be characterized under international law and what does such characterization entail?
- (c) Questions of *responsibility*: Should it be determined that the imposition of inhuman conditions of life, leading to massive deaths, was a violation of international obligations, the question of responsibility of States, the United Nations and individuals arises in the light of the doctrine of State responsibility and of individual criminal responsibility.

II The legality of the trade sanctions under international law

The procedure of the U.N. Charter has been disregarded

The Security Council is entitled to resort to Article 41 of the U.N. Charter, which permits the imposition of economic sanctions against member States if the Council determines this necessary as a response to a “threat to the peace, breach of the peace or an act of aggression”.⁴ Article 41 of the Charter reads as follows:

“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

At the procedural level the Security Council must first determine that specific circumstances do indeed exist amounting to a “threat to the peace, breach of the peace or an act of aggression” (Article 39). Having made such a determination, it may decide

³ See particularly the report submitted by Prof. Marc Bossuyt (“The adverse consequences of economic sanctions on the enjoyment of human rights”), Commission on Human Rights, UN Doc. E/CN.4/Sub.2/2000/33, of 21 June 2000.

⁴ According to Article 39 of the UN Charter “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to “make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

whether to resort to force (Article 42), to the interruption of economic relations, communications or diplomatic relations (Article 41), or to non-coercive measures.

After Iraq invaded Kuwait in August 1990, the Security Council made a determination (Resolution 660) that the peace had been breached. On the base of this determination the Security Council imposed stringent trade sanctions against Iraq (Resolution 661).

After the illegal Iraqi occupation of Kuwait was terminated and the sovereignty of Kuwait restored, the specific situation which prompted the determination in August 1990 by the Council, namely that of a “breach of the peace” was ended and no case was made by the Security Council that an imminent “threat to the peace” existed, justifying continued sanctions against Iraq. If such a threat did effectively exist, it was not identified as such by the Council.

With its resolution 687 (1991) the Security Council nevertheless maintained the sanctions against Iraq. Had the members of the Security Council been confronted with a need to determine that a devastated Iraq remained an imminent threat to international peace and security, necessitating the maintenance of economic sanctions, such a resolution would have most probably been defeated. By disregarding the procedure envisaged in the Charter, the Council ensured the maintenance of the sanctions.

The questionable legitimacy of the Security Council and the perversion of the U.N.

The Security Council is first of all an eminently political body. Five of its fifteen members (The U.S., U.K., France, Russia and China) have a permanent seat in the Council and possess the right of veto. The other ten members are elected from the U.N. membership on a rotating basis. The overwhelming dominance of the permanent members is not only derived from their veto rights but also by the size of their delegations in New York and their frequent private meetings (as a sub-group of the Council) in which decisions are worked out. After the demise of the Soviet Union, the Security Council has been effectively dominated by the Western permanent members (U.S., U.K. and France - collectively the P-3), and particularly by the United States, usually flanked by the United Kingdom.

The dominance of the P-3 over the Council is strengthened by the dominance of the same States within international financial institutions, such as the International Monetary Fund, the World Bank and the World Trade Organization, and secured through pressures they can apply bilaterally on vulnerable members of the Security Council. Such pressures are often of a financial nature. Thus, “[i]n order to obtain votes for the crucial [Security Council] Resolution 678, which would authorize member States ‘to use all necessary means’ to force Iraq to withdraw from Kuwait if it failed to do so by January 15, 1991, the United States engaged in open bribery, blackmail, and coercion.”⁵, including “new aid packages” for Ethiopia and Zaire through the World Bank and the International Monetary Fund, conciliatory moves towards China, increased aid to Colombia, “forgiving” \$7 billion in Egyptian debt. The U.S. however failed to pressurize Cuba and Yemen. Immediately after Yemen cast a “no” vote on Resolution 678, its Ambassador was told that this would be “the most expensive ‘no’ vote you ever cast”. Three days later the U.S. cancelled its \$70-million aid package to Yemen, one of the poorest nations on earth, and soon some 900,000 Yemeni workers were banished from Saudi Arabia, a U.S. ally.⁶

More generally, the Security Council has been widely criticized for engaging in double standards, such as refusing to act on repeated breaches of the U.N. Charter and international law by Israel and other allies of the permanent members.

⁵ Ramsey Clark: “The Fire This Time: U.S. War Crimes in the Gulf”, Thunder's Mouth Press, 1992, p. 153

⁶ Ibid. p. 155

The unbalanced relationship between the P-3 and the rest of the membership, has caused concern among the more vulnerable members of the United Nations, as well as outside the United Nations. This structural imbalance and the fact that the four permanent members of the Council share among themselves over 80 percent of international arms exports cast a shadow over the *legitimacy* of the Council and its *credibility* as a body entrusted to maintain international peace and security.

In assessing the legality of the sanctions imposed by the Council, we will in the present paper disregard the fundamental issue of legitimacy, and assume that the Council has not transgressed the boundaries of legitimate conduct. Such assumption is based on the fact that most U.N. members, including those who were not parties to the decisions to maintain sanctions, have nevertheless acquiesced to the hegemony of the Western permanent members of the Security Council. Such acquiescence has ensured the formal legitimacy of the Council, at least at the level of international relations. No U.N. member has yet left the organization or threatened to do so and few, if any States, have overtly dared to defy the decisions of the Security Council regarding sanctions on Iraq.

Are there any legal limits to the discretionary power of the Security Council?

According to some publicists the Security Council is not bound by any legal norm when deciding to enforce the peace. It is effectively acting outside any legal constraint nor any form of accountability, except that provided by the political will of the States composing the Council. This position is however hotly contested and does not represent a majority view. The prevailing view is that the Security Council, while possessing a wide degree of discretion to determine situations as constituting a threat to the peace and deciding on measures to deal with such threats, is nevertheless bound by at least the provisions of the Charter, by general principles of international law and by basic norms of human rights.

Article 41 which allows the imposition of trade sanctions does not place any specific limits, neither in scope or duration, on their use. It is open-ended.

However Article 24(2) of the U.N. Charter, requires the Security Council to “act in accordance with the Purposes and Principles of the United Nations” when discharging its duties, such as the enforcement of the peace.

The Purposes of the United Nations are listed in Article 1 of the Charter and include the maintenance of international peace and security; the development of friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples; the achievement of international co-operation in solving international economic, social, cultural and humanitarian problems; and the promotion the respect for human rights without any distinction.

The Principles according to which member States shall act, stated in Article 2, include the sovereign equality of U.N. members; the requirements that members act in good faith in fulfilling their international obligations; the requirement of the peaceful and just resolution of disputes; and the principle of non-intervention in domestic affairs of member States.⁷

The Preamble of the U.N. Charter presents the philosophical and ethical underpinnings of the United Nations Organisation and provides a further source to assess U.N. policies:

We the peoples of the United Nations [are] determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.

⁷ The list is not exhaustive.

Using the Preamble and the Purposes of the United Nations as a yardstick, it is obvious that measures, such as the sanctions on Iraq, which undermine the “dignity and worth of the human person”, discriminate between “nations large and small”, impair the “conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”, hinder “social progress and standards of life” and undermine “human rights”, cannot ensure “international peace and security” nor the “friendly relations among nations”.

A number of scholars also maintain that the United Nations, when acting, are bound by general principles of international law, including the obligation to act in good faith when carrying out international obligations.

It is submitted that the United Nations, when acting, or when ordering States to act, must at least take account of human rights obligations and may not, under any circumstance, violate human rights that individual States are not entitled to violate when acting alone. In other words, States may not, by acting collectively, evade their obligations to the human person.

What legal regime for the protection of human rights is applicable to U.N. sanctions ?

It is sometimes argued that when the Council pursues measures for the maintenance of peace, it cannot take consideration of human rights norms and is only limited by so-called humanitarian norms applicable to situations of armed conflict. This view is based on the assumption that economic sanctions are a form of non-military warfare.

The above view is difficult to sustain for the following reasons: The use of force, regulated by the laws of armed warfare, assume that attacks are aimed at military targets, not at civilians, and that warfare has a clear military purpose. The rules of armed warfare prohibit attacks on civilians as well as starvation as a form of warfare. As economic sanctions target civilian populations, they would fly directly in the face of the imperative ban of attacking civilians. Starving civilians or depriving civilians of objects for life sustenance is furthermore prohibited under the provisions of international humanitarian law. It is also difficult to how deprivation of food, medicines and educational materials could further a military objective.

Economic sanctions do not constitute the type of acts for which international humanitarian law was enacted. They constitute a non-military coercion of a government, by crippling a national economy and causing massive shortages. Their ultimate objective is not necessarily military.⁸ Such measures must therefore be regulated by human rights, rather than humanitarian, norms.

The U.N. Charter includes obligations in the field of human rights. Article 55 requires the United Nations to promote “higher standards of living, full employment, and conditions of economic and social progress and development; and (...) universal respect for, and observance of, human rights and fundamental freedoms for all...” Article 56 requires member states to act individually and in co-operation with the U.N. for the achievement of these human rights obligations. The obligation to promote the respect for human rights entails the correlative duty not to impair or violate human rights when carrying out legitimate tasks, including those necessary for the maintenance of international peace and security. At the very least, the United Nations and States acting under its authority, must respect those rights that may not, under any circumstances, be waived (or derogated from), such as the right to life and the right not to be subjected to inhuman treatment. Even when human rights are accidentally or incidentally violated during acts taken for the maintenance of the peace, all the more when such violations are part of a deliberate policy of causing hardships, victims must be allowed to raise claims if they consider to have been unlawfully or arbitrarily injured in their rights.

⁸ The economic sanctions imposed on Haiti, for example, were aimed at restoring democracy in the country, not to eliminate a military threat.

III The characterization of the sanctions as an offence

Among substantive⁹ human rights that the economic sanctions against Iraq have impaired are the right to life; the right not to be subject to inhuman treatment; the right to health; the right to an adequate standard of living, including food, water, clothing, shelter; the right to work; the right to education; the right to the free flow of information across borders; and the right to development.

It is submitted that the obligation to refrain from violating human rights and from preventing another State of fulfilling its own human rights obligations, is an imperative obligation of States as well as of international organizations. States are thus under the obligation to refrain from violating human rights of individuals within other jurisdictions as well as preventing the authorities of another State of fulfilling its own human rights obligations. International and regional human rights courts have recognized that territorial jurisdiction extends to all individuals affected by the offending State, even if they do not reside within that State.

The sanctions against Iraq as gross violations of human rights

When human rights violations are committed against single individuals, they give rise to the responsibility of the violating State, but are not defined as crimes under international law. Human rights tribunals have traditionally examined complaints by individuals and delivered judgements which have, at times, ensured financial compensation to victimized individuals. Economic sanctions are not aimed at specific individuals, but at whole populations. The infliction of injurious measures on populations are obviously massive in nature and are generally based on government policies. They constitute gross human rights violations, which depending on the circumstances may amount to war crimes, crimes against humanity or genocide.

The sanctions against Iraq as a crime under international law

Existing human rights bodies, including the regional human rights courts, have only dealt until now with individual cases of human rights violations, not with massive violations of human rights. Their statutory base is grounded on tort law, not on criminal law. Economic sanctions constitute, however, a collective denial of human rights that may amount to a crime under international law.

The difficulty in characterizing economic sanctions as a specific statutory crime derives from the fact that all existing statutory crimes under international law have been enacted as a response to acts of physical violence against the integrity of the human person, rather than to policies of deprivation with similar consequences. Both domestic and international courts have, however, determined that the deliberate deprivation of food and medicine (or other essentials for life) from a person may be equated, in terms of criminal liability, to physical acts of violence against the person. Depriving a population of goods necessary for life, such as subjecting prisoners to a diet of starvation, has been deemed by the Nürnberg Tribunal in 1945 as a crime against humanity.

