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Abstract. This article questions the legality of the extent of the Iraqi sanctions regime, due to its severe impact on human rights such as the right to life and the right to health. After examining whether the Security Council is bound by human rights, the article examines if and to what extent the Security Council may limit human rights norms when imposing economic sanctions. In the process it distinguishes between non-derogable and derogable human rights. With respect to the latter, it supports limitation in accordance with a proportionality principle that protects the core of the rights involved, while at the same time allows the Security Council the flexibility required by its unique role in the maintenance of international peace and security.

1. INTRODUCTION

After Iraq’s invasion of Kuwait in August 1990, the Security Council imposed extensive trading and financial sanctions against Iraq in Resolution 661 of 6 August 1990.¹ This resulted in the suspension of Iraq’s customary trade and financial relations, including restrictions on the sale of Iraqi oil and the freezing of the country’s assets. All contractual obligations held by states or their nationals with Iraq or Kuwait that could undermine the sanctions regime were in effect suspended.² Resolution 661 (1990) also instituted an arms embargo and provisions requiring verification that Iraq destroyed or disposed of its chemical and biological weapons of mass destruction.³ While Resolution 661 (1990) prohibited weapons or any other military equipment, Security Council Resolution 687 (1991),

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¹ UN Doc. S/RES/661 (16 August 1990). The text of all the resolutions referred to in this article are available at www.un.org/documents/.
² Id., at para. 20.

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which was adopted at the end of the Gulf War, included a more detailed listing of proscribed items. These included conventional arms, weapons of mass destruction, ballistic missiles, and services related to technical support and training. Resolution 687 (1991) has proved to be the primary source of conflict between Iraq and the United Nations. Iraq’s failure to abide by its terms accounts for the continued imposition of the sanctions, more than ten years after the Gulf War. At the time the sanctions were imposed, Iraq boasted one of the most modern infrastructures and highest standards of living in the Middle East. As the world’s second largest oil producer, it had in recent decades used oil revenues for ambitious projects and development programs, as well as to build one of the most powerful armed forces in the Arab world. It had established a modern, complex health care system, with giant hospitals built on Western models and using the latest equipment. It had constructed sophisticated water-treatment and pumping facilities and had an extensive school and university system.

After the Gulf War of 1990 and 1991, the country’s economy and infrastructure lay in ruins. This was attributable, inter alia, to the air campaign against Iraq, which was conducted under the authority of the Security Council. By 1995, on the eve of the adoption of the Security Council Resolution’s oil-for-food program, United Nations agencies in the field were reporting that the deterioration of the economy and infrastructure had accelerated to the point where the country was experiencing pre-famine conditions. Even though the oil-for-food program has brought some relief, the situation of the civilian population remains desperate. Ten years after the imposition of sanctions deteriorating living conditions, inflation, and low salaries make people’s everyday lives a continuing struggle, while food shortages and the lack of medicines and clean drinking water threaten their very survival.

Although there have been several calls for lifting the sanctions in the past, the Security Council has consistently refused to do so, stating that

4. UN Doc. S/RES/687 (3 April 1991), at paras. 7–13; Fishman, supra note 3, at 702.
7. Id.
9. This was the assessment of a Food and Agricultural Organization (‘FAO’) Crop and Nutritional Status Assessment Mission between July and September 1995, cited in HRW Explanatory Memorandum, supra note 8, at para. 1.
10. ICRC Report, supra note 5, at 2; Fishman, supra note 3, at 687 points out that two million men, women and children have died over a period of nine years. See also W.M. Reisman & D.L. Stevick, The Applicability of International Law Standards to United Nations Economic Sanctions Programmes, 9 EJIL 86–141, at 101–103 (1998).
Iraq had not fully complied with the conditions for their suspension. Some of the voices calling for a reconsideration of the sanctions policy are not only concerned about the moral and political propriety of the uninterrupted sanctions regime, but also about its legality. This article expresses some of the concerns of those who question whether the impact of the sanctions on civil society is still reconcilable with basic human rights norms.

The analysis departs from the premises that the Security Council is bound to certain legal norms when resorting to enforcement measures under Article 41 of the United Nations Charter (hereinafter ‘the Charter’). These include the purposes and principles of the Charter contained in Articles 1 and 2, as well as the norms of *ius cogens*, i.e., peremptory norms of international law. As human rights form part of the principles and purposes of the United Nations and, in some respects, constitute norms of *ius cogens*, they are an appropriate point of departure for determining limitations to enforcement action by the Security Council.

