Collective Economic Sanctions and International Humanitarian Law

An Enforcement Measure under the United Nations Charter and the Right of Civilians to Immunity: an Unavoidable Clash of Policy Goals?

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It is a commonplace to state that the credibility and hence the effectiveness of a rule of law depend on the mechanisms and procedures available to ensure respect for it. This is particularly true for public international law, with its sometimes poor record of compliance. And it is even more true for international humanitarian law, which becomes applicable and must be respected in time of armed conflict.[1] Yet violations of international humanitarian law generally mean loss of innocent lives, immense suffering and mindless destruction. When a party to an armed conflict – its ruling elite, its armed forces, its police or anyone else – breaks the law and seriously disregards basic international obligations of a humanitarian nature, the international community ought to react.[2] The high visibility of

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1 It is always refreshing to remember Sir Hersch Lauterpacht's famous remark: "[I]f international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law." H. Lauterpacht, The Problem of the Revision of the Law of War, British Year Book of International Law 29 (1952), 360, 381.

2 See the paradigmatic wording of Article 1 common to the four Geneva Conventions and to Additional Protocol I: "The High Contracting Parties undertake to respect and to

such human tragedies may put added pressure on governments and diplomats "to do something" to stop the unlawful behaviour.

Schachter wrote that "[it] is hard to think of a subject of international law more complex and nuanced than enforcement and compliance".[3] Bearing in mind this invitation to caution, we propose to examine the impact of international humanitarian law on one of the various enforcement measures available to the Security Council in the course of an armed conflict, i.e. collective economic sanctions. By "international humanitarian law" we mean those rules of international law applicable in armed conflict which are specifically intended to solve humanitarian problems caused by warfare. In order to spare the lives and well-being of those who are not or are no longer participating in military operations, in particular the civilian population, they limit the right of parties to an armed conflict to inflict harm on the enemy, or to attack or destroy objects and property of a non-military character.[4]

I. The Problem

Economic sanctions figure among the measures not involving the use of military force which the Security Council may take, under Chapter VII of the United Nations Charter, against a State to give effect to measures decided "to maintain or restore international peace and security".[5] Since

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ensure respect for the present [Convention][Protocol] in all circumstances". – Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949, 6 UST 3114, 75 UNTS 31 ("First Geneva Convention"); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949, 6 UST 3217, 75 UNTS 85 ("Second Geneva Convention"); Convention Relative to the Treatment of Prisoners of War, of 12 August 1949, 6 UST 3316, 75 UNTS 135 ("Third Geneva Convention"); and Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 UST 3516, 75 UNTS 287 ("Fourth Geneva Convention"). Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, 1125 UNTS 3, reprinted in 16 ILM 1391. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, reprinted in 16 ILM 1442, does not include the idea of collective responsibility in its own Article 1, but as Protocol II is additional to the 1949 Geneva Conventions, Article 1 of the latter also applies to the new rules of Protocol II.

[3] O. Schachter, United Nations Law, AJIL 88 (1994), 1, 10.

[4] See the definition used by the ICRC in Y. Sandoz/C. Swinarski/B. Zimmermann (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva 1987), XXVII.

[5] UN Charter, Article 41.

the end of the Cold War and the revival of the Security Council's role in the system of international security, economic sanctions have assumed increasing importance. Yet when deciding to impose economic sanctions upon a State, the Security Council does not operate in a legal vacuum. The purpose of this article is to examine the limits established by international humanitarian law which any decision involving collective economic sanctions must take into account.

We will confine our analysis to economic sanctions decided in the context of an armed conflict. The question as to whether and how far economic sanctions in peacetime have to abide by standards established by international human rights law will not be systematically pursued.[6] Furthermore, economic sanctions taken individually by one State against another as means of pressure or as economic countermeasures will not be examined. The study is limited to collective sanctions decided by the Security Council under Chapter VII of the UN Charter and concentrates on problems relating to implementation of collective economic sanctions. These lines are also not intended as a discussion of the legality or the wisdom of individual Security Council decisions imposing economic sanctions in a particular situation.

A meaningful study of a doctrinal issue in law should always begin with an assessment of the facts. In our context, the pertinent questions would be as follows: Have collective economic sanctions against a party to an armed conflict achieved the desired end, which is "to maintain or restore international peace and security"? Is a comprehensive ban on trade and financial transactions a suitable and effective instrument to induce the government of the embargoed country to change its behaviour in the intended way, and within a reasonable time? Do sanctions work? – It seems that up to now hardly anybody has dared give a straightforward answer to those questions, either by way of a general conclusion or as the result of an evaluation of particular situations.[7] Yet the UN Secretary-General's

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[6] Examples of economic sanctions decided outside an armed conflict: those imposed on South Africa during the apartheid years and on Haiti to enable President Aristide to return. See N. Schrijver, The Use of Economic Sanctions by the UN Security Council: an International Law Perspective, in: H.H.G. Post (ed.), International Economic Law and Armed Conflict (Dordrecht/Boston/London 1994), 131 and 141 respectively.

[7] Among recent publications see in particular L. Fisler Damrosch, The Civilian Impact of Economic Sanctions, in: L. Fisler Damrosch (ed.), Enforcing Restraint, Collective Intervention in Internal Conflicts (New York 1993), 274, 306. The author asks for a principled approach which includes moral concern for the civilians potentially affected by the economic sanctions. W.M. Reisman, The Utility and Lawfulness of Economic Sanctions: Time for a Reappraisal, Proceedings of the 1995 Annual Meeting of the American

description of economic sanctions as a "blunt instrument" reveals an ill-disguised uneasiness about an otherwise generally accepted mechanism to enforce collective decisions.[8] And comparing costs and results of economic sanctions from a humanitarian perspective, non-governmental humanitarian organizations tend to give a negative answer to the question of their effectiveness.[9]

It is not the purpose of this study to examine the effectiveness or the "success" of economic sanctions. However, whatever views are held on this question, one conclusion seems to be uncontested, namely that the civilian population of the country against which economic sanctions are being enforced is always the primary victim of such a measure. Among the civilian population, the most vulnerable groups obviously suffer the greatest hardship: children, women supporting a family, the elderly, the sick, the handicapped and the poor. There seems to be general agreement that although the purpose of economic sanctions may never be punishment, even less (collective) punishment of the civilian population at large,[10] their impact on individuals quite often ultimately bears a close resemblance to it.

Collectively enforced economic sanctions, particularly those in effect for a lengthy period of time, not only impair or even cripple the economy and make individuals suffer, they also affect or even destroy the fabric of society in the embargoed country. Pervasive corruption, black market, rising crime rates, the discrediting of existing elites, or unjustified changes in economic activity very often result from a sanctions regime, or are reinforced by such measures. Unscrupulous individuals may make huge profits by illegally bypassing the sanctions. To speak of mere "regrettable side-effects" of sanctions is inadequate in view of the severe and lasting negative impact on civil society. Such negative effects on the civilian population are of course intended by those who impose economic sanctions. To the latter's mind, the purpose of such sanctions is to induce a govern-

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Society of International Law (forthcoming). See also the paper prepared by Australia and the Netherlands and submitted to the Working Group of the General Assembly on An Agenda for Peace and entitled "United Nations sanctions as a tool of peaceful settlements of disputes", also distributed as UN Doc. A/50/322 of 3 August 1995.

[8] Supplement to An Agenda for Peace, UN Doc. A/50/60 and S/1995/1 of 3 January 1995, para. 70, also published by the UN as An Agenda for Peace (2nd ed. 1995).

[9] For a case-by-case analysis of the impact of economic sanctions on the civilian population see in particular: International Federation of Red Cross and Red Crescent Societies (ed.), World Disaster Report 1995 (1995), 19 – 27.

[10] For an authoritative statement see Supplement to An Agenda for Peace, *supra* note 8, para. 66.

ment to comply with Security Council decisions and to change its course. True, if and when the government has accepted what it is expected to do, the sanctions will be abolished. Yet no analysis of the impact of economic sanctions will fail to reveal their long-term effects on the society of the embargoed country. Obviously, such effects will not automatically disappear at the end of the sanctions regime.