The following recognized categories of international crimes have been referred to by various authors with regard to the sanctions against Iraq: International terrorism, war crimes, genocide and crimes against humanity. Economic sanctions resemble in some ways to the use of torture but do not fulfil the statutory definition of torture that requires the victim to be “in the hands” of the torturer. Some authors designate the sanctions as “weapons of mass destruction”, “biological warfare” or “hostage-taking”. None of these concepts constitute, however, statutory crimes under international law but are helpful in emphasizing the criminal nature of economic sanctions.

⁹ Victims of economic sanctions are also denied procedural human rights, including the right to effective remedy and to a judicial determination of their rights

The sanctions against Iraq as a form of international terrorism

The concept of “international terrorism” has not yet been internationally defined. It is mentioned here because of the similarity of economic sanctions with terrorism and because the U.S. statutory definition of “international terrorism” would bring the sanctions against Iraq under its ambit, if U.S. judicial authorities would deign to fulfil their duties to prosecute. The similarity is based on the fact that under U.S. statutory definition, “international terrorism” consists in acts endangering human lives that “appear intended to intimidate or coerce a civilian population and/or to influence the policy of a government by intimidation or coercion.” Economic sanctions follow exactly this logic and would thus amount to a form of State-inspired form of international terrorism, at a much grander scale than all known cases of terrorism.

The sanctions against Iraq as war crimes

The rationale for considering the sanctions against Iraq as “war crimes” is based on the fact that the sanctions constitute an “attack on a civilian population” and that at least for some time during the sanctions period, the Iraqi population was subjected to an effective policy of “starvation”. It is reasoned that what is strictly prohibited, even in situations of war, must logically be prohibited outside the existence of an overt military conflict. That U.S. and U.K. planes continue to bomb Iraqi targets does not necessarily imply that the U.N. sanctions should be subject to the laws of armed conflict. It may be stated that insofar as economic sanctions are subject to the principles of international humanitarian law, they constitute from the outset a prohibited conduct, because they target civilian populations, as such. According to this reasoning, the sanctions against Iraq would constitute a form of war crimes, albeit on a grand scale.

The sanctions against Iraq as a form of genocide

A number of authors maintain that the sanctions against Iraq amount to the crime of genocide. The conventional definition of genocide requires that the offender intended to destroy a population, in part or as whole, as such. While there is some evidence that the United States government intended to inflict upon the Iraqi people conditions of life foreseen to cause massive deaths, such evidence does not amount to the specific criminal intent required for genocide. Numerous acts and statements by U.S. leaders lead to the conclusion that they were reckless regarding the consequences of the sanctions and did not really care whether children were dying in Iraq. They did not, however, demonstrate a specific intent to cause the death of Iraqi civilians. Those who are rightfully revolted by the sanctions against Iraq may consider such observations as overly legalistic, but it is important to distinguish between genocide and “crimes against humanity” (see below) in order not to dilute the concept of genocide, reserved for the most blatant forms of extermination, often linked with a campaign of genocidal incitement. The charge of genocide is certainly not applicable to non-U.S. States and their leaders, some of which may have displayed, however, criminal recklessness with regard to the lives of Iraqi civilians.

The sanctions against Iraq as crimes against humanity

The concept of “crimes against humanity” was brought to life at the Nürnberg Trial in 1945. The concept underwent various changes in definition and was recently defined in the Statutes of the International Criminal Tribunals on Yugoslavia and Rwanda, and in the Statute of the newly established International Criminal Court. “Crimes against humanity” are essentially policy-driven, massive and serious human rights violations, including, *inter alia*, murder, torture, ethnical cleansing, rape and persecution. In order to satisfy the criteria of “crimes against humanity”, it is not necessary to demonstrate an intent to “destroy” a human group. If it is shown that massive and severe violations of fundamental human rights, such as the right to life, were perpetrated as a matter of policy, such acts would amount to “crimes against humanity”, even when no specific intent to kill could be shown to have existed.

With regard to the above considerations, it is submitted that the deliberate measures, imposed over a long period of time as a matter of policy with the knowledge of causing hundreds of thousands of deaths, amount to crimes against humanity, with the possibility that some the actors involved may have possessed the required mental state to be charged of committing genocide.

IV Foresight and intent with respect to the consequences of the sanctions against Iraq

In assessing the responsibility for injurious consequences of acts, such as the U.N. sanctions on Iraq, questions are raised regarding the extent to which those carrying out these acts could foresee or were aware of the consequences of these acts. These questions require a detailed inquiry that would by far exceed the scope of this paper and the capabilities of the author. However a number of general observations are in order.

Foresight and intent by the United States

Before the imposition of sanctions Iraq imported between 70 and 80 percent of foodstuffs consumed in Iraq. The bulk of these food imports was purchased from the United States, Canada and Australia. The United States administration has for decades monitored foreign States' international trade and national accounts in order to adjust its foreign policies towards these States. It has in the past used food as a weapon to extract concessions from other nations. According to American press reports the U.S. government knew perfectly well of the vulnerability of Iraq to a food embargo before imposing sanctions. This is why the United States insisted in including an effective ban on food imports in the provisions of the U.N. sanctions on Iraq, disregarding objections by Cuba and Yemen who regarded a food ban as inhuman and illegal. This ban on food imports was theoretically lifted after the "Gulf war" but was maintained in effect because Iraq was prevented from exporting sufficient quantities of oil to import the required quantities of food.

In January 1991, a secret report on Iraqi Water Treatment Vulnerabilities was produced by the U.S. Defense Intelligence Agency (DIA) and disseminated to the forward command centers responsible for attacking Iraq. The report analysed the extent to which damage to Iraqi water treatment facilities would and could cripple the Iraqi economy and cause epidemics among the population. This report was partly declassified in 1995, possibly by mistake. The very compilation of this extremely detailed report in the context of the "Gulf war", the secrecy surrounding its origin and authorship, its dissemination to the forward command centers and the ensuing determination by the United States to prevent the rehabilitation of the water treatment system through sanctions, have been interpreted as an intention to poison the Iraqi population through contaminated water.

The United States demonstrated throughout the sanctions period a general intent to maintain the deprivation of the Iraqi population at the highest possible level through domestic legislation, international pressure and its voting pattern within the U.N. Sanctions Committee. It went far beyond any other U.N. member in its determination to harm Iraq, as can be gauged by the frequency with which it has resorted to "holds" within the Sanctions Committee, till this very date.

In order to maintain the sanctions against growing international opposition, the United States has availed itself of a little known anomaly within the U.N. Charter. According to the provisions of the Charter, once sanctions have been imposed on a country by a decision of the Security Council, they can be maintained indefinitely, even against the desire of an overwhelming majority in the Council, if one permanent member so desires. The reason is that it is not the periodic renewal of sanctions but their ending that requires an affirmative vote of the Council and that vote can be defeated by the veto of any permanent member. The United States administration, determined to maintain the

sanctions against Iraq as long as possible¹⁰, has threatened to wield its veto against any draft resolution aiming to end the sanctions. It thus holds the U.N. and the people of Iraq hostage to its whims.

Members of the Security Council were put on notice

While it is not clear to which extent other members of the Security Council had reliable information on the conditions in Iraq when they cast their affirmative vote in August 1990 to impose sanctions, they were very soon afterwards put on notice by a number of U.N. study missions to Iraq, by international humanitarian organizations and by press reports.