It has to be emphasized that this article does not question the legitimacy of economic sanctions as an instrument for enforcing Security Council decisions. The power of the Security Council to adopt such measures in order to restore or maintain international peace and security is defined clearly in Article 41 of the Charter. Furthermore, the article also does not question whether the threshold requirement for resorting to enforcement measures has been fulfilled in the case of Iraq, namely that a threat to international peace exists. It accepts that such a threat has existed throughout the embargo and that it has not yet subsided. Consequently it is within the discretion of the Security Council to impose economic sanctions against Iraq in order to remove this threat to international peace and security.

The article also does not elaborate on the question of who has the right to decide whether the Security Council has acted *ultra vires*. In particular, it does not deal with the question whether the International Court of Justice (hereinafter ‘the ICJ’) can review the legality of Security Council decisions.  

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12. Art. 24(2) of the Charter determines that in discharging its duties, the Security Council shall act in accordance with the purposes and principles of the United Nations.
13. T.D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter*, 26 Netherlands YbIL 33–138, at 82 (1995). Since the Security Council derives its powers from member states who are themselves bound to these norms, the principle of maxim *nemo plus juris ad alium transferre potest, quam ispe haberat* would prevent states from transferring more powers to the organization than they have themselves.
15. Art. 39 of the UN Charter.
decisions. Instead, it proceeds from the premises that – regardless of whether the ICJ has the power of judicial review – the member states of the United Nations can reject the legality of a Security Council decision and thus refuse to implement it as a ‘right of last resort,’ which also applies to binding Security Council decisions in terms of Chapter VII of the Charter. This relates to the fact that the implementation of enforcement measures in international law is of a decentralized nature in that it is left to the member states. Consequently, Security Council decisions ultimately have to be accepted by member states in order to be implemented. The refusal to implement Security Council measures as a ‘right of last resort’ must, however, only be exercised in extreme situations where there is a strong case that the measures are illegal. This follows from the fact that a presumption of legality underpins Security Council decisions, as well as the fact that a liberal use of the ‘right of last resort’ would seriously compromise the efficiency of the organization.

In essence the current article only questions the legality of the extent of the Iraqi sanctions regime, due to its severe impact on human rights such as the right to life and the right to health. In doing so, it first identifies the particular human rights norms to which the Security Council is bound. It then examines if and to what extent the Security Council may limit human rights norms when imposing economic sanctions. In the process it distinguishes between non-derogable and derogable human rights. With respect to the latter, it supports limitation in accordance with a proportionality principle that protects the core of the rights involved, while at the same time allowing the Security Council the flexibility required by its unique role in the maintenance of international peace and security.


21. Fraas, supra note 14, at 93; see also Dissenting Opinion Judge Winiarski in Certain Expenses of the United Nations, supra note 17, at 232. However, the Security Council’s insistence in the preamble to UN Doc. S/RES 666 (1990) that it alone would determine whether humanitarian circumstances had arisen in Iraq, cannot be interpreted as meaning that states have no ‘right of last resort.’
Each aspect of the analysis consists of a general inquiry into the relevant principles, followed by an application of those principles to the relevant period in the Iraqi sanctions regime. This period concerns the phase which followed after the formal recognition of the cease-fire in Security Council Resolution 687 (1991) until the present. Before this time, during the Gulf War, the law of armed conflict (humanitarian law) provided the limits to the Security Council’s enforcement measures as opposed to human rights law. Human rights norms thus only emerged as a limitation to Security Council action once the war was over. Before commencing with the analysis, an overview of the Security Council measures that exempt goods and payments determined for humanitarian purposes from the sanctions is given. This would provide necessary background information for an inquiry into the legality of the current sanctions regime.

2. **Overview of the Humanitarian Exemptions to the Sanctions Regime**

Resolution 661 (1990) excluded payments and foodstuffs exclusively for medical or humanitarian purposes from the sanctions regime and provided for a sanctions committee, which had to oversee the implementation of the sanctions. Shortly afterwards, in Resolution 666 (1991), the Security Council decided that the sanction committee created in Resolution 661 (1990) had to keep the situation in Iraq and Kuwait under constant review to determine whether humanitarian circumstances have arisen. If it determined that such a humanitarian need existed, it had to report promptly to the Security Council as to how this should be done.

Resolution 666 (1990) also requested the Secretary-General to seek urgently and on a continuing basis, information from relevant United Nations and other appropriate humanitarian agencies on the availability of food in Iraq and Kuwait. In the process particular attention had to be paid to vulnerable categories such as children under the age of 15, expectant mothers, the sick, and the elderly. