العنوان:	Economic Sanctions and Human Rights
المصدر:	شؤون اجتماعية
الناشر:	جمعية الاجتماعيين في الشارقة
المؤلف الرئيسي:	Niblock, Tim
المجلد/العدد:	مج18, ع71
محكمة:	نعم
التاريخ الميلادي:	2001
الصفحات:	11 - 33
رقم MD:	668573
نوع المحتوى:	بحوث ومقالات
قواعد المعلومات:	EduSearch
مواضيع:	حقوق الإنسان، العقوبات الاقتصادية
رابط:	http://search.mandumah.com/Record/668573

Economic Sanctions and Human Rights

Tim Niblock•

The article examines the manner in which the human rights dimension of the sanctions imposed on Iraq has been treated. The political factors affecting how human rights issues are handled in the contemporary world order, and the implications of this for the case of Iraq, are examined first. Attention is then given to the legal basis on which the sanctions regime can be challenged, with particular emphasis on aspects that relate to human rights. The analysis focuses on three fields of possible challenge: the provisions of the UN Charter (and the possibility that the Security Council may, in terms of these provisions, be acting ultra vires); humanitarian law, based on the Hague Conventions and Regulations and the Geneva Conventions relating to the treatment of civilians during armed conflicts; and human rights law. The article concludes with an assessment of whether the humanitarian and human rights dimensions constitute a viable basis on which the sanctions regime which the UN Security Council has imposed on Iraq can be contested.

1. Perspective

The nature and scale of the impact of economic sanctions on Iraq, since they were first imposed on 6 August 1990, is now well known. One of the remarkable aspects of this whole experience, indeed, has been the detail with which the agencies of the United Nations have documented the damage that UN Security Council resolutions have inflicted on the people of Iraq. While precise figures may be subject to debate, there is little doubt that the sanctions regime has led to the death of more than one million

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Iraqis, of whom approximately one-half were children.[1] The loss of life has stemmed from a variety of factors, of which the most critical are the inadequate nutrition that has been available to the population, the deterioration of sanitary conditions, and the lack of sufficient medicine and health care. In addition to the loss of life, the overall conditions of living have been critically affected. Much of the social, medical and educational infrastructure which had enabled Iraqis to enjoy reasonable life prospects prior to 1990 has now disintegrated as a result of the prohibitions on some commodity imports, and the delays in obtaining clearance for the import of others. The mass of the population has been left without the ability to improve their human condition. Life, for most Iraqis, has been reduced to a simple struggle for survival.

A natural reaction to this state of affairs would be to raise the issue of human rights--to question how measures which inflict such suffering on a civilian population can be compatible with international humanitarian and human rights legislation. Contemporary conditions would seem to make such an approach particularly likely, given the increased salience accorded to human rights issues internationally since the end of the Cold War. Surprisingly, however, critiques of the sanctions imposed on Iraq have tended not to take this approach. Certainly there has been some writing on the legal dimensions, basing itself on humanitarian and human rights legislation,[2] but the more common approach of those opposed to sanctions has been simply to decry the suffering meted out to the Iraqi people. Others have focused on the ineffectiveness of sanctions, taking this as grounds to call for the termination of the sanctions regime. The general trend, then, has been to accept the legality of what has been done, and to use practical grounds to plead for a change of policy. This characteristic applies both to non-governmental organisations within the

1. For details of how such figures are compiled, see Tim Niblock, *'Pariah States' and Sanctions in the Middle East: Iraq, Libya and Sudan* (Boulder and London: Lynne Rienner, 2001), pp. 143-147.
2. Such literature that there is on this subject will form the foundation of the presentation of the legal arguments in sections 3 and 4 of this article, and will be mentioned then. Two general books which deal with the topic should, however, be noted here. They are: W.J.M. Van Genugten, and G.A. de Groot, eds., *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights: a Multi-Disciplinary Approach* (Antwerp: Intersentia, 1999); and Arab Cause Solidarity Committee (ed.), *International Law and Interventionism in the New World Order: From Iraq to Yugoslavia* (Madrid: ACSC, 2000).

Western world, and to governments and popular movements elsewhere in the world.

In what follows, the writer will examine the relevance, both practical and theoretical, of international humanitarian and human rights legislation for the debate on sanctions. There are two questions that need to be answered. The first is: why has so little of the debate on Iraqi sanctions taken into account the international legislation which is intended to protect civilian populations from maltreatment? The second is: does a solid basis in fact exist, in international humanitarian and human rights legislation, on which the sanctions imposed on Iraq could be contested? As the writer is a political scientist rather than a human rights lawyer, the legal arguments presented will make substantial use of the relatively few legal writings that have addressed these issues. The conclusion will bring together the legal and political dimensions of the sanctions issue, and will assess how the interaction between the two dimensions affects the viability of using the humanitarian and human rights legislation to contest the sanctions regime.