More generally, all members of the Security Council could not be oblivious to the fact that comprehensive economic sanctions, as imposed on Iraq, were directed against the entire economy, that is against the entire population living in Iraq, not against its government. They were thus knowingly engaging in a policy of creating unspecific but massive hardships to a civilian population. The general intent of this policy was clearly injurious, although the specific harm ensuing from this wholesale deprivation, such as a significant increase in child mortality, widespread malnutrition and declining school attendance, may not have been foreseen by all of them.

A number of U.N. missions visited Iraq after the “Gulf war”. They reported to the Security Council on the “apocalyptic” consequences of the “war” they had witnessed, including the extent of the devastation wrought by allied bombing on the Iraqi infrastructure and the risk of a vast humanitarian tragedy. The members of the Council were thereby put on formal notice regarding the humanitarian situation in Iraq caused by both the sanctions and the “Gulf war”. They were further urged by these missions to allow Iraq to obtain goods necessary to prevent a humanitarian disaster.

The Security Council disregarded the pleadings of U.N. humanitarian missions who visited Iraq in 1991. As a response to the main two missions (Ahtisaari and Aga Khan) it proposed to Iraq a compound deal. This deal was inadequate both with regard to the recommendations made by these humanitarian missions and with regard to absolute standards of human decency, such as the threshold of extreme poverty defined by the World Bank at \$1 per day per person. The allegedly humanitarian concession was furthermore tied to conditions infringing on Iraqi sovereignty as well as the requirements that 30 per cent of Iraqi oil sales would be automatically siphoned off for war reparations to Kuwait. Normally, questions of reparation are to be determined judicially. Not so here. The rule of law, it appears, was not to apply to the Iraqi people, whose lives and whose children’s lives were made conditional upon payment of an arbitrarily imposed fine. The Government of Iraq rejected this deal outright.

Between 1991 and 1995, various U.N. agencies, including the FAO, UNICEF and WHO, provided the Security Council with mounting evidence on increased malnutrition as well as increased rates of morbidity and child mortality ensuing from the sanctions. The Security Council did not act upon such evidence. As the evidence began to be seep into international media, opposition to the sanctions increased. In 1995 the Council decided to revive its proposal from 1991, slightly sweetening the offer. After long negotiations with the Government of Iraq, the “oil-for-food” programme was signed and began to be implemented.

The “oil-for-food-” programme was not designed to revive the Iraqi economy and repair the damage from the “Gulf war”, but only to prevent “further degradation” of the humanitarian situation in Iraq, in other words to maintain excessive rates of malnutrition

¹⁰ Various hypotheses are offered for this determination: The desire of the US to weaken Iraq until its accepts to share its oil resources with US oil corporations; the desire to ensure continued flow of payments to Kuwait, through the Compensation Fund; and the desire to maintain high oil prices which would secure the payment by Gulf States of their huge arms purchases since 1991. It is important to note that apart from Kuwait and the United Kingdom, no country has shown a particular zeal to maintain the sanctions on Iraq.

and mortality of Iraqi children without however further increasing these rates. In 1998, the Council finally agreed that the “oil-for-food” programme would strive to “improve” the humanitarian situation by permitting the repair of dilapidated infrastructure, such as the electricity and the telecommunications system. The United States insisted, however, that the programme should not attempt to revive the Iraqi economy nor contribute to development.

General and specific intent

It is obvious that the imposition of comprehensive economic sanctions against Iraq which included measures that effectively prevented the Government of Iraq from ensuring the lives and health of its population, were intended to harm the entire Iraqi population. Even if the ultimate purposes of the sanctions, such as the elimination of weapons of mass destruction and the demarcation of the Iraqi-Kuwait border, had been legitimate, the means chosen to achieve these purposes was to inflict an unbearable pressure on the Iraqi population. The United States government was fully aware, even before the sanctions were imposed, of the probable humanitarian consequences of these measures. Evidence, such as the study on Iraq’s Water Treatment Vulnerability, suggests that a specific intent by at least some U.S. officials had existed to cause epidemics and deaths of civilians in Iraq, a genocidal intent. In 1996 Madeleine K. Albright, then U.S. Ambassador to the United Nations, confirmed that in spite of the deaths of half a million Iraqi children as a result of the sanctions (a fact she did not deny), their “price is worth it” for America¹¹. Such a declaration strongly suggests the existence of a reckless criminal intent or even circumstantial evidence for the charge of genocide.

All members of the Security Council were fully informed already in the summer of 1991 about these consequences with evidence of increasing malnutrition of child mortality flowing to them year after year. Even if doubts existed regarding the accuracy of mortality statistics, the mountain of evidence was conclusive: Children were dying in their thousands as a result of the sanctions. Those Council members who cannot demonstrate good faith efforts to end measures they knew were causing increased rates of mortality and morbidity of civilians must be held to have possessed at least a general, reckless, intent to cause such deaths and injury.

V Attribution of responsibility to States and individuals

The limit to the obligation of U.N. member States to implement Security Council decisions

All U.N. members are obliged, under the terms of the U.N. Charter, to implement binding resolutions of the Security Council, including those pertaining the sanctions on Iraq. They were thus required to enforce the sanctions against Iraq within their own jurisdictions, by prohibiting trade with Iraq, freezing Iraqi assets, etc. Many States enacted laws or issued regulations in this respect, although the severity of these laws and regulations between countries differs greatly. States that were particularly determined to harm Iraq, such as the United States and the United Kingdom, enacted extremely detailed laws and regulations and threatened heavy penalties for violations. The nature of these laws and regulations and the severity or laxity of their enforcement provides evidence of governments’ injurious intent towards the people of Iraq or the lack of such intent.

While States must in general implement binding decisions of the Security Council, they are not bound to implement resolutions that would transform them into international criminals. Should the Security Council decide to exterminate a nation (deciding that the

¹¹ At CBS News (“60 Minutes”), 12 May 1996, p. 8. Madeleine K. Albright was interviewed by Leslie Stahl.

existence of that nation endangers international peace and security)¹², such a decision would not bind States. In fact, those States which would implement such decisions would commit criminal acts. It is up to individual States and their leaders to assess whether the measures they are required to implement are lawful: They cannot presume such lawfulness, even if the decisions emanate from the Security Council. At Nürnberg in 1945, defendants tried to evade their responsibilities by invoking the Führer Principle applicable in Nazi Germany at the time. The Tribunal dismissed such defenses and asserted overriding principles of humanity, applicable universally, that should be obvious to every decent person. These principles are now part of international customary law, binding on all States and individuals, and have entered the realm of peremptory norms of international law, or *jus cogens* norms.

The responsibility of States and the United Nations towards the victims of the sanctions

Under the doctrine of State responsibility “every internationally wrongful act of a State entails the international responsibility of that State”¹³. Further, “[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.”¹⁴

The doctrine of State responsibility is not directly applicable to the responsibility of international organisations¹⁵. Thus, it is doubtful whether it is possible to hold the United Nations Organization and its chief officers responsible for the consequences of the sanctions. U.N. officials do not participate in the decisions leading to the imposition and maintenance of the sanctions. Only to the extent that U.N. officials actively and knowingly contributed to the negative consequences of the sanctions, can their responsibility, at the individual level, be engaged. In fact, many U.N. officials have warned against the inhuman consequences of the sanctions and thus fulfilled with good faith their obligations to the people of Iraq.

Even if violations amount to international crimes, for which individuals, including public officials and heads of States, may be personally liable, States also incur responsibility for internationally wrongful acts committed by their subjects, but such responsibility is generally considered as civil, not criminal.

Should conclusive evidence be produced that the economic sanctions imposed by the United Nations and implemented by States have caused harm to individuals, such as deprive them of life, health, educational achievement, economic well-being or family rights, the States responsible for such consequences must be considered liable towards the victims. The victims should be compensated for the injury they, and their deceased next-of-kin, have suffered. The offending States should moreover express formal apologies and ensure that such acts will not be repeated, for example, by supporting the drafting of an international convention banning economic sanctions or subjecting international sanctions to strict human rights norms.