Economic sanctions against a State often have a negative impact on third parties as well, primarily the neighbouring States of the embargoed country. When commercial transactions with the latter are forcibly interrupted, existing trade flows will be diverted. Not only will the private sector of the economy be affected, but public finance will also suffer because, for example, revenues derived from trade, such as tariffs, will decline. Furthermore, their nationals working in the embargoed country may lose their jobs and become a burden for their State of origin. In its Article 50, the UN Charter has acknowledged the possibility of such negative effects on other countries of measures taken in the name of collective security, and recognizes the legitimacy of claims by affected third States. And in his An Agenda for Peace, the Secretary-General invited governments to examine the problems and to devise practical solutions.[11] In its 1995 session, the General Assembly adopted a resolution under the heading "Implementation of Charter provisions related to assistance to third States affected by the application of sanctions", without, however, going much beyond an appeal to all States members of the United Nations and to concerned international organisations to take into account the special problems caused by economic sanctions to third States.[12] On the other hand, the very diversion of trade flows caused by economic sanctions may also give rise to huge profits and enrich at least parts of the society of such neighbouring countries. The effects of such sanctions on third States and the questions involved will not, however, be pursued in this article.[13]

Having acknowledged that negative effects of collective economic sanctions on the civilian population of the embargoed country cannot be avoided, and that such negative effects are inherent in collective economic sanctions, we intend to examine the following questions:

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[11] An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping, Report of the Secretary-General of 31 January 1992, para. 41, UN doc. A/47/277-S/24111, also published by the UN as An Agenda for Peace (2nd ed. 1995). See also *supra* note 8, paras. 73 – 75, and the Australian and Dutch Working Paper, *supra* note 7, at 30.

[12] UN GA RES/50/51, of 11 December 1995, with reference to the Secretary General's Report on the matter, UN doc. A/50/361.

[13] See e.g. Schrijver, *supra* note 6, at 148.

– Which provisions of international humanitarian law must be taken into account when collective economic sanctions are decided against a State?

– What can be done to reconcile the obvious conflict in values: the interest of the international community in the enforcement of a decision taken under Chapter VII of the UN Charter *versus* humanitarian concerns for the civilian population of the targeted State?

Throughout this study it must be borne in mind that, in the course of an armed conflict, imposing economic sanctions is, as a rule, a more lenient alternative to the actual use of military force against the recalcitrant State, a substitute for hostile military action.

II. Economic Sanctions, Economic Warfare and Economic Countermeasures

The term economic sanctions denotes measures not including the use of military force and taken individually or collectively by States to put pressure on an individual State (the targeted or embargoed State), with a view to inducing the authorities of that State to adopt a specified course of action.[14] Economic sanctions may limit or altogether suspend the import and export of certain commodities, freeze assets held abroad, suspend international financial transactions, or sever lines of communication, to the detriment of that State and its residents, in particular its political leaders. Economic sanctions may be decided in peacetime by one country against another. Such measures are bilateral in nature and are better known as economic countermeasures.[15] Unless excluded by the law applicable to the two States concerned, such countermeasures are perfectly legal.[16] On the other hand, if economic sanctions are part of the war effort against the enemy, the term economic warfare is often used.[17] Finally, economic sanctions may also be a measure taken within the context of a collective security system, in particular the United Nations: these are collective economic sanctions.

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[14] During the civil war in Angola, the Security Council decided to impose economic sanctions not on a government but on an insurgent movement, UNITA – an unprecedented move, SC Res. 864 (1993).

[15] L. Boisson de Chazournes, Economic Countermeasures, Proceedings of the 1995 Annual Meeting of the American Society of International Law (forthcoming).

[16] However, a full-fledged blockade may become an act of aggression as defined by the UN General Assembly in its resolution 3314 (XXIX), Article 3 (c) of the Annex.

[17] K. Zemanek, Economic Warfare, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, vol. II (Amsterdam [etc.] 1995), 38.

From time immemorial, belligerents have tried to weaken the enemy's military strength also by attacking its economy. In an armed conflict, attacks on the armed forces' means of sustenance have always been, and still are, a legitimate means of bringing the adversary to its knees. Such measures are lawful if they comply with two criteria: they must be in accordance with relevant rules of international humanitarian law, including the rule of proportionality, and they must not harm legitimate interests of third (neutral) States. But modern *ius in bello* as codified by the 1977 Additional Protocol I severely restricts the scope of permissible warfare against the enemy's civilian economy. Thus, attacks against the civilian infrastructure and its destruction are as such unlawful.[18]

In the past, economic warfare usually took the form of an interdiction of any form of trade by sea. If such interdiction is extended to commercial transactions between the enemy and neutral countries, the term blockade is used. Whereas at first blockades exclusively affected maritime commerce, they were later extended to the transport of goods by aircraft. Blockades have always been considered a lawful means of warfare, although the interests of neutral States are adversely affected by such action. International law accepts this and attempts to accommodate the interests of the blockading party and those of the adversely affected neutral country. Thus, for a blockade to be lawful, the decision must have been duly declared and notified to all maritime powers. The blockade must be effective, i.e. the blockading State must be in a position to enforce the measure, at sea and in the air.[19]

History offers some well-known examples of blockades.[20] It seems that the blockade of the ports of Flanders by the Dutch fleet toward the end of the sixteenth century was the first systematic attempt to cut off all commercial transactions between an enemy and other powers. During the seventeenth and eighteenth centuries Europe experienced blockades in many different wars. The effects of the maritime blockade declared by

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[18] See in particular Protocol I, Articles 52 and 54.

[19] Oppenheim/Lauterpacht, International Law, A Treatise, vol. II (7 th ed. London 1952), 774. – See also a recent restatement of the contemporary law applicable to armed conflicts at sea: International Institute of Humanitarian Law, San Remo Manual on International Law Applicable to Armed Conflicts at Sea, L. Doswald-Beck (ed.) (Cambridge 1995), text with explanations by a team of experts in the law of naval warfare. See in particular Part IV Section II, Methods of warfare: Blockade, rules 93 –104, with commentary, pp. 176 –180.

[20] L. Weber, Blockade, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, vol. I (Amsterdam [etc.] 1992), 408.

Great Britain in its war against Napoleon's armies were felt in many countries of continental Europe. A blockade was also an important factor in the outcome of the American Civil War. World Wars I and II saw acts of economic warfare, including blockades, on a very broad scale. World War II is a particularly striking example of a situation where economic warfare against the enemy took place concurrently with a blockade affecting neutral countries. The distinction between the two measures thus became blurred.

Economic warfare against Germany and Japan was not only decided upon but also implemented by the same group of States which after the end of World War II established the United Nations. The Charter of 1945 fundamentally changed the framework of international relations. Nation States became part of a multilateral system of rights and duties, and their way of coexisting with each other was no longer the same. Economic sanctions also underwent a change which affected their purpose and, in particular, the way they could be established. They became an instrument for the enforcement of collective decisions, designed to redress a wrong committed by a State against the community of nations.[21]

III. Economic Sanctions as a Collective Measure of Coercion

According to Article 24 of the United Nations Charter, the Security Council bears primary responsibility "for the maintenance of international peace and security". In the event of any threat to the peace, breach of the peace, or act of aggression, the Council may decide on measures to maintain or restore international peace and security (Article 39). In order to give effect to its decisions, the Council may resort to "measures not involving the use of armed force" (Article 41). If such measures prove to be inadequate, it may take "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security", including the use of armed force (Article 42). Economic sanctions belong to the first category of measures defined by Chapter VII of the Charter, i.e. measures not involving the use of force, which are designed to avoid the use of armed force or to stop ongoing violence. In the words of

[21] Article 16 of the Covenant of the League of Nations already provided for the possibility of imposing economic sanctions on an aggressor State. But they were limited in scope and not mandatory. Economic sanctions were decided against Italy, in response to the attack on Abyssinia – not very successfully! See Schrijver, *supra* note 6, 126.

Zemanek, imposing economic sanctions is the use of "economic force in the interest of maintaining international peace and security".[22]

In particular, Article 41 of the United Nations Charter refers to "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication", thus underlining the close links between sanctions directly affecting the economy and interference with means of international communication. The list also makes it clear that sanctions may vary in scope. The Security Council is, however, not bound by the enumeration in Article 41 and may resort to other types of sanctions. Depending on the gravity of the situation, the Security Council may select one or more economic activities as targets for sanctions, thereby fine-tuning the pressure on the targeted country. These are selective economic sanctions. Comprehensive economic sanctions are another possibility open to the Security Council to force a State to comply with the international legal order; they are certainly the most far-reaching and extreme measure short of the use of armed force.

It might be useful to recall that economic sanctions as a means of collective coercion may be imposed only when the Security Council has formally determined "the existence of any threat to the peace, breach of the peace, or act of aggression."[23] The Security Council has no authority to impose economic sanctions in other situations. In particular, Chapter VI of the Charter, with its various means and procedures for the pacific settlement of disputes between States, such as mediation, arbitration or judicial settlement,[24] does not mention economic sanctions. In accordance with Chapter VIII of the UN Charter and with the authorization of the Security Council, regional organizations may also decide to impose collective economic sanctions upon one of their members.[25] The considerations set out below also apply *mutatis mutandis* to measures taken at the regional level.