2. The New World Order, Human Rights and Sanctions

The role played by international law in the international system is inevitably dependent on the character and dynamics of the global order at the time. It will be contended here that the reluctance of critics of sanctions to base their arguments on humanitarian and human rights law stems from the particular character of the New World Order, as it has existed since the disintegration of the Soviet Union at the beginning of the 1990s. The central point is that, in the early 1990s, the United States sought to project its international role–and the New World Order in general–with reference to promoting the key values of Western liberal democratic systems. International progress towards democracy, free enterprise and the protection of human rights was supposed to be characteristic of the new order. Attempts to disrupt the new international harmony would be met by collective action organised (under US guidance) through the international organisations. The "end of history" thesis was sometimes built into this perspective: the world was seeing the victory of liberal democracy, beyond which there would be no further political system that could

evolve. Where liberal democracy was not yet established, it would be within the foreseeable future. There was, ultimately, no alternative system that could provide a challenge to it.[3]

The case of Iraq was, within this framework, of particular importance. The Iraqi occupation of Kuwait came in the critical period while the New World Order was in gestation, and in practice the crisis helped to shape the conception of the new order. The Iraqi move was projected by the United States and its closest allies as a challenge to the values which were now supposed to predominate: a flagrant aggression which breached international law, carried out by a regime which would show no more respect for the human rights of Kuwaitis than it would for those of its own population. The allied coalition that repelled the aggression had been assembled within the framework of resolutions of the United Nations Security Council, and was the instrument through which the values of the New World Order were enforced.

Security Council Resolution 687, adopted on 3 April 1991 after the war had ended, covered the conditions which Iraq would have to satisfy if sanctions were to be lifted: some specified measures of disarmament, the recognition of Kuwaiti sovereignty and of Kuwait's demarcated borders, and the payment of compensation.[4] No mention was made of any human rights requirements. The discourse of Western leaders, however, remained focused on the character of the Iraqi regime and its human rights abuses. Security Council Resolution 688 of 5 April 1991 gave expression to this, condemning "the repression of the Iraqi civilian population in many parts of Iraq ...," demanding that Iraq "immediately ends this repression," and expressing the hope that an open dialogue would take place "to ensure that the human and political rights of all Iraqi citizens are respected."[5]

It was not unnatural, therefore, that those who opposed the continuation of sanctions after the end of the Gulf War were reluctant to argue on

3. See F. Fukuyama, *The End of History and the Last Man* (Harmondsworth: Penguin, 1993).
4. United Nations, S/RES/687, 3 April 1991.
5. United Nations, S/RES/688, 5 April 1991. Whereas Resolution 687 was adopted under Chapter VII of the United Nations Charter, such that the Security Council could authorise the use of force to implement its provisions, Resolution 688 was not. Nonetheless, Resolution 688 sets the need to end repression within the context of the maintenance of international peace and security, thereby making a link with the mandatory provisions of Resolution 687. For a critique of this legal device see R. Al-Qaysi, "The Legal and Humanitarian Actions Against Iraq Pursuant to the Gulf War," in Arab Cause Solidarity Committee, ed., *International Law and Interventionism...*, pp. 56-59.

the ground of human rights. The United States and its allies had taken possession of the international infrastructure that determined how international law was applied through the United Nations Security Council, and how human rights issues were treated. Many of those who were critical of the continuation of sanctions, moreover, were eager not to be seen as defending the Iraqi regime, whose human rights violations and lack of democracy were acknowledged. It was better to move away from the arguments about international law and human rights, and to focus on the practical impact of the sanctions on the Iraqi population and their lack of effectiveness in achieving results.

It may seem surprising that the reluctance to engage with the human rights dimensions of the sanctions regime continued through the 1990s and into the new millennium. The realities of international relations under the New World Order had by the mid-1990s become clear. To many of those outside of the circle of Western governmental thinking, the new world of rights and democratic values had become a camouflage under which the United States, and to some extent other Western powers, used their international hegemony to pursue their economic and strategic interests to the detriment of others. In this view, human rights and democratic values had not achieved a new status and role within the international system, but had become instruments of strategic/economic expansion.[6] The key determinant as to whether human rights issues were taken forward in the international arena was simply whether the interests of the United States would benefit. Such observers pointed out that, in international comparisons of human rights observance, the United States itself did not achieve a good rating.[7]

Yet in practice the field of human rights legislation did expand during the 1990s and not all of it was favourable to the interests of the United States. The body of international human rights legislation has expanded, and governments have become more intent than before to act upon the

6. For some further elaboration of this, see N. Chomsky, *The New Military Humanism: Lessons from Kosovo* (London: Pluto Press, 1999); and N. Chomsky, *Rogue States: The Rule of Force in World Affairs* (London: Pluto, 2000).

7. The 1998 Observer Human Rights Index ranked the United States as the ninety-second worst offender out of a total of 196 states, sandwiched between Haiti and Lesotho. Among affluent states, the United States was the second worst offender. See *The Observer*, 28 June 1998.

legislation.[8] There has been a steady move towards expanding human rights legislation in cultural and economic fields, and an increasing recognition of the close interrelationship between human rights, peace, democracy and development. The rights of minorities were given more specific recognition than before in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the UN General Assembly in 1992.[9] The right to development also attracted more attention than before. The Declaration on the Right to Development had been adopted by the UN General Assembly in 1986, but it was not until the 1990s that it was put on the agenda of international conferences--such as at the UN Conference on Environment and Development in Rio de Janeiro (1992) and the UN Conference on Social Development in Copenhagen (1995).[10] The increased governmental concern with human rights was complemented by, and to some extent stimulated by, non-governmental organisations playing a growing role in this sphere. Such bodies as Amnesty International, Human Rights Watch and Article 19 have helped to ensure that human rights issues remain at the forefront of popular concerns, and that governments must bear some cost in international esteem if they infringe basic human rights.[11]

Increasingly, human rights issues can be (and are) pursued in fora where national governments cannot limit or control the international legal process. The safeguarding of global human rights, in particular situations, has therefore been given precedence over national sovereignty. This was made explicit in the Pinochet case in Britain. Although the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the UN in 1984, and had been ratified by the

8. The content of this paragraph and the one that follows is drawn from the introduction of the writer's recent book on sanctions. See Niblock, *'Pariah States' and Sanctions...* , pp. 4-5.

9. The International Covenant on Civil and Political Rights (article 27) had phrased minority rights in negative terms ("minorities shall not be denied the right..."), whereas the declaration puts the rights positively: "...persons belonging to national or ethnic, religious and linguistic minorities ... have the right to enjoy their own culture..." See J. Symonides, *Human Rights: New Dimensions and Challenges* (Paris: UNESCO, 1998), p. 89.

10. *Ibid.*, pp. 5-6.

11. As has been pointed out elsewhere, this is to some extent a result of media coverage. Of particular importance here is the increased ability and willingness of television reporters to convey powerful images of people suffering human rights abuse in different parts of the world. Demands for action against governments mistreating their own populations follow from this.

British government through its Criminal Justice Act of 1988, it was not until 1999 that the convention was used to bring a case against the former Chilean president, Augusto Pinochet, during one of his regular visits to Britain. The point was made that courts in one country could have jurisdiction over acts of torture inflicted in another, even when the accused was a former head of state. A further instance of international jurisdiction overriding considerations of national sovereignty was the establishment by the UN Security Council of International Criminal Courts for Yugoslavia and Rwanda.[12] These were empowered to hold to account individuals accused of violations of human rights in the two countries concerned. The agreement to establish an International Criminal Court will in due course carry this international jurisdiction over wrongdoing much wider. Once 60 countries have ratified the treaty, which was signed in July 1998,[13] measures will then be taken to set the new court up and enable it to exercise its authority to try those accused of genocide, aggression, war crimes and crimes against humanity. It is expected that the court will begin operating some five years after the initial agreement.

There would seem to have developed, therefore, a strong political basis on which critics of the sanctions regime could employ human rights arguments. There is widespread scepticism about the use made of human rights arguments by the United States, but this has created a dynamic towards reasserting the independence of international law. Some of the recent developments in human rights legislation, and in the implementation of that legislation, have been outside of the framework favoured by the United States.

The critics of sanctions, therefore, could appropriate the discourse on human rights and sanctions. Their failure to do so up to the present may in part be a hangover from the attitudes that developed in the early 1990s, and perhaps also from a continuing embarrassment at employing this approach with relation to a regime whose abuse of civil and political rights is well known. The discussion will now turn to an assessment of the legal arguments that can be used to contest the sanctions regime imposed on Iraq.

12. United Nations S/RES/827, 25 May 1993 and S/RES/955, 8 November 1994 respectively.
13. See *The Observer*, 19 July 1998.

3. The Legal Grounds for Contesting Sanctions

The legal validity of the sanctions imposed on Iraq can be challenged on a variety of different grounds. The grounds for challenge will be presented here under three main headings: those which relate to the United Nations' own charter and principles (where the Security Council is accused of acting *ultra vires*); those which stem from humanitarian law; and those which relate to international human rights legislation.

A. The Security Council Acting *Ultra Vires*

The one clear limitation on the power of the Security Council lies in its obligation to act according to the UN Charter. According to Article 24 of the Charter, any measures taken by the Security Council must comply with the "purposes and principles of the United Nations." The purposes of the UN are listed in Article 1 of the Charter. The international lawyer Marc Bossuyt, in his working paper prepared for the UN Commission on Human Rights, has outlined the implications that this has for sanctions:

> Article 1, paragraph 1, requires that sanctions or other measures undertaken to maintain international peace and security must be "effective" and must be "in conformity with the principles of justice and international law." Sanctions must be evaluated to ensure that they are not unjust or that they do not in any way violate the principles of international law stemming from sources "outside" the Charter. Likewise, sanctions must be constantly reviewed to ascertain whether or not they are effective in maintaining peace and security. Ineffective or unjust sanctions or those that violate other norms of international law may not be imposed, or must be lifted if they have been imposed.[14]

Paragraph 2 of Article 1 requires that all measures taken by the United Nations "respect the principle of equal rights and the self-determination of peoples." If sanctions unduly limit a people's right to self-determination, therefore, they are incompatible with the purposes and principles of the United Nations. It is important to note that the paragraph refers to

14. United Nations Economic and Social Council, "The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights: Working Paper Prepared by Mr. Marc Bossuyt," E/CN.4/Sub.2/2000/33, 21 June 2000, p. 8.

peoples rather than governments. Limiting the scope of governmental action is, of course, not forbidden and is indeed an essential part of the requirements for the maintenance of peace. The difficulty lies in defining the point at which restrictions on governmental action limit a people's right to self-determination.

Paragraph 3 covers the UN's role in promoting and encouraging respect for human rights. It also requires the United Nations to "solve issues which are of a pressing humanitarian nature." Bossuyt comments as follows:

> Sanctions, therefore, must not result in undue hardships for the people of a country. Sanctions that directly or indirectly cause deaths would be a violation of the right to life. Other human rights could also be violated by sanctions regimes such as the rights to security of the person, health, education or employment.[15]

Paragraph 4 requires that all measures taken by the United Nations facilitate the harmonisation of national or international action. There has to be, therefore, an overall consistency covering those situations where sanctions are applied (and those where they are not). If it can be shown that the infringement of international peace by Iraq is no different in character from that committed (for example) by Israel, then the legality of the sanctions against Iraq could be brought into question.

The limitations which are covered above are reinforced in Article 55 of the charter which, in paragraph 3, requires the United Nations to promote higher standards of economic and social progress; solutions to international economic, social, health and other problems; and respect for and observance of human rights.

It would not be difficult to show that the sanctions imposed on Iraq contravene some of the stated purposes and principles of the United Nations. Leaving aside the human rights dimensions, the sanctions have not been effective–and effectiveness constitutes one of the requirements of article 1, paragraph 1. The sanctions regime should therefore have been lifted once the lack of effectiveness became evident (at least by the mid-1990s). There is at present, however, no recognised channel through which a state can seek legal redress over the Security Council's interpretation of

15. *Ibid.*

the UN charter. This raises a general issue which will be addressed in the conclusion of this article: is there any means whereby the Security Council can be made accountable to the provisions of international charters and covenants, as interpreted by an independent international judicial body? If no such means exist, some would contend that the approach is not worth pursuing--given that it could not achieve any positive and enforceable result.

B. Humanitarian Law

The distinction between humanitarian law and human rights law must first be made clear. The former, which is the concern of this section, applies to situations where there is an ongoing armed conflict. It focuses on the protection of civilian life under war conditions. Human rights law, on the other hand, provides for the protection of civilian life, health and property in all situations short of war.

The basis of humanitarian law was laid down in the Hague Conventions and Regulations of 1899 and 1907. Article 50 of the Regulations stipulates that "no general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible." The most detailed provisions of humanitarian law, however, are found in the Geneva Conventions of 1949 and the two protocols that were added to the latter in 1977. Articles 48 of Protocol 1 (1977) requires the parties to a conflict to distinguish at all times between the civilian population and combatants, and between civilian and military objectives.[16] Military operations can only be directed against military objectives. Article 51 gives further emphasis to this point, stating that the civilian population should not be the object of attack, whether collectively or individually. The article, furthermore, forbids acts or threats of violence whose primary purpose is to spread terror among the civilian population. Combatants are obliged to ensure that materials which are indispensable for the survival of the civilian population are available to them, such as food, agricultural

16. For further detail on the conventions and their requirements with regard to civilian populations see T. O'Donnell, *Iraq and the Proportionality of UN Sanctions after Ten Years: Report Compiled for Save the Children Fund* (London: Save the Children Fund, 2000), pp. 32-36.

areas where food can be produced, drinking water etc. Article 54 specifically forbids "starvation of civilians as a method of warfare."

The International Court of Justice has summed up the legal position as follows:

> The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants; it is accordingly prohibited to use weapons causing them harm or uselessly aggravating their suffering. In application of that second principle, states do not have unlimited freedom of choice of means in the weapons they use.[17]

The emphasis on parties to a conflict not causing "unnecessary suffering to combatants" raises the issue of proportionality. Collateral damage to civilian life and property is possible, when legitimate military targets are being attacked, but this must not be excessive.[18] In the words of the Geneva conventions, proportionality prohibits any "attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian property...which would be excessive in relation to the concrete and direct military advantage anticipated." Clearly the concept of "excessive collateral damage" is imprecise, leading combatants to claim that any damage to civilians is collateral and unavoidable, but the authoritative legal commentary on the laws of war provides some indication of the bounds to what may be regarded as legitimate:

> A remote (military) advantage to be gained at some unknown time in the future would not be a proper consideration to weigh against civilian loss... The advantage concerned should be substantial and relatively close... There can be no question of creating conditions to surrender by means of attacks that incidentally harm the civilian population.[19]

17. This is to be found in the ICJ's "Nuclear Weapons Opinion" (ICJ Reports, 1996, para. 78). Quoted from T. O'Donnell, *Iraq and the Proportionality...*, p. 36.
18. For a discussion of these issues see E. Davidsson, *The Economic Sanctions Against the People of Iraq: Consequences and Legal Findings*, found at www.juscogens.org/irak/itarefni/sanctionsed.html, 1998, pp. 14-22.
19. Quoted from Center for Economic and Social Rights, *Unsanctioned Suffering: a Human Rights Assessment of United Nations Sanctions on Iraq* (New York: CESR, May 1996), p. 37.

The relevance of these elements of humanitarian law for the case of Iraq now needs to be examined. The issue has to be addressed at two levels. The first concerns whether the conflict between the Security Council and Iraq can be defined as an "armed conflict" of the kind that is necessary for the laws of war to apply. The second is that of substance: whether the Security Council has in practice pursued policies which target the civilian population or which result in excessive collateral damage to civilian life and property.

There is in fact a strong basis for considering the Iraqi case as one of continuing armed conflict. It can be argued that Security Council Resolution 687 of 4 April 1991, which laid down the basis of the existing sanctions regime, did not rescind Resolution 678, which had authorised the use of force. Indeed Resolution 678 has been interpreted by the United States as providing authorisation for the continuation of enforcement measures against Iraq--including the imposition of the no-fly zones in northern and southern Iraq, the air strikes on Iraqi targets, and the imposition of the naval blockade on Iraq. The leading powers in the Security Council therefore face a dilemma: if their enforcement measures against Iraq are legitimate, then a state of armed conflict continues to exist and the provisions of humanitarian law must apply. If they maintain that the provisions of humanitarian law do not apply, there is no legal basis for the continuation of the enforcement measures against Iraq. Apart from the legal considerations following from Resolution 678, however, there are other reasons why the situation falls within the category of "ongoing armed conflict." The continuing military measures being taken against Iraq themselves constitute grounds for placing Iraq in that category. An international legal ruling relating to a war crimes case in Yugoslavia, moreover, adds further backing to this position:

> International humanitarian law applies from the initiation of ... armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached.... Until that moment, international humanitarian law continues to apply in the whole territory of the warring states...whether or not actual combat takes place.[20]

If humanitarian law does apply to the case of Iraq, there is a strong

20. Quoted from the Appeals Chamber's judgement on the Tadic case, as given in O'Donnell, *Iraq and the Proportionality...*, p. 31.

argument that the sanctions against Iraq stand in contravention to the law. Comprehensive economic sanctions of the type imposed on Iraq do not distinguish the civilian population from the governmental institutions whose policies they are intended to change. Indeed, it is specifically the civilian population that has been made to suffer. Those in positions of authority inevitably have the means to ensure that they do retain access to food, basic commodities and medicine. The logic of comprehensive economic sanctions, moreover, can only realistically be conceived in terms of damage to civilian life. As Davidsson states:

> [I]t is the very intent of comprehensive economic sanctions to inflict hardship on a country's entire population. This imposition of hardship is not incidental to but central to such sanctions. Had general hardship not been the overriding goal, more selective forms of sanctions, such as arms embargo, travel ban for specific categories of people and freezing of the assets of specific individuals, would have been resorted to.[21]

The deteriorating conditions of the civilian population are used to bring about change--either to foster the discontent which will bring about the overthrow of the regime, or to force the government concerned (through its desire to protect the lives of its citizens) to accept the conditions which the Security Council wishes to impose. Civilians, therefore, become an instrument employed as a weapon against a recalcitrant government–in direct contradiction to the requirements of international law.

Even if the situation is not regarded as a state of outright war, it is difficult to accept that any lesser standards should apply. In the words of former US Attorney-General Ramsey Clark, "If law prohibits even minimal assault on civilians in time of war, when a government will not surrender, can it permit the assault of an entire nation when its government will not submit, striking the poorest and weakest hardest and killing the most fragile?"[22]

21. Davidsson, *The Economic Sanctions...*, p. 20.
22. Quoted in H. Kochler, *Ethical Aspects of Sanctions in International Law: the Practice of the Sanctions Policy and International Law* (Vienna: International Progress Organisation, 1994), p. 12.

Nor are there any further considerations that can mitigate the clarity of the legal position. Some Western politicians have advanced the argument that the Iraqi government carries the blame for damage inflicted on the civilian population, through its failure to accept the conditions for the lifting of sanctions as laid down by the Security Council. While this may carry some moral logic, it does not affect the legal issue. Signatories to the Geneva Conventions are obliged to respect the conventions "in all circumstances."[23] To make the humanitarian needs of civilians dependent on a government accepting conditions imposed by an outside body (whether a state or an international organisation) would contravene the conventions. The limited humanitarian support that is available through the Oil-for-Food programme, moreover, does not absolve the Security Council from responsibility for the ongoing damage to civilian lives and conditions. The sanctions regime critically restricts the ability of the Iraqi government to regenerate its economy and its basic infrastructure, and it is this factor that sets the framework for civilian suffering.

C. Human Rights Law

International human rights legislation has been described as developing through three phases or "generations", those of civil and political rights, social and economic rights, and national and communal rights. O'Donnell characterises these generations as follows:

> First generation rights comprise civil and political rights, which are now at the core of most human rights treaty regimes. Examples would be: right to life; abolition of slavery; right to a fair trial; prohibition of torture and the right to recognition before the law. These tend to have the strongest and least flexible enforcement mechanisms. They are fairly "universal" in nature. Second generation rights generally concern rights of social and economic importance. Examples would be the right to work; right to social security; right to an adequate standard of living and the right to education. Because the attainment of social and economic rights depends greatly on the particular social organisation of each state, enforcement mechanisms tend to be more flexible and less powerful than those pertaining to first generation rights. As far as third

23. This is taken from Article 1, which is common to all four of the 1949 convention.

> generation rights are concerned, this notion has emerged since the 1970s. It was supported predominantly by developing states. It would include rights such as: the right to self-determination; the right to development; the right to a protected environment and the right to peace. They pertain more to "people" or groups than to individuals.[24]

In assessing the relevance of human rights legislation to the issue of sanctions, it is important to take note of all three generations of rights. There has been a tendency in the Western world to focus exclusively on civil and political rights and to neglect the inter-relationship between human rights, peace, living conditions and development. This narrowing of the field of human rights may be prejudicial to the interests of people in non-Western countries. A distinction does have to be made, however, between those rights that are peremptory or "non-derogable"–applicable whatever the circumstances (at least in peace-time)–and those that depend on the ability of the responsible authorities to provide the necessary goods and services. Among the non-derogable rights is the right to life (and, by extension, perhaps the right to health), while among the derogable rights are those to social security and to work.

The international legal documents most relevant to the impact of sanctions on populations are the Universal Declaration of Human Rights, 1948 (UDHR); the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (CPPGC); the International Covenant on Civil and Political Rights, 1966 (ICCPR); the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR); and the Convention on the Rights of the Child, 1990 (CPR). Among the rights which have been enshrined in international law through these documents are the right to life (UDHR, art. 3; CPPGC, whole text; and ICCPR, art. 6), the right to health (UDHR, art. 25 by implication; ICESCR, art. 12), the right of children for protection (ICCPR, art. 24; CRC, whole text), the right of people to freely pursue economic developmet (ICESCR, art. 1), the right to freedom from inhuman and degrading treatment (UDHR, art. 5), and the right to an adequate standard of living (ICESCR, art. 11).

While the full range of these rights are relevant to, and should form part of, an assessment of the human rights issues raised by sanctions, nonetheless the emphasis in what follows is more limited. It is on those human

24. O'Donnell, *Iraq and the Proportionality...*, p. 43.

rights to which Western governments themselves attach most significance. If sanctions stand in contravention to such rights, the impact of the legal arguments on the governments that have imposed the sanctions are likely to be strongest. Particular attention will be given to the right to life and the right of children for protection--in both cases non-derogable rights that carry clear obligations and responsibilities.

The right to life has been described by the United Nations Human Rights Committee as "basic to all human rights," and as such is a right from which no derogation is permitted even in times of emergency.[25] The responsibilities that follow from the right to life are wide-ranging. Some writers have sought to restrict the application of this right to such cases as arbitrary deprivation of life through execution, disappearance and torture.[26] This would exclude deprivation of life through the inadequate provision of basic needs such as food and medicines. The Human Rights Committee, however, has asserted the opposite. In its general comment on Article 6 of the ICCPR, the committee noted that the right to life had "too often been narrowly interpreted." The right to life, the committee said, could "not properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures."[27] Segall notes that, according to this view, "a sanctions regime should not deny the population access to the basic and minimum services essential to sustain life."[28] This position, moreover, is supported by the wider framework of human rights legislation. Article 11 of the ICESCR requires that states "recognise the right of everyone to an adequate standard of living...including food, clothing and housing, and to the continuous improvement of living conditions."[29] As Segall argues, "at the very least, the existence of these rights must mean that it is prohibited to deliberately act in a way which actively deprives individuals of food and causes

25. Quoted in A. Segall, "Economic Sanctions: Legal and Policy Constraints," *International Review of the Red Cross*, 836 (1999), p. 783, footnote 34. For a wider discussion of the scope and significance of the right to life, see Ramcharan, B.G. (ed.), *The Right to Life in International Law* (Dordrecht: Martinus Nijhoff, 1985).
26. See Y. Dinstein, "The Right to Life, Physical Integrity and Liberty," in Henkin, L. (ed.), *The International Bill of Human Rights* (New York: Columbia University Press, 1981).
27. Segall, "*Economic Sanctions...*", p. 766.
28. *Ibid.*
29. Quoted in *Ibid.*

hunger and/or starvation."[30] The implications of this for the sanctions regime imposed on Iraq are clear.

The Convention on the Prevention and Punishment of the Crime of Genocide covers a further dimension of the right to life -- in this case a collective right to life. The convention defines genocide in terms of "acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group," and among the acts which are mentioned are "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" (art. 3). The convention applies in times of peace as well as times of war, so there is in this case no dilemma as to whether humanitarian law or human rights law applies.

The large-scale loss of life in Iraq through sanctions clearly does constitute the destruction "in part ... of a national ... group."[31] It may be questioned whether there has indeed been the "intent" which is necessary for the provisions of the convention to apply. Bossuyt, in his working paper for the UN Commission of Human Rights, responds to this as follows:

> The sanctions regime against Iraq has as its clear purpose the deliberate infliction on the Iraqi people of conditions of life (lack of adequate food, medicines etc.) calculated to bring about its physical destruction in whole or in part. It does not matter that this deliberate physical destruction has as its ostensible objective the security of the region. Once clear evidence was available that thousands of civilians were dying and that hundreds of thousands would die in the future as the Security Council continued the sanctions, the deaths were no longer an unintended side-effect–the Security Council was responsible for all known consequences of its actions. The sanctioning bodies cannot be absolved from having the "intent to destroy" the Iraqi people. The United States ambassador to the United Nations in fact admitted this; when questioned whether the half million deaths were "worth it," she replied: "we think the price was worth it."[32]

30. *Ibid.*

31. This theme has been developed in the writings of Geoff Simons. See G. Simons, *The Scourging of Iraq: Sanctions, Law and Natural Justice* (London: Macmillan, 2nd Edition, 1998).

32. United Nations Commission on Human Rights, *Review of Further Developments* ..., para. 72. Denis Halliday, former UN humanitarian coordinator for Iraq, suggests that the only issue is whether the sanctions constitute *de jure* or *de facto* genocide. See Halliday, J., "Economic Sanctions on the People of Iraq: First Degree Murder or Manslaughter," Arab Cause Solidarity Committee (ed.), *International Law and Interventionism*..., pp. 16-18.

The Convention on the Rights of the Child provides an equally strong basis on which to question the international legality of comprehensive economic sanctions. It has been signed by more states than any of the other human rights conventions or covenants.[33] It was preceded by the Declaration of the Rights of the Child, which the UN General Assembly adopted under Resolution 1386. The latter provided that children should enjoy special protection and that "by law and other means" they "should be able to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity" (principle 2).[34] The convention recognises that every child has "the inherent right to life," and requires that all states signatories "ensure to the maximum extent possible the survival and development of the child," and "take appropriate measures to diminish infant and child mortality ... (and) combat disease and malnutrition including ... through the provision of adequate nutritious food and clean drinking water." [35]

The implications of this for the case of Iraq are summed up well in a report on sanctions prepared by the New York-based Center for Economic and Social Rights:

> It is hard to think of a more grave breach of child rights in modern history than the suffering and death of hundreds and thousands of children under the age of five caused by a political dispute between 'their' government and the international community.[36]

The critical point is not that children have been among those who have suffered from sanctions, but that (being the most vulnerable part of society) they have suffered more than the rest. Almost one-half of those who have died from the poor nutrition and health conditions stemming from sanctions have been under five years of age.[37] Monthly figures for deaths of children under five from the most serious conditions provide some explanation of how this has come about. Comparing February 2000 with

33. While the US delegation which participated in the preparation of the convention approved the text, it has as yet not been signed by the US government. The only other member state of the UN not to have signed the convention at the time of this writing is Somalia.
34. Quoted from the resolution as given in O'Donnell, *Iraq and the Proportionality...*, p. 47.
35. *Ibid.*
36. Center for Economic and Social Rights, *Unsanctioned Suffering...*, p.37.
37. Niblock, *'Pariah States' and Sanctions...*, pp. 145-6.

February 1989, deaths of children under five from diarrhoea were 1,224% higher, deaths from pneumonia and respiratory diseases 1,800% higher, and deaths from malnutrition 2,623% higher.[38]

4. Conclusion and Assessment

It has been shown above that there are indeed both procedural and substantive grounds for the regime of comprehensive economic sanctions on Iraq to be deemed in contravention of international law. The grounds cover all three of the possible dimensions: the provisions of the UN Charter, of humanitarian law, and of human rights law.

It has also been suggested, however, that the attempt to contest the sanctions regime on grounds of international law faces one major obstacle: there is at present no recognised legal channel whereby measures taken by the Security Council can be contested. The permanent members of the Security Council, moreover, can (and do) maintain that the Security Council has unfettered power in the imposition of sanctions. They point out that article 41 of the UN Charter, which empowers the Council to impose sanctions, sets no restrictions on the imposition (provided a threat to peace exists, and the purpose of sanctions is to maintain or restore international peace and security).[39] The article simply states: "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." Article 103 of the charter, moreover, provides that "the obligations of Members of the United Nations under the Charter prevail over conflicting obligations under any other international agreement."[40] While these provisions can be contested on the basis of other provisions of the UN Charter and of the wider body of international law, as shown above, there is no legal body that can impose an independent interpretation on the Council. The

38. Figures provided to the writer by the Ministry of Health, Baghdad, March 2000. The figures were produced in conjunction with UNICEF.

39. See Segall, *Economic Sanctions...*, pp. 1-2.

40. It is important to note that the article refers to "any other international agreement," and does not cover obligations under customary international law. It is contended by Segall that "many of the obligations under human rights and humanitarian law treaties should now be regarded as forming part of customary international law." Segall, *Economic Sanctions...*, footnote 4, p. 9.

International Court of Justice, under Article 34 of its statute, can only adjudicate on cases where states are parties to the dispute.[41] Cases involving international organisations, therefore, cannot be brought before the Court.

While no state can bring a case against the Security Council in the International Court of Justice, a case could be brought against those states that have instigated a particular Security Council resolution. The ICJ's ability to handle such a case, however, remains at present unclear. In February 1998, the Court took a decision which suggested that it could indeed play a role. It rejected the arguments of the US and the UK that it had no jurisdiction to hear a case brought by the Libyan government, which was contending that those accused of the Lockerbie PanAm bombing should be tried under the provisions of the Montreal Convention, and not those of Security Council Resolutions 731, 748 and 883.[42] The substance of the case, however, was never heard. In August 1998 the US and UK put forward new proposals for the resolution of the Lockerbie issue, which the Libyan government accepted.

The difficulty of finding a legal channel through which sanctions can be contested, however, should not necessarily lead to the abandonment of the international legal critique of comprehensive economic sanctions. At the least, the critique does undermine the perceived legitimacy of the measures which have been taken. This can have two positive effects. On the one hand, it may help to persuade the members of the Council to avoid such measures in the future. On the other hand, it may encourage the search for more appropriate means to handle the case of Iraq. To some extent the latter has already happened, through the move away from comprehensive sanctions towards a "smarter" form of sanctions. Yet the latter move itself is inadequate: it fails to take account of the acute need for regeneration in Iraq, caused by ten years of comprehensive sanctions. Any restrictions on development, outside of those relating to the acquisition of weaponry, impede the ability of the country to recover.

The human rights considerations, moreover, do need to come in on both sides of the argument. For as long as the Iraqi government itself lacks

41. See O'Donnell, *Iraq and the Proportionality...*, p. 55. International organisations do, nonetheless, have the right to ask the ICJ for advisory opinions.
42. See Niblock, *"Pariah States" and Sanctions...*, pp. 45-6.

regard for the civil and political rights of its citizens, the ability to contest sanctions policy on international human rights grounds will be limited. It will fail to attract the popular support needed to bring pressure on the governments that have orchestrated sanctions.

If the Security Council had chosen to include human rights conditions in Resolution 687, rather than unrealistic obligations for reparations, there would have been a stronger basis on which the Council could have claimed the moral high ground. Nor would this have necessarily been unacceptable to the Iraqi side. In mid-1991, the Iraqi government was itself seeking to find a new political basis for the regime, had opened talks with the Kurdish leaders, and had announced that Iraq was moving towards democratisation.[43] It had also accepted the establishment of UN Humanitarian Centres on its territory, knowing that this opened the way to wider international involvement with humanitarian and human rights issues in the country. No doubt there were tactical reasons why the Iraqi government adopted this approach at the time, but a positive reaction to the approach, within a framework where the United Nations was specifically empowered to work with the Iraqi government in promoting human and political rights, could have enabled some progress to be made. In practice, the impact of comprehensive economic sanctions took developments in the opposite direction ■

43. Parts of the text of this paragraph are taken from the conclusions on the Iraqi case in the writer's book on sanctions. *Ibid.*, p. 191.

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