Responsibility of public officials under international criminal law

When acts amount to international crimes, i.e. war crimes, crimes against humanity or genocide, they give rise to the individual criminal responsibility of offenders and their accomplices, in a similar manner as under national criminal law. The commission of a

¹² There is, in theory, nothing that could prevent the collectivity of governments, to decide to destroy a particular nation, if they so wish. The Nazi government, elected democratically, decided constitutionally to exterminate the Jewish minority in Germany.

¹³ International Law Commission, Draft Articles on State Responsibility (2000), article 1

¹⁴ Ibid , article 2

¹⁵ Such responsibility is derived from the Law of International Organisations which deals essentially with the responsibility of international organisations in the field of contract law and for unlawful acts by their own employees.

criminal offence is not limited to the direct perpetrators but also those who plan, order or abet the commission of the crime. Individuals who commit any of the above-listed crimes are subject to universal jurisdiction, meaning that they may be prosecuted by and in any State. Such individuals are enemies of mankind but are entitled, nevertheless, to be judged in accordance with due process. The impunity enjoyed by numerous such individuals because of their official immunity is gradually giving way. A number of State leaders, such as former Chilean dictator Augusto Pinochet, or the current Prime Minister of Israel, Ariel Sharon, have been formally charged for their role in planning, ordering or abetting war crimes, crimes against humanity and torture.

If it is possible to demonstrate that specific individuals have possessed the required criminal intent to inflict injury upon innocent civilian Iraqis, and if the acts in question amount to an international crime under conventional or customary international law, these individuals must be held criminally liable for their participation in these acts and should be prosecuted. Instigators include, at the very least, U.S. and U.K. leaders and senior public officials. Accomplices include leaders in countries that did not instigate the imposition or maintenance of the sanctions but provided effective support for their continued maintenance.

Iraq's leadership has been widely charged as responsible for various international crimes committed both before, during and after the "Gulf war". These acts include the alleged use of chemical weapons against Kurdish civilians, alleged war crimes committed during the occupation of Kuwait, the shelling of Israeli cities in the "Gulf war" and alleged crimes against humanity committed during the internal uprisings that followed the "Gulf war". But these acts, even if they are related to, have not "caused" the humanitarian harm documented in Iraq since 1990.

It is sometimes held that the Government of Iraq bears the responsibility for the humanitarian tragedy ensuing from the U.N. sanctions for refusing to comply with the demands of the Security Council. Nobody has, however, alleged that the Government of Iraq had itself planned, ordered or implemented the deprivations imposed on Iraq. The refusal by States to comply with Security Council resolutions constitutes a violation of a treaty provision but does not, by and itself, raise criminal culpability of the non-complying State.

VI Conclusions

The people of Iraq have suffered greatly from decisions taken and acts committed in the name of the international community. Neither Iraqi children nor adults have been consulted whether they accept to be sacrificed in the U.S.-inspired war against Saddam Hussein. The harm done unto them amounts to crimes against humanity for which States and individuals must, however, be held responsible.

The dignity of the Iraqi people requires that fundamental principles of law and of ethics be upheld. It is a minimal expectation of equity that the victims of the economic sanctions in Iraq be provided with judicial and material remedies for the harm they have unjustly suffered. It is equally necessary that individuals responsible for this calamity be brought to justice in accordance with existing norms of international law. Whether this will occur in the foreseeable future depends on the determination of survivors to redeem their dignity and by the success of world-wide efforts to place right before might.

END

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Both above books contain numerous concise but valuable articles by renowned authors, including Noam Chomsky, Phyllis Bennis, Denis J. Halliday, Robert Risk, John Pilger and others, on the roots of U.S./U.K. policy towards Iraq, the effects of the sanctions and on opposition to the sanctions. They usefully complement Ramsey Clark's book written 8 years earlier.

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