Besides the conditions set out in Chapter VII, international law includes several other safeguards and constraints which are particularly relevant to decisions on collective economic sanctions. The Security Council must give due consideration to them when introducing such sanctions

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[22] *Supra* note 17, at 39.

[23] UN Charter, Article 39. All Security Council resolutions on economic sanctions refer specifically to Chapter VII.

[24] UN Charter, Article 33.

[25] UN Charter, Articles 52 – 54.

against a State or a group of States. These legal limits to economic sanctions will now be examined.

IV. Limits to Economic Sanctions in International Law

1. Like any other measure decided by the Security Council, a decision imposing economic sanctions on a State must be "in accordance with the Purposes and Principles of the United Nations", as set out in Articles 1 and 2 of the Charter.[26] This is not the place for detailed examination of these provisions. Suffice it to say that promoting and encouraging respect for human rights and fundamental freedoms are among the UN's purposes and primary tasks.[27] Any decision on economic sanctions must therefore necessarily take human rights into account. While the Universal Declaration of Human Rights no doubt provides the general yardstick for determining the main content of applicable human rights law, the more specific obligations codified by treaty law must also be borne in mind. With respect to economic sanctions decided in the course of an armed conflict, specific rules are to be found primarily in the four Geneva Conventions of 1949, their Additional Protocols of 1977, and relevant customary law. The said Conventions extensively codify what have also been called "human rights in armed conflicts".[28] The promotion of those rights is unquestionably one of the tasks of the United Nations.[29]

2. On the other hand, it follows from Articles 25 and 103 of the Charter that a Security Council decision of a binding nature prevails over obligations of a member State under international treaty law,[30] i.e. not only obligations arising out of a bilateral treaty between the State called upon to respect an embargo and the embargoed State, but also multilateral

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[26] UN Charter, Article 24, para. 2, referring to Articles 1 and 2 of the Charter: "Purposes and Principles".

[27] UN Charter, Articles 1, para. 3, and 55 c).

[28] UN GA Res. 2444 (XXIII) of 19 December 1968: "Respect for Human Rights in Armed Conflicts".

[29] On the relationship between the "human rights-oriented" United Nations and international humanitarian law, see the proceedings of the International Symposium on the occasion of the fiftieth anniversary of the United Nations (Geneva 1995), L. Condorelli (ed.), Les Nations Unies et le droit international humanitaire/The United Nations and International Humanitarian Law (Paris 1996).

[30] *Lockerbie* case, Order of 14 April 1992, ICJ Reports (1992), 316. See V. Gowland-Debbas, The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie case, AJIL 88 (1994), 643, 667; B. Simma (ed.), The Charter of the United Nations, A Commentary, Article 103 (by R. Bernhardt) (1995), 1118.

agreements to which member States are party. This certainly does not mean that the Security Council is above the law. Entrusted as it is by Article 24 of the Charter with primary responsibility for the maintenance of international peace and security, it obviously does not have any discretionary right to disregard one of the very foundations of a peaceful international order: the rule of law. And the Council certainly has no interest in doing so.

Article 103 makes it clear that there is also no way for the Security Council to disregard international obligations other than those enshrined in international treaties, i.e. general principles of law or customary law. Moreover, it may safely be argued that the Council may not infringe upon treaty obligations which protect basic rights of the individual, in peacetime or during armed conflict. Whether called "elementary considerations of humanity",[31] "obligations *erga omnes*",[32] "fundamental general principles of humanitarian law"[33] or "minimum standards" which cannot be derogated from,[34] or whether considered as peremptory norms (*jus cogens*),[35] as rights which cannot be waived by the beneficiary[36] or by his/her power of origin,[37] or as part of a treaty with a limited right of denunciation,[38] the doctrinal qualification of such basic rules does not matter at this point. The important thing is to recognize that there are absolutely binding legal obligations which tie the hands not only of States individually but also of the Security Council.

True, the content of such minimum standard or "hard-core" provisions of international law is not defined in every detail, and there is no ready-

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[31] *Corfu Channel*, Merits, ICJ Reports (1949), 22.

[32] *Barcelona Traction*, Judgment, ICJ Reports (1970), 32. See D. Schindler, Die erga-omnes Wirkung des humanitären Völkerrechts, in: U. Beyerlin [et al.] (eds.), Recht zwischen Umbruch und Bewahrung, Festschrift für Rudolf Bernhardt (Heidelberg 1995), 199.

[33] *Case concerning Military and Paramilitary Activities in and against Nicaragua*, Judgment, ICJ Reports (1986), 113.

[34] Declaration of Minimum Humanitarian Standards, of 2 December 1990 ("Turku Declaration"), prepared by a group of experts and published by the Institute for Human Rights (Turku/Abo 1990). Reprinted in AJIL 85 (1991), 377–381, and as UN doc. E/CN.4/1995/116.

[35] Vienna Convention on the Law of Treaties, of 23 May 1969, Article 53, 1155 UNTS 331. See T. Meron, Human Rights and Humanitarian Norms as Customary Law (Oxford 1989), 220–222.

[36] 1949 Geneva Conventions I-IV, *supra* note 2, common Articles 7/7/7/8 respectively.

[37] In the case of belligerent occupation. See Fourth Geneva Convention, *supra* note 2, Article 47.

[38] Vienna Convention on the Law of Treaties, *supra* note 35, Article 60, para. 5; and 1949 Geneva Conventions I-IV, common Articles 63/62/142/158 respectively.

made list of all relevant provisions available. However, the prohibition of direct military operations of any kind, including the weapon of hunger, against the civilian population as such is no doubt covered by that "minimum yardstick".[39] If starvation of the civilian population is out of bounds for parties to an armed conflict, the provisions of the Geneva Conventions and their Additional Protocols on relief actions for the benefit of specially vulnerable groups threatened by starvation also belong to that category of absolutely binding obligations. Rejecting hunger as a weapon of warfare also means the commitment to undertake relief operations for persons threatened by starvation, or at least to allow and to facilitate such operations.[40] A Security Council resolution on economic sanctions must heed those limits.

3. Any decision of the Security Council imposing economic sanctions must abide by one of the basic principles of international law: proportionality.[41] Proportionality is of course a yardstick applicable to the whole system of international law, and indeed to any legal order whatsoever. In the context of economic sanctions, that principle means that a careful balance must be struck between the conflicting interests involved in the issue, i.e. the interest of the international community in attaining the (legitimate) goal of such sanctions on the one hand, and the interest in avoiding unacceptable harm to the civilian population of the targeted State on the other. The question to be asked is: does the goal of economic sanctions justify the costs in humanitarian terms? If the expected (negative) impact on the targeted State, in particular its civilian population, appears to be excessive in relation to the importance of the goal which the sanctions may reasonably be expected to achieve, alternative measures must be taken into consideration.

4. Circumstances in the targeted country change, not least because of the impact of the sanctions. Serious harm to the civilian population usually appears only after a certain time has elapsed. Therefore, the Security Council must periodically review the measures decided against the targeted country, as long as economic sanctions continue to be in force. In particular, examining the proportionality of the measures taken is a permanent task of the Security Council. Sanctions should continue only as long as they appear to be necessary, appropriate and proportionate.

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[39] In the words of the ICJ, *supra* note 33, at 104.

[40] See D. Schindler, Humanitarian Assistance, Humanitarian Interference and International Law, in: R.St.J. Macdonald (ed.), Essays in Honour of Wang Tieya (The Hague 1993), 689 – 701.

[41] J. Delbrück, Proportionality, in: Bernhardt, *supra* note 17, Inst. 7 (1984), 396.

5. The purpose of economic sanctions is to modify the behaviour of those in charge of the targeted State. The Security Council's embargo resolution must clearly define that purpose. Punishment is not a legitimate goal.

6. What is the situation if the Security Council oversteps the line and its sanction decision contravenes absolutely binding limits? At first sight, States are duty bound to comply with any decision the Security Council may take under Chapter VII of the Charter, including the imposing of economic sanctions.[42] This holds true even if that decision contravenes international obligations which the State is called upon to respect vis-à-vis the embargoed State. However, States must not comply with those parts of a sanction decision that are manifestly contrary to absolutely binding rules, such as fundamental obligations under the Geneva Conventions or their Additional Protocols which safeguard the survival of the civilian population. To disregard a Security Council resolution would admittedly appear justified only in an extreme case. As a first step, "doubtful" wording of a sanctions resolution must always be construed in such a way as to avoid an open clash with the international legal order. But States no doubt are under an absolute obligation to authorize relief operations for the benefit of the civilian population of the embargoed States, if the conditions of the Fourth Geneva Convention are met, even though the sanctions decision may not mention such a "humanitarian exception" to the complete ban on trade and financial transactions.

To end this first part of our analysis of the limits to economic sanctions in armed conflict we should like to stress that none of the safeguards just mentioned casts any doubt on the legitimacy of economic sanctions as an instrument for enforcing international decisions. Moreover, none of them is intended to make economic sanctions impossible *de facto*. Respect for the above-mentioned limits should, however, help to minimize the main weakness of economic sanctions: the fact that they are, in the already quoted words of the UN Secretary-General, a "blunt instrument".[43] They are indeed an instrument which strikes indiscriminately and fails to make a distinction between what can lawfully be targeted under international law, on the one hand, and innocent civilians with their claim to immunity from the effects of warfare, on the other. The conditions outlined above are intended to make sure that the harm done by economic sanctions to the civilian population is kept within reasonable bounds.

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[42] UN Charter, Articles 25 and 103.

[43] *Supra* note 8, para. 70.

V. International Humanitarian Law and Economic Sanctions

Reference has already been made to that body of international rules setting limits to the harm which can lawfully be inflicted, in the course of an armed conflict, upon those who are not, or are no longer, participating in military operations, namely international humanitarian law.[44] Its rules draw upon customary law and a number of treaties, in particular the four 1949 Geneva Conventions on the protection of war victims and their two Additional Protocols of 1977.[45] International humanitarian law is applicable in times of armed conflict, with an extensive set of provisions applicable in international armed conflict and a more limited legal regime for armed conflicts of a non-international character. As *jus in bello* it deals exclusively with humanitarian issues raised in the course of an armed conflict and does not answer questions relating to the cause which arguably may justify the use of force *(jus ad bellum).*

The most fundamental obligation of international humanitarian law is the customary rule which prohibits attacks on the civilian population as such. Therefore, in any military operation a distinction must always be made between the civilian population or civilian objects on the one hand, and members of armed forces or military objectives, i. e. objects whose capture, neutralization or destruction offers a definite military advantage, on the other. Only the latter may be targeted by coercive military operations. Nor may the civilian population or civilian objects be the target of attacks by way of reprisals. International law does acknowledge that lawful operations against military objectives may cause incidental damage to civilians and civilian objects, but with the proviso that such damage must not be excessive in relation to the concrete and direct military advantage anticipated. Accordingly, coercive actions involving the use of military force may be directed against enemy military personnel and military objectives only.[46]

International humanitarian law does not directly address the issue of economic sanctions decided in the course of an armed conflict. None of its provisions mentions economic sanctions or deals in any other way explicitly with the humanitarian issues raised by such measures. The absence

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[44] *Supra* note 4.

[45] *Supra* note 2.

[46] With its Articles 48, 51 and 52, Protocol I, *supra* note 2, has reaffirmed these rules. Article 52, para. 2, contains a definition of what is a legitimate military objective. Further provisions on the protection of civilians in Articles 53 – 56. For non-international armed conflicts see Protocol II, *supra* note 2, Articles 13 and 14 –17.

of specific provisions does not, however, mean that international humanitarian law is irrelevant for examining their effects. Insofar as the Security Council resorts to economic sanctions in the context of an armed conflict to which international humanitarian law applies, that decision must take into account relevant international rules on the protection of various vulnerable groups, in particular the civilian population, against the effects of armed conflict. There is indeed no reason to assume that States should not be bound by rules of a humanitarian character, when acting in the context of and pursuant to a collective enforcement measure decided by the Security Council in the course of an armed conflict. While the safeguards of international humanitarian law have been established primarily to protect the civilian population against the effects of military operations in an armed conflict between two belligerents, considerations of humanitarian policy clearly suggest that they also apply to enforcement measures based on Chapter VII of the UN Charter.[47] As will be shown later in this paper, the Security Council's practice supports this premiss.

The Fourth Geneva Convention (on the protection of civilians in armed conflict)[48] and the two Additional Protocols of 1977[49] comprise a number of provisions which are directly relevant for our subject. They all elaborate on the basic injunction to safeguard civilians and can be summarized as follows:

1. Civilians in the power of the adversary may not be deprived of access to sustenance necessary for their survival. Starvation of the civilian population as a method of warfare is prohibited.[50]

2. Civilians in the power of the adversary are entitled to receive the medical care and attention required by their condition.[51]

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[47] The question of the applicability of international humanitarian law to measures decided by the UN Security Council pursuant to Chapter VII also arises in the context of peacekeeping operations of the United Nations. See C. Emanuelli, Les actions militaires de l'ONU et le droit internationl humanitaire (Montreal 1995); H.P. Gasser, Die Anwendbarkeit des humanitären Völkerrechts auf militärische Operationen der Vereinten Nationen, Schweizerische Zeitschrift für internationales und europäisches Recht (1995), 443 – 473.

[48] *Supra* note 2.

[49] Id.

[50] Fourth Geneva Convention, Articles 23 and 55; Protocol I, Article 54, para. 1; Protocol II, Article 14. These provisions come closest to a right to food as recognized by international human rights law. See e.g. International Covenant on Economic, Social and Cultural Rights, of 16 December 1966, Article 11.

[51] Fourth Geneva Convention, Articles 16 and 55; Protocol I, Article 10, para. 2; Article 3, para. 1 (2), common to the four 1949 Geneva Conventions. It should be made clear that enemy military personnel are of course also entitled to receive medical care.

3. In particular, in the case of an international armed conflict, States are under an obligation to authorize and to facilitate the passage and distribution of the following relief goods to persons affected by an armed conflict:

– medical supplies, for the benefit of all civilians;

– religious objects, for the benefit of all civilians;

– essential foodstuffs, clothing and tonics, for the benefit of children under fifteen, expectant mothers, and mothers with small children.[52]

Additional Protocol I not only extends the right to receive relief supplies to all members of the civilian population, but also adds to the list of goods which constitute the minimum indispensable for the survival of persons in war. However, such extended relief actions are subject to the consent of the States concerned.[53]

The same rules apply to naval blockades. If the civilian population of the blockaded country is threatened by starvation or severe shortage of medical supplies, an exception to the blockade must be authorized and shipments must be allowed to reach that country.[54]

4. If civilians are not adequately provided with goods indispensable to their survival, including foodstuffs, access to water, or medical supplies, several provisions specify that relief operations shall be undertaken. Such relief operations must be authorized by the power which has control over the persons in need, and free passage must be allowed by any transit country, even for consignments intended for the population of an enemy country.[55]

5. Whether or not a State has the obligation to accept a relief operation for the benefit of a population under its control or to authorize transit through its territory, consent by any one of the States concerned may always be subject to certain conditions,[56] to wit:

– technical arrangements for the transit of the goods through the territory of the State concerned, including search of the consignments for control purposes. Legitimate security considerations of the transit State must be taken into account;

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[52] Fourth Geneva Convention, Article 23, para. 1.

[53] Protocol I, Article 70.

[54] See e.g. M. Bothe, Commentary on the 1977 Geneva Protocol I, in: N. Ronzitti (ed.), The Law of Naval Warfare (Dordrecht/Boston/London 1988), 761; San Remo Manual, *supra* note 19, rules 103 and 104.

[55] Fourth Geneva Convention, Articles 23, 59 – 61 (occupied territories), 108 –111 (civilian internees); Protocol I, Articles 69 and 70; Protocol II, Article 18, para. 2.

[56] Fourth Geneva Convention, Article 23, paras. 2 – 4, and Protocol I, Article 70, para. 2.

– guarantees as to the proper end use of the relief goods or, in other words, adequate safeguards that the goods are actually reaching the persons in need and are not diverted to serve any other purpose, for example use by the armed forces;

– monitoring of the distribution by representatives of a Protecting Power or by delegates of the International Committee of the Red Cross (ICRC), acting under the authority of the Fourth Geneva Convention.[57]

A transit State may withhold consent to a relief operation if there is reason for fearing that a definite advantage would accrue to the economy of the recipient State, through substitution of relief supplies for goods necessary for the military effort.[58]

The activities of personnel participating in a relief operation must be facilitated. Individual relief workers must be respected and protected.[59]

6. The international rules on non-international armed conflict make relief operations subject to the consent of the parties concerned, in particular the government in place.[60] That government is, however, under an obligation to consent to a relief operation by an impartial humanitarian organization if the affected civilian population would otherwise be exposed to starvation or to a lack of essential medical care. The same holds true for neighbouring States through whose territory shipments would have to transit. They must authorize the passage of relief supplies through their territory if the nutritional or medical condition of the affected population so requires.[61]

After this rapid overview of the relevant rules of international humanitarian law pertaining to the right of civilians in armed conflict to essential food and medical supplies, reference must now be made to a specific aspect of their implementation. Under the Geneva Conventions, the monitoring of compliance with international humanitarian law by parties to an

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[57] Fourth Geneva Convention, Article 143, which grants representatives of a Protecting Power and delegates of the ICRC access to all places where protected persons may be found.

