
Sanctions and Humanitarian Exemptions: A Practitioner's Commentary

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Abstract

International sanction laws are necessary to provide guidance for coercive actions of a non-military nature directed at governments or groups whose conduct is considered a threat to international security. Humanitarian exemptions must be an inherent part of such laws so as to protect the innocent from repercussions of sanctions inconsistent with the International Bill of Human Rights and other humanitarian law. This article, using sanctions against Iraq as an example, questions the adequacy of the existing legal and procedural framework in ensuring such protection. It points to the intangibility of the relevant body of law as well as its jurisdictional limitations. The absence of laws of precedent and defined standards has facilitated arbitrary application. Imprecisely formulated United Nations resolutions and the lack of ongoing monitoring of the impact of sanctions on the human condition have further encouraged a subjective and punishment-oriented approach. Taking into account the articles by Craven and O'Connell in this symposium, this commentary outlines safeguards which must be built into sanction regimes in order to ensure that international law is applied for the protection of the civilian population while coercive action is taken to force perpetrators to comply with international norms of behaviour.

'We find it difficult, however, to believe that there will be a case in the future where the UN would be justified in imposing comprehensive economic sanctions on a country.'

Second Report, *The Future of Sanctions*
International Development Committee,
UK House of Commons, 27 January 2000

A legal discussion of sanctions as implemented against Iraq must take account of two well-documented facts:

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- (1) The human condition in Iraq is in a precarious state. The papers by Matthew Craven and Mary Ellen O'Connell acknowledge this reality.¹ Comparative analyses of all sectors of life, before and after the imposition of comprehensive economic sanctions, confirm that Iraq's state of development and quality of life have regressed dramatically.² Before 1990 Iraq was a country with progressive socio-economic indicators for health, education, water and electricity supply and sanitation, and agricultural development. Since 1990, Iraq has become an increasingly impoverished and, in economic and social terms, poorly performing state.³ A global review of child health, for example, shows that Iraq has suffered an increase in child mortality of 160 per cent, the highest of all 188 countries reviewed for the 1990–1999 period.⁴
- (2) Out of a total of \$44.4 billion of oil revenue earned by Iraq from 16 December 1996, when the oil-for-food programme was initiated, to 13 July 2001, the most recent date for which the UN has produced aggregate data, only \$13.5 billion worth of humanitarian supplies actually arrived in Iraq. This amounts to \$119.70 as the total value of civilian commodities which were made available per capita/per year through the oil-for-food programme.⁵

These two facts can only lead to one conclusion: humanitarian exemptions, as in the case of Iraq, have not adequately protected the population from the impact of comprehensive economic sanctions. Neither of these two papers suggests that, as a consequence, economic sanctions should be abolished as an instrument of coercive action. The authors rightly accept that threats to peace, breaches of peace or acts of aggression are part of a global reality and that the community of nations therefore requires provisions such as those contained in Chapter VII of the UN Charter.

This assumption leads to a series of fundamental observations on the adequacy of the existing international legal framework and the corollary regulatory support created for the protection of civilian populations in countries subjected to sanctions. A review of 11 years of economic sanctions against Iraq provides the information necessary for a critical assessment. The 'routinization' in the use of sanctions as a tool for the maintenance of collective security, to which Craven refers, makes such an assessment urgent.

Article 24(2) of the UN Charter explicitly states that the UN Security Council must discharge its duties 'in accordance with the Purposes and Principles of the United Nations'. The inadequacy of allowable finance for commodity imports, particularly in the first six phases of the oil-for-food programme (1996–1999), the disjointed delivery of humanitarian supplies, frequently aggravated by the Security Council's withholding of ordered items and the refusal by the Security Council to allow oil revenue for

¹ Craven, 'Humanitarianism and the Quest for Smarter Sanctions', this issue, at 43; O'Connell, 'Debating the Law of Sanctions', this issue, at 63.

² See Annual Reports by the International Committee of the Red Cross, CARE, CARITAS, Save the Children–UK, UNICEF, World Health Organization and World Food Programme.

³ Graf Sponeck, 'Iraq', in *Das Friedensgutachten* (2001) 162.

⁴ UNICEF, *The State of the World's Children* (2001).

⁵ See UN, Office of the Iraq Programme, *Weekly Update*, 7–13 July 2001.

recurrent cost financing to maintain Iraq as a nation, have led *inter alia* to severe infringements on the rights of Iraqis to life, health, food and work as provided by the International Covenant on Social, Economic and Cultural Rights.

It would seem that the UN Security Council, in the absence of specific jurisdictional clauses in this International Covenant, is already answerable for its acts to individual civilians in Iraq and the international community at large. There are several reasons, however, why this is not happening, with the resulting negative consequences for a population living under sanctions. The academic debate on the concept of responsibility under relevant treaties continues. It is not helpful to try to determine in this debate whether the major causes for civilian deprivation are internal or external to a country. It is a fact that the comprehensive economic sanctions *are* contributing to civilian suffering.

Such suffering has become acceptable to the UN Security Council as 'unavoidable' in the broader interest of global peace and security. Why is it that the sanctions against Iraq are not imposed in such a way that civilian suffering is limited to tolerable economic consequences? Instead, they are extended to all aspects of life in violation of existing international legal instruments of protection. Commentators have noted the 'looseness' and 'intangibility' of UN Charter provisions and those characteristics are indeed major obstacles to objective and controllable sanction implementation. The absence of a common-law approach based on documented precedents and a concise regulatory framework to guide and limit the application of Chapter VII leads to arbitrary application of UN Charter articles such as Articles 24(2) and 55(b) and (c), as O'Connell indicates.

Without a concrete 'red line' demarcation of what represents a threat to peace, breach of peace or act of aggression, a subjective determination that Iraq continues to pose a threat, in accordance with Article 39 of the UN Charter, has prevailed.

Arbitrariness of application and therefore misuse of the UN Security Council's authority are furthermore facilitated by a lack of preciseness in the formulation of sanction objectives and of what constitutes *compliance*. As was noted during the symposium, phrases which are suitably opaque may attract a sufficient consensus. This circumstance has accompanied the Iraq sanction process from the very beginning. Security Council Resolution 687 (1991) and follow-up Resolution 1284 (1999) are both imprecise in their wording of what constitutes compliance: '... Council agreement that Iraq has completed *all its actions contemplated*...' ⁶ and '... Iraq has *cooperated in all respects*...' ⁷ The act of determining that conditions prevail which allow the lifting of sanctions is therefore reduced to a subjective or political decision as distinct from an objective and legal decision. What some members of the Security Council have called 'constructive ambiguity' has in the case of Iraq resulted in a disabling liability for a population that is meant to be protected by international law and rules of procedure.

Craven refers to the linkage established by the UN Security Council of military and

⁶ SC Res. 687 (1991), at para. 22 (emphasis added).

⁷ SC Res. 1284 (1999), at para. 33 (emphasis added).

economic sanctions. While it is correct that both are ‘deployed for the same purpose namely, the intentional infliction of harm upon an opponent’, Craven’s conclusion that therefore ‘maintaining a formal distinction between economic and military measures has little to recommend it’, is not borne out in the case of Iraq. The former, it must be recalled, has an exclusive impact on government, the latter a predominant impact on the civilian population. The assumption behind this linkage was that economic pressure on the population would lead to political change at government level. This has turned out to be a fallacy with significant human costs. O’Connell’s reminder that UN sanctions should focus on the wrongdoer⁸ is relevant here. Using the Iraq case as an important precedent, international law should in future situations strictly delink these two types of coercive measures and apply either of them in a precisely targeted manner, in accordance with Article 41 or 42 of the UN Charter. Targeting, however, does not eliminate altogether the negative impact of sanctions on an innocent population.

Apart from intangible UN Charter provisions and imprecisely formulated sanctions resolutions, there is a third element which prevents the implementation of an objective and controllable sanctions regime. Comprehensive multi-sectoral reviews of the country’s human condition and corresponding needs assessments were not carried out at the start of sanctions against Iraq in 1990, nor have they been instituted since then. Already in 1991, at the time of the Gulf War, various inter-agency missions were dispatched to Iraq,⁹ all for short-term durations. None of them resulted in an integrated programme which could have formed a basis for negotiating a humanitarian exemption programme giving due regard to ‘effectiveness’ and ‘humanity’ with the Iraqi authorities. Instead, the United Nations and the Government of Iraq negotiate distribution plans for each phase of the oil for food programme; these plans, however, are largely void of a dynamic and integrated multi-sectoral approach. The accompanying periodic implementation reports prepared by the UN on the oil for food programme have been restricted to state of supply accounts of in-country arrivals of humanitarian goods, without any analyses of the overall sectoral and national conditions. What must be seen as a fourth shortcoming in economic sanction management is that the United Nations Security Council, in the case of Iraq, has severely neglected its mandatory oversight responsibility. Intermittent reviews, such as that undertaken by the Amorim Panel¹⁰ on humanitarian issues, although important stop-gap measures, cannot be considered as adequate compliance with United Nations obligations of sanction monitoring, nor can the commendable sectoral studies carried out periodically by UNICEF, FAO, WHO and UNDP.

Article 1 of the UN Charter outlines the purposes of the United Nations as maintaining international peace, developing friendly relations among nations and achieving international cooperation. Charter Article 55 specifies that the Security

⁸ O’Connell, *supra* note 1, at 77.

⁹ UN/DPI, *The UN and the Iraq Conflict* (1996), at 36 and 56–61.

¹⁰ Convened in 1999 by the UN Security Council and named after its chairman, Celso L. N. Amorim, Ambassador of Brazil to the UN.

Council must 'promote universal respect for human rights'. This denotes that the United Nations is meant to 1) enhance dialogue, not confrontation, and 2) carry out its policies within the limits prescribed by the Charter. On both counts, the UN Security Council, in the case of Iraq, has chosen to ignore the ethos as well as the general limitations set by the UN Charter. Craven points out that '... if there are such limits, they remain to be adequately articulated'.¹¹

Additionally, a review of the UN Security Council's rules of procedure, as they have been applied over the years in the context of Iraq, shows a remarkable shift from predominantly 'public' meetings in which any member government can participate to 'informal' meetings confined to members of the Security Council. For this reason, the Government of Iraq has rarely had an occasion over the past 10 years to explain its position and defend legitimate interests. Dialogue, as a tool for the pacific settlement of their dispute, has been systematically stymied by individual permanent members of the Security Council.

Craven's conclusion that 'the effect of sanctions is construed less as an argument against sanctions as a practice, and more as an argument as to how sanctions can be improved as a strategic tool'¹² is a significant observation. As has been shown, it is fully borne out by the manner in which the UN Security Council is in fact implementing sanctions against Iraq.

The emphasis in Craven's paper upon the need for the humanization of sanctions and their effective implementation¹³ and O'Connell's suggestion that the right to impose sanctions says nothing about their legality are important reminders for the sanction reform debate. It is within this context that such a discussion must take place. Seen against the background of 11 years of sanctions against Iraq, these two papers assist in the identification of 10 areas in which fundamental groundwork must be carried out. The objective would be to devise safeguards for the protection of civilian populations living in countries under sanctions:

- 1 The law of precedent should become a norm of international sanction law;
- 2 Existing international law, as reflected in the International Bill of Human Rights, the Hague and Geneva Conventions and other binding treaties, must be supplemented with a series of legal interpretations of sanction-related provisions;¹⁴
- 3 Definitions of standards to be followed by the UN Security Council and regional bodies in imposing, maintaining or lifting sanctions must become available. Only then will compliance with standards be possible, as demanded by O'Connell;¹⁵

¹¹ Craven, *supra* note 1, at 53.

¹² Craven, *supra* note 1, at 60.

¹³ *Ibid.* Part I, p.6, para. 3.

¹⁴ E.g., what constitutes a *threat* or *breach of peace*? What kind of sanctions would *violate* Articles 1, 24 and 55 of the Charter? What kind of acts in a sanction regime would constitute a *violation* of Article 50 of the Hague Convention? When are sanctions in violation of Article 23/IV of the Geneva Convention on free access of medical supplies?

¹⁵ O'Connell, *supra* note 1.

- 4 Rules of procedure, particularly with regard to human condition assessment, oversight and dialogue, must be vigorously enforced;
- 5 There must be strict adherence to the provisions of the Geneva Conventions on the free flow of essential goods (food and medicines) into countries under sanctions;
- 6 Comprehensive economic sanctions, given the Iraq experience, should no longer form part of international sanction options and, instead, should be replaced by targeted coercive measures against perpetrators of human rights and international law violations;¹⁶
- 7 A detailed sanction termination procedure must be identified;
- 8 Existing international law should be amended to ensure that jurisdictional and territorial considerations constitute no barriers for application;
- 9 At present, the UN Security Council's mandate includes both 'legislative' and 'executive' functions. A review should take place with some urgency to determine whether this constitutes a conflict of interest;
- 10 The UN Security Council is not beyond international law. The International Court of Justice (ICJ), in accordance with Article 36 of its Statute, should be considered as the arbiter in all cases where legal disputes arise between the UN Security Council and a country under sanctions.

Adoption of a common-law approach, the definition of standards, the recorded interpretation of general international law, adherence to existing procedures, the abolition of comprehensive economic sanctions in favour of targeted coercive action and the confirmation of the UN Security Council's accountability constitute a formidable list for fundamental reforms. Such reforms are preconditions for an *objective* and *humanized* implementation of sanctions in the future. The International Court of Justice and the UN Human Rights Commission would have to play a leading role in guiding the sanction discussion in this direction.

The adoption of such an approach would also make it more difficult for the right of veto to be misused and would enhance the prospect that 'sanctions reflect the objectives of the international community, not just the national interests of its most powerful members'.¹⁷ Furthermore, it would protect against the arbitrary use of selective and often no more than anecdotal information. In the case of Iraq, such 'tampered' information has been effectively deployed by protagonists, including the media, and has had serious consequences for objective analysis and ultimately for the welfare of the Iraqi population. These proposed reforms would also allow United Nations civil servants, both at UN headquarters and in the field, to continuously feed relevant empirical data into the political process in accordance with agreed standards

¹⁶ A paper submitted by Prof. Marc Bossuyt to the UN Human Rights Commission (E/CN.4/Sub.2/2000/33, 21 June 2000) identifies a six-prong test to evaluate sanctions, which should form part of any future sanction methodology.

¹⁷ L. Axworthy, as former Minister of Foreign Affairs of Canada, 'Foreword', in D. Cortright and G. A. Lopez, *The Sanctions Decade* (2000).

and rules of procedure, thereby fulfilling the UN's mandate as an honest broker. This, under present circumstances, is not possible.

The state of the human condition in today's Iraq must be seen as a powerful reminder of the urgency of legal and procedural reform of sanctions as an international tool intended to combat abuse without abusing. The issues raised in the two papers by Craven and O'Connell provide important contributions in this respect.