[58] Fourth Geneva Convention, Article 23, para. 2 (c).

[59] Protocol I, Article 71.

[60] Article 3 common to the Geneva Conventions does not mention relief operations. It is only Protocol II, Article 18, para. 2, that gives expression to international concern for the fate of starving civilians.

[61] Protocol II, Article 18, para. 2. See the resolution of the Institut de droit international, "The protection of human rights and the principle of non-intervention in internal affairs of States", which concludes that an offer of food or medical supplies is not an unlawful intervention (Article 5, para. 1), Annuaire de l'Institut de droit international, vol. II, 63 (1989), 339, and Schindler, *supra* note 40.

armed conflict is largely entrusted to Protecting Powers.[62] In practice, however, it is the International Committee of the Red Cross (ICRC) that is present in the conflict areas. The ICRC is a private, non-governmental organization over which States have no control. Its delegates have an unconditional right of access to persons affected by armed conflict, wherever they are and at any time.[63] One of their more important mandates is to monitor and evaluate the nutritional and medical situation of the civilian population in a conflict area or in an occupied territory. The corresponding task is to distribute relief supplies to those who are in need and, at the same time, to make sure that such relief is not diverted from its original purpose.

The ICRC is generally perceived as offering reasonably strong guarantees for an impartial distribution of the goods, via its network of delegates on the spot and thanks to its contacts with all the parties concerned. Observance of strict neutrality is an essential condition for maintaining the credibility the ICRC needs and without which no action is possible in the often poisoned atmosphere prevailing in war. An absolute guarantee that the relief goods will reach only those who are actually entitled to receive them is, however, impossible. It is unfortunately an illusion to believe that a hungry soldier will always pass on food to civilians without taking his share.

It is evident that these tasks require the physical presence of ICRC delegates wherever the victims actually are. Parties to an armed conflict must authorize their access to any person and to any place, subject only to security considerations.[64] Even though a sanctions regime may impose restrictions on travelling to and from the sanctioned State, the law of Geneva – the Geneva Conventions and Additional Protocols – stipulates that ICRC personnel must be exempted from any restriction on their freedom of movement. The various sanction resolutions have respected this obligation.

To sum up the policy which lies behind the international rules governing relief to civilian victims of war, we can do no better than to quote the International Court of Justice which in its judgment in the *Nicaragua* case stated that:

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[62] Articles 8/8/8/9 common to the four 1949 Geneva Conventions.

[63] Third Geneva Convention, Article 126, and Fourth Geneva Convention, Article 143. On the ICRC's right of initiative see Articles 9/9/9/10 common to the 1949 Geneva Conventions and, relating to non-international armed conflict, their Article 3.

[64] Id.

"There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliation or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law".[65]

The Security Council must take into account the pertinent provisions of international humanitarian law when deciding on or implementing collective economic sanctions in the context of an armed conflict. Those provisions are the legal basis for what are aptly called the "humanitarian exceptions" to economic sanctions, or the "humanitarian window". Did the Security Council provide for such humanitarian exceptions when it imposed economic sanctions during the Gulf conflict and in the context of the war in the former Yugoslavia?

VI. Collective Economic Sanctions: Recent Practice

Prior to the end of the Cold War, only twice had sanctions been decided on the basis of Chapter VII of the UN Charter. Neither case arose in the context of an armed conflict. In 1966 the Security Council imposed economic sanctions on an (unrecognized) State: Southern Rhodesia.[66] Although these sanctions were quite comprehensive in scope, they remained largely ineffective. The long common border with South Africa made trade with the outside world relatively easy and monitoring quite impossible. Moreover, the restrictions imposed by the international community induced the Rhodesian government to build up a tightly controlled war economy to ensure the availability of essential goods, *inter alia* by substituting locally produced goods for imports. The outcome was a more vigorous domestic economy.

The other instance were the sanctions against South Africa which the Security Council decided to impose in 1977, as a response to the *apartheid* regime.[67] The sanctions were limited to an arms embargo, prompted by the fear that South Africa was about to build up a nuclear arsenal.

But it was of course the Iraqi attack on Kuwait in August 1990 which opened up a new area for collective enforcement measures under the UN Charter in general and for economic sanctions against individual States in

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[65] ICJ Reports (1986), 124.

[66] SC Res. 232 (1966). See Schrijver, *supra* note 6, at 129, and for an in-depth analysis: V. Gowlland-Debbas, Collective Responses to Illegal Acts in International Law, United Nations Action in the Question of Southern Rhodesia (Dordrecht 1990).

[67] SC Res. 418 (1977).

particular. The war in the former Yugoslavia gave the international community another occasion for taking collective action and imposing economic sanctions. Both sanction regimes are of direct relevance for understanding the scope and the workings of the so-called "humanitarian exception" to economic sanctions.[68]

Iraq and the Gulf War

Four days after the invasion of Kuwait by Iraqi armed forces in August 1990 and the adoption, on the same day, of a first resolution condemning Iraqi aggression and asking for the immediate withdrawal of the Iraqi forces from Kuwaiti territory,[69] the Security Council decided to impose a comprehensive set of economic and financial sanctions on Iraq.[70] Member and non-member States of the United Nations were asked to prevent any transfer of goods and services to or from Iraq and occupied Kuwait. At the same time, Resolution 661 (1990) established a Sanctions Committee, comprising representatives of all members of the Security Council. It was given the task to monitor the sanctions and handle the day-to-day management of the embargo.[71]

However, Resolution 661 (1990) has made an exception from the ban for "supplies intended strictly for medical purposes and, in humanitarian circumstances, foodstuffs".[72] Supplies for medical purposes have thus always been exempted altogether from the embargo, while the import of foodstuffs is permitted, if "humanitarian circumstances" so require, subject to authorization. With such broad wording, Resolution 661 went beyond the minimum standards established by the Fourth Geneva Convention, which says that authorization for relief operations must be given if

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[68] Since 1989, the Security Council has also decided embargo measures against Somalia (SC Res. 733 [1992]), Libya (SC Res. 748 [1992]), Liberia (SC Res. 788 [1992]), Haiti (SC Res. 841 [1993]) and Angola/UNITA (SC Res. 864 [1993]). Being limited in scope (usually arms embargoes), these sanctions did or do not restrict the import of medical supplies or essential foodstuffs for the civilian population. There was therefore no need for a "humanitarian exception".

[69] SC Res. 660 (1990) of 2 August 1990.

[70] SC Res. 661 (1990) of 6 August 1990. See also SC Res. 665 (1990) and 670 (1990) which deal *inter alia* with issues related to implementation of the sanctions.

[71] On the tasks of a sanctions committee see Schrijver, *supra* note 6, at 151. See also P. Conlon, Lessons from Iraq: The Function of the Iraq Sanctions Committee as a Source of Sanctions Implementation Authority and Practice, Virginia Journal of International Law 35 (1995), 633.

[72] SC Res. 661 (1990), para. 3 c).

children, pregnant women and mothers with small children lack essential foodstuffs.[73] Resolution 661 extends the right to relief to the population at large, in conformity with Article 70 of Protocol I. This was a commendable step towards taking into account the needs of all parts of the civilian population. On the other hand, the Security Council did not include in the items exempted from the embargo "objects necessary for religious worship", as should have been done[74] – no doubt an oversight and not an intentional discrimination.

As mentioned before, supplies of foodstuffs must be exempted from an embargo if "humanitarian circumstances" so require. The Security Council had two options for rendering this broad and ill-defined notion meaningful and operational: either by making the wording of the exception more specific, or by establishing procedures whereby its meaning may be determined in actual practice, on a case-by-case basis. The Council chose the latter course. Without modifying the substantive provisions of Resolution 661, Resolution 666 (1990) set up a procedure whereby the Sanctions Committee had to monitor the situation in Iraq and in (occupied) Kuwait, and, if necessary, grant clearance for the delivery of foodstuffs for the benefit of the civilian population. Accordingly, the UN Secretary-General was invited to supply the Sanctions Committee with the necessary information, based on findings of UN agencies and other (i.e. mainly non-governmental) organizations.[75] Special attention was to be given to particularly vulnerable groups, including children, expectant mothers, maternity cases, the sick and the elderly. If the situation so required, the Sanctions Committee was instructed to grant permission to import foodstuffs into Iraq. Distribution of the relief goods would be monitored by the ICRC or other humanitarian organizations. Resolution 666 (1990) explicitly acknowledged the mandate given to the ICRC by the Geneva Conventions for situations of armed conflict.

After the end of Operation Desert Storm and the liberation of Kuwait the economic sanctions against Iraq were not lifted. Their continuing validity was confirmed by Security Council Resolution 687 (1991), the resolution which set the conditions for an end to the hostilities.[76] That

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[73] Fourth Geneva Convention, Article 23.

[74] Fourth Geneva Convention, Article 23. To the author's knowledge, this inadvertence has never given rise to any difficulty.

[75] The ICRC was well qualified to monitor and report on the nutritional situation in Iraq, at least in those parts of the country to which its delegates had access. They had no access to occupied Kuwait, however.

[76] See SC Res. 687 (1990), para. 1 and paras. 20 – 29.

resolution did, however, ease the conditions under which foodstuffs for the civilian population could be imported into Iraq and at the same time simplified the procedures of the Sanctions Committee. On 14 April 1995, the Security Council adopted Resolution 986 (1995) which authorized Iraq to export a certain quantity of petroleum and to sell it on foreign markets. The proceeds of the sale was to be used "to meet the humanitarian needs of the Iraqi population" ("oil for food"). In particular, the major part of the funds were to be used to finance the import of "medicine, health supplies, foodstuff and supplies for essential civilian needs".[77] In order to implement this scheme, the United Nations Secretariat negotiated with the Iraqi Government a Memorandum of Understanding, which was signed on 20 May 1996.[78]

Security Council Resolution 687 (1991) also holds Iraq responsible for damage caused by the attack on Kuwait and during its subsequent occupation. A fund was to be established under the same resolution to pay compensation to victims of injustice, by drawing on assets resulting from the sale of Iraqi oil.[79] This is a novel use of the tool of economic sanctions. Practice has yet to determine its impact on the enjoyment of rights by victims of an armed conflict.

Do the Security Council resolutions on economic sanctions against Iraq take due account of the provisions of the Geneva Conventions relating to relief for the civilian population?[80] Is the "humanitarian exception" established by Resolutions 661 and 666 (1990) compatible with applicable international humanitarian law? The answer is in the affirmative. In particular, the sanctions regime authorizes relief operations under the conditions specified by the Geneva Conventions. However, such a conclusion obviously does not settle all humanitarian issues raised by economic sanctions. The civilian population of Iraq has unquestionably suffered and

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[77] SC Res. 986 (1995), para. 8 a).

[78] Memorandum of Understanding between the Secretariat of the United Nations and the Government of Iraq on the Implementation of Security Council resolution (1995), 986, signed in New York, 20 May 1996, 35 ILM 1095 (1996).

[79] SC Res. 687 (1990), paras. 16–19, SC Res. 706 (1991) and SC Res. 712 (1991). See J. Crook, The United Nations Compensation Commission – A New Structure to Enforce State Responsibility, AJIL 87 (1993), 144–157. Some compensation has been paid, with proceeds from the sale of oil sold by Iraq before the invasion, but the bulk of claims still have to be settled. According to Resolution 986 (1995) ("oil for food", *supra* note 77), part of the sum was to be transferred to the Compensation Fund. At the time of writing it is too early to pass judgment on the results of this measure.

[80] Additional Protocol I, *supra* note 2, was not applicable during the Gulf War, as neither Iraq nor some members of the Coalition had ratified the treaty.

continues to suffer hardship under the embargo, despite its "humanitarian exceptions".[81]

Furthermore, no ambiguity is possible, despite Resolution 986 (1995): the economic sanctions against Iraq remained in place after the end of the military campaign in 1990/91 and are still in force at the time of writing this article.

The war in the former Yugoslavia

In its Resolution 757 (1992) the Security Council decided to impose comprehensive economic sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY).[82] According to para. 4 (c) of that resolution, the ban on commercial and financial transactions with the FRY does not include "supplies intended strictly for medical purposes and foodstuffs notified to the [Sanctions Committee]." The "humanitarian exception" established by Resolution 757 is different from the approach taken when sanctions were imposed on Iraq, because humanitarian relief for the civilian population is completely exempted from any restriction. All medical supplies and all foodstuffs intended for the civilian population can be imported by the FRY, subject to notification of and clearance by the Sanctions Committee. This is a positive development in the Security Council's approach to the special needs of the civilian population of an embargoed country.

As in the case of Iraq, a Sanctions Committee was established for the FRY, with representatives of the various members of the Security Council participating in its work.[83] The Committee's task is to monitor compliance with the sanctions and, *inter alia*, to give the necessary clearance for the shipment of humanitarian relief to the FRY. As a result of Resolution 820 (1993), which tightened the sanctions imposed on the FRY,[84] procedures to obtain such clearance became increasingly cumbersome and delays ever more frequent. The ICRC felt that impediments were being placed in the way of its humanitarian activities for the various categories

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[81] See e.g. ICRC Annual Report 1995, 241–245, and World Disaster Report 1995, *supra* note 9, at 24.

[82] SC Res. 757 (1992). Previously, an embargo on the supply of arms and other military equipment to RFY had been imposed by SC Res. 713 (1991).

[83] SC Res. 724 (1991). See M.P. Scharf/J.L. Dorosin, Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee, Brooklyn Journal of International Law XIX (1993), 771–827.

[84] SC Res. 820 (1993).

of victims in the Yugoslav armed conflict, not only those in the FRY itself but also in Bosnia-Herzegovina, as relief goods intended for some parts of the territory of Bosnia-Herzegovina had to transit through the FRY. The matter was raised with the Sanctions Committee for the former Yugoslavia. In response the Committee decided to deal with humanitarian goods in transit through the FRY under the "no-objection procedure".[85]

The wording of the term "humanitarian exception" in the resolutions concerning the economic sanctions on the FRY is in accordance with the provisions of the Geneva Conventions establishing the right of the civilian population to receive medical aid and relief supplies. Again, this does not mean that the embargo against the FRY is not causing severe hardship for the civilian population, in particular in the field of health care.[86]

Economic sanctions against the FRY were suspended by Resolution 1022 (1995), adopted by the Security Council on 22 November 1995.

VII. Economic Sanctions and ICRC Relief Activities

The ICRC has a long history of bringing essential medical supplies and foodstuffs to victims of warfare, in particular the civilian population. It has also had extensive experience of relief operations for the benefit of persons living in a country which is under blockade or otherwise subject to economic sanctions. One case in point is the supply of food to the population of occupied Greece during the Second World War.

Greece had always been heavily dependent on imported food, particularly grain, to feed its population. Occupation by the Italian armed forces and later by the German *Wehrmacht*, and the blockade imposed by the United Kingdom in reply to German aggression in Europe, brought about an interruption of all imports by Greece, including shipment of urgently needed food supplies. In summer 1941 the nutritional situation of the Greek population became critical. After negotiations with the British government for an exception to the blockade, and with the occupying power for the right to import relief supplies and to monitor their distribution, the ICRC was authorized by both sides to start shipping grain from Canada to Greece and distributing it to the Greek population. The actual transport of the cargo across the Atlantic was handled as a joint venture, with the Swedish government and the ICRC as partners. Delegates of the

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[85] Communication SCA/8/95(11–1) of 17 July 1995 to the ICRC (on file with the author).

[86] See e.g. ICRC Annual Report 1994, 159.

ICRC and of the Swedish Red Cross monitored the distribution of the grain right down to village bakeries. They had to make sure that the relief goods did not fall into the hands of the occupying troops, and apparently succeeded in doing so, to the satisfaction of the blockading forces. Right up to the end of the war, an impressive amount of relief goods were shipped through the blockade. That operation saved the Greek people from starvation.[87]

More recently, the ICRC has been conducting relief operations in the two countries currently subjected by the Security Council to comprehensive economic sanctions, i.e. Iraq and the Federal Republic of Yugoslavia (Serbia and Montenegro).[88] How have economic sanctions affected the ICRC's assistance to war victims in the two embargoed countries? While we are of course fully aware of the major contributions made by many governmental and non-governmental entities and organizations, we propose to examine how the ICRC has managed to cope with these additional constraints on its activities. To begin with, a brief reminder of the various steps which lead to the distribution of relief may be helpful.

ICRC delegates first evaluate on the spot the nutritional and medical situation of the civilian population, and determine the needs to be covered. Special attention is given to the needs of particularly vulnerable groups, including persons in detention. The delegates' reports are assessed by ICRC headquarters in Geneva, which establishes the programme for the relief operation to be undertaken. The ICRC then notifies the Sanctions Committee of the proposed consignment, giving the necessary details as to the nature of the goods and the practical arrangements for their transport and distribution. Strictly speaking, the ICRC does not feel obliged to do this, as it is of the opinion that under existing international law, in particular the Fourth Geneva Convention of 1949, the ICRC has full authority to act as a neutral intermediary between parties to an armed conflict, for the benefit of the victims. That authority includes the right to undertake relief operations if the state of the target group so requires.[89] However, for the sake of complete transparency the ICRC always notifies

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[87] See F. Bugnion, Le Comité international de la Croix-Rouge et la protection des victimes de la guerre (Geneva 1994), 269.

[88] See the various ICRC Annual Reports and a first-hand account of humanitarian operations during the Gulf War, C. Girod, Tempête sur le désert, Le Comité international de la Croix-Rouge et la Guerre du Golf 1990–1991 (Brussels-Paris 1995), and in the former Yugoslavia, M. Mercier, Crimes sans châtiment, L'action humanitaire en ex-Yougoslavie 1991–1993 (Brussels-Paris 1994).

[89] *Supra* note 63.

the competent Sanctions Committee of a proposed relief consignment. The Committee then delivers the documents necessary for crossing the borders ("no-objection procedure").

Sometimes tricky problems have had to be solved, as when spare parts for water pumps and chemicals for purification of drinking water had to be imported into Iraq. Though for use in hospitals only, the import by the ICRC of fuel also raised some difficulties. These items can of course be used for less peaceful purposes as well (so-called "dual use items"). In all cases, satisfactory solutions were worked out with the Sanctions Committee in New York. Moreover, ICRC relief consignments are always open to inspection by the authorities in charge of monitoring the sanctions, be it in the countries of origin, transit or final destination. Once they arrive on the spot, ICRC delegates take delivery of them and distribute the relief supplies to the institutions or the individuals in need. Delegates may also be called upon to monitor distributions carried out by a local body, in particular the local Red Cross or Red Crescent organization. It is ICRC policy to keep track of relief supplies until they reach those who are actually in need of them (the "end user").

Neither of the two Sanctions Committees currently operating – one for the former Yugoslavia and the other for Iraq – has interfered significantly with relief consignments organized by the ICRC. Once each side was familiar with the mandate and working technique of the other, working relations between the ICRC and these committees have been good. It seems that those in charge of administering the sanctions, both the representatives of governments which are members of the Committees and the administrative staff from the UN Secretariat, trust the ICRC's neutrality, impartiality and efficiency. They seem to appreciate the ICRC's efforts to maintain transparency and its proven capacity to monitor the distribution of relief by its own delegates who are actually present in the conflict area.

However, economic sanctions, and the unavoidable bureaucratic procedures necessary to manage them, have no doubt considerably increased the work involved in the administration of relief operations. The ICRC has had to take special measures to cope with the additional workload. Moreover, delays are always possible, and any bureaucracy gives rise to friction, particularly in the process of transporting relief goods through transit countries. It must nonetheless be recognized that several steps have already been taken in New York to facilitate the procedures.[90]

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[90] See e.g. *supra* note 85.

In order to minimize this negative impact on the distribution of relief and to avoid additional administrative obstacles, recognized international humanitarian organizations, such as the ICRC, should in future be fully exempted from any form of direct control by the Sanctions Committee concerned. A list of goods should be established by common consent, with the understanding that the ICRC (or any other institution authorized to do so) may import and distribute these goods under its own exclusive responsibility, without prior notification of the Sanctions Committee. Such a simplification of procedures would in no way interfere with the sanctions regime per se, since the Security Council, through the competent Sanctions Committee, naturally retains the power to monitor compliance with any sanctions resolution. But practical implementation of the "humanitarian exception" to economic sanctions could in this way be improved. Moreover, the establishment of a single and permanent Sanctions Committee with a professional staff, instead of numerous ad hoc committees, could also enhance expertise, streamline procedures and render the system more efficient.[91]

VIII. Economic Sanctions with a more Humane Approach?

The comprehensive economic sanctions decided by the Security Council against Iraq and the Federal Republic of Yugoslavia (Serbia and Montenegro) have brought home the dilemma facing the international community. On the one hand, the goal of such measures is to induce the authorities of the State concerned to comply with the international legal order. This is without any doubt a legitimate goal. On the other hand, there is the suffering inflicted on the civilian population, particularly its most vulnerable groups, and the serious harm done not only to the economy but to the civil society of the targeted country in general. Unintended though these effects may be, they are a demonstrable fact. They are inherent in economic sanctions, and probably unavoidable. At the same time there is no valid policy consideration which could possibly compel us to acquiesce to these negative effects of economic sanctions on the civilian population.

Economic sanctions being a "blunt instrument", the dilemma cannot be talked away but has to be faced head on. Raising ethical, legal and practical questions in regard to the implementation of economic sanctions does not mean denying their legitimacy as such.[92] Economic sanctions may in-

[91] See also the proposals made by the Dutch-Australian paper, *supra* note 7, at 26.

[92] In the same sense: Supplement to An Agenda for Peace, para. 71 (*supra* note 8).

deed be a more appropriate way of enforcing a Security Council decision than the use of armed force, and are probably preferable from a humanitarian standpoint. The course to be followed, therefore, is to find ways of making economic sanctions less "blunt", more discriminating, in order to minimize the negative effects for the civilian population.

This is an appropriate time to come forward with suggestions for examining the sanctions regime, since a debate on the future of economic sanctions as a tool for peaceful settlement of disputes and as an enforcement measure is now well under way. The first signal was probably given by the UN Secretary-General, who discussed issues related to economic sanctions in his Supplement to An Agenda for Peace and proposed that several measures be examined in order to shield the civilian population from unintended side-effects of such sanctions.[93] In a statement made on behalf of the Security Council, its President concurred with the (modest) proposals made by the Secretary-General.[94] The question of sanctions was also taken up by a General Assembly Working Group on An Agenda for Peace, which established a Sub-group on sanctions. At its first session, Netherlands introduced the already mentioned joint Australian-Dutch paper entitled "United Nations sanctions as a tool of peaceful settlement of disputes", with a number of specific proposals.[95] Moreover, the issue has been for quite some time on the agenda of the UN Department of Humanitarian Affairs and its Inter-Agency Standing Committee, chaired by the Under-Secretary-General for Humanitarian Affairs. At the moment of writing, a report drafted by independent experts at the request of the Inter-Agency Standing Committee is being examined. It is expected that recommendations will be submitted thereafter to the Security Council.[96]

Problems raised by economic sanctions have also been discussed in academic fora. Thus, at the suggestion of the Legal Adviser of the Dutch Ministry for Foreign Affairs, the issue was on the agenda of an informal meeting of scholars and government lawyers organized during the United Nations Congress on Public International Law (New York, March 1995).[97] The International Institute of Humanitarian Law (San Remo)

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[93] Id., para. 75. The Secretary General's An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping, *supra* note 11, para. 41, addressed the issue of economic sanctions only in terms of economic difficulties caused to third States.

[94] UN Doc. S/PRST/1995/9, of 22 February 1995.

[95] *Supra* note 7.

[96] No official document has yet been made public.

[97] Paper on file with the author.

also discussed the humanitarian issues related to economic sanctions at its annual roundtables.[98]

The 26th International Conference of the Red Cross and Red Crescent (Geneva, December 1995) addressed the issue of economic sanctions and their humanitarian consequences. In the broader context of its resolution on "Principles and Action in International Humanitarian Assistance and Protection", the Conference recalled some of the principles which should govern the decision on and the implementation of such sanctions. In particular, States are encouraged to consider

> "a. when designing, imposing and reviewing economic sanctions, the possible negative impact of such sanctions on the humanitarian situation of the civilian population of a targeted State and also of third States which may be adversely affected by such measures,
>
> b. assessing the short- and long-term consequences of UN-approved economic sanctions on the most vulnerable, and monitoring these consequences where sanctions have been applied,
>
> c. providing, including when subject to economic sanctions, and to the extent of their available resources, relief for the most vulnerable groups and the victims of humanitarian emergencies in their own territories".[99]

The resolution furthermore calls upon States to permit relief operations for the benefit of the most vulnerable groups, "when required by international humanitarian law". Finally, the ICRC, the National Red Cross and Red Crescent Societies and their International Federation are asked to help reduce the "undesirable side-effects of sanctions on the humanitarian situation of the civilian population".[100]

With this statement, the 26th International Conference is in line with the ongoing discussions on economic sanctions. Without calling in question or even discussing the legitimacy of such measures as a tool for enforcement on the international level, the resolution asks, however, for increased attention to be given to their consequences in humanitarian terms.

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[98] International Institute for Humanitarian Law, 18th Round Table on Current Problems of International Humanitarian Law (1993), with a summary of the statement by H.P. Gasser, pp. 41–43, and: United for the Respect of International Humanitarian Law, Report of the 20th Round Table on Current Problems of International Humanitarian Law (1995), 40 – 51, 88 – 90.

[99] Resolution IV of the 26th International Conference of the Red Cross and the Red Crescent, section F, para. 1, International Review of the Red Cross, January-February 1996, 73 – 74.

[100] Id., paras. 2 and 3.

Not without some discussion at the drafting stage, the Conference also refers to the responsibility of the embargoed State to assure the survival of the most vulnerable groups in its own population.

IX. Concluding Remarks and a few Proposals

Taking into account the preliminary results of the ongoing debate on economic sanctions and the experience of the ICRC with relief operations in such situations, we put the following proposals forward for further consideration.

The question of standards

Any collective economic sanctions decided by the Security Council pursuant to Chapter VII of the Charter and applicable in the context of an armed conflict, i.e. in situations where international humanitarian law applies, must comply with the pertinent provisions of the 1949 Geneva Conventions and their Additional Protocols. In particular, sanctions must comprise a "humanitarian exception" to permit relief operations in favour of the civilian population of the embargoed State, if their health or nutritional situation so requires.

However, international humanitarian law sets minimum standards only, that is, standards which must be respected as an absolute minimum in the exceptional situation of armed conflict. By prohibiting starvation of civilians as a method of warfare and by ensuring basic medical care for victims of armed conflict, the Geneva Conventions are intended to guarantee no more than the bare survival of the civilian population in war, pending the end of the hostilities. The situation is different indeed in the case of economic sanctions, where no force of arms threatens the survival of the civilian population. Such sanctions decided by the UN Security Council affect the lives of ordinary people who, because of the absence of hostilities, may well be of the opinion that they have the right to live in normal conditions.

Moreover, for both Iraq and the FRY no end to the sanctions regime has been in sight for a very long time. The ongoing sanctions against Iraq demonstrate that economic sanctions against a single State may last for an almost indefinite period, because its government is sufficiently well entrenched to be able to resist the Security Council's will.

Economic sanctions should never have the effect of pushing the civilian population, or parts of it, below the subsistence level, and certainly not

for a prolonged period.[101] The minimal standard which must be assured in the course of economic sanctions must therefore be higher than a mere guarantee for bare survival.

With their "minimum standard" approach geared to the problems caused by armed conflicts, the rules of international humanitarian law on medical and food aid have not been set up with the intention of coping with problems of long-term sanctions regimes. And indeed they fail to do so. They assure the bare survival of persons affected by armed conflict. To provide no more than basic necessities for the civilian population may be morally acceptable in the course of active hostilities involving the armed forces of that same country, but it is much less acceptable during economic sanctions imposed by the Security Council.

It is therefore submitted that the "humanitarian exceptions" which have to be built into any decision on collective economic sanctions must allow for a higher standard than the mere absence of hunger and the provision of basic medical care, i.e., for a higher standard than the one assured by the 1949 Geneva Conventions and their Additional Protocols. As an example, postal services for exchanges between individuals should not be severed by economic sanctions. And the import of educational material for children should be exempted from sanctions decided by the Security Council.[102]

Comprehensive versus selective economic sanctions

The economic sanctions imposed on Iraq and on the FRY are comprehensive in nature. They cover almost all types of international commercial and financial transactions and all communications with these two countries. A future evaluation of these two situations may very well show that such a comprehensive ban was not really necessary and that a selective approach might have been sufficient to reach the intended goal.

Article 41 of the UN Charter allows such partial bans. By aiming at selected commercial activities, at financial transactions and at lines of communication which are really important for the country and its economy, as well as for its rulers taken individually, and by leaving untouched the import of ordinary goods and services which are needed every day by the civilian population, a selective sanctions regime may turn out to be as ef-

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[101] A similar conclusion is reached by Fisler Damrosch, *supra* note 7, at 281.

[102] Though education is an uncontested basic right of children, the Geneva Conventions do not address the issue.

fective as a comprehensive one ... or even more severe. The "unintended" or "unavoidable" effects on the civilian population could thereby be limited to a strict minimum. On the other hand, selective and fine-tuned sanctions on financial transactions or assets abroad may actually hurt those in power far more than comprehensive sanctions.[103]

Limits in duration

Experience with the embargo measures against Iraq and the FRY has shown that economic sanctions may last for a very long period. In other words, after a certain time it may become apparent that economic sanctions quite simply lack the force to achieve the intended change in the behaviour of the embargoed country. Therefore, if there is no reasonable chance for the economic sanctions to attain their intended goal, they should not be extended. Other ways of exerting pressure on the country and its rulers should be considered. There is indeed no moral justification for continuing to subject the civilian population to serious hardship if there is no chance that the sanctions will achieve their aim, which is to change the mind and behaviour of those in power. It may sometimes be necessary to acknowledge that the chosen course of action has failed and that other ways ought to be tried.

Such a policy presupposes a meaningful appraisal of the impact of sanctions on a periodic basis. Periodic appraisals must imperatively include an evaluation of the effects of sanctions on the civilian population of the country concerned.[104] The harm done to civilians, their health and nutritional situation, to the civilian infrastructure etc. must be compared not only with the intended results already achieved (or not achieved!), but also with the prospects for the sanctions' success in a foreseeable future. If the conclusions are negative, economic sanctions should be suspended.

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[103] In his Supplement to An Agenda for Peace, *supra* note 8, para. 75 (c), the UN Secretary-General suggests mechanisms which would allow the Security Council "to fine-tune [the sanctions] with a view to maximizing their political impact and minimizing collateral damage." See also G. Evans, Cooperating for Peace (Saint Leonards 1993), 139, who suggests "to introduce a broad range of sanctions measures and undertake to lift them progressively as particular targets are achieved".

[104] In the same sense Supplement to An Agenda for Peace, *supra* note 8, para. 75.

Tightening procedures

Each resolution of the Security Council imposing economic sanctions on a State has established a separate Sanctions Committee with the mandate to take all necessary steps for the monitoring of the day-to-day management of the sanctions. In reply to many criticisms regarding lack of transparency in the activities of these Committees, several steps have recently been taken in the right direction.[105] They include the publication of decisions and the submission by each Committee of a detailed annual report to the Security Council. There is indeed no reason not to expect from a subsidiary organ of the Security Council the same professional standards as is expected of any domestic administration. Moreover, the day-to-day running of a sanctions regime is not a task for diplomats but for civil servants. It has also been proposed that the various ad hoc sanctions committees be replaced by a single but permanent and professionally run body reporting to the Secretary-General and ultimately to the Security Council. This proposal certainly makes sense.

As mentioned already, monitoring of the economic sanctions must concentrate on two issues: the effectiveness of the sanctions, and their social impact. While it is up to a political body – the Security Council – to decide whether the targeted country has met the required conditions or not, it may be appropriate to turn to an independent institution specializing in fact-finding to assist the Council in reaching such a decision. The International (Humanitarian) Fact-Finding Commission established by Protocol I additional to the Geneva Conventions may be the right body for such a task.[106] Assessment of the immediate needs of the civilian population under a sanctions regime, is, however, no doubt in better hands when carried out by an independent humanitarian body. The ICRC, with its network of delegates in conflict areas and its neutral standing accepted by all sides, may be well qualified for this task. The condition is that the ICRC and other humanitarian organizations have unimpeded access to the territory of the embargoed country.

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[105] See Note by the President of the Security Council, UN Doc. S/1995/234 of 29 March 1995. A/RES/50/51, of 29 January 1996, also requests the Secretary General to strengthen the procedures of the Sanctions Committees and, in particular, to improve the transparency of their dealings.

[106] Protocol I, *supra* note 2, Article 90. See F. Krill, The International Fact-Finding Commission, International Review of the Red Cross 31 (1991), 190.

After the end of economic sanctions

Once the economic sanctions have been lifted, the international community should show its concern for the plight of those who have suffered particular hardship on account of these measures, i.e., the civilian population of the embargoed State. If that population has to overcome severe after-effects of such sanctions, and if its own government is not in a position to handle the situation in a satisfactory way, the United Nations should step in. While it is perfectly legitimate that the interests of neighbouring countries should be taken into account,[107] the international community should not close its eyes to the distress of an entire civilian population in the embargoed country. Some sort of compensation scheme might be the appropriate response.

In its advisory opinion on Namibia, the International Court of Justice stated that "the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation".[108] The idea expressed by the Court might point the way towards taking better account of the interests of the people of an embargoed State. The international community should find a way to devise economic sanctions as an enforcement measure which would not at the same time "deprive the people [of the embargoed country] of [basic] advantages derived from international cooperation."

[107] UN Charter, Article 50, and Supplement to An Agenda for Peace, *supra* note 8, paras. 73 – 75.

[108] ICJ Reports (1971), 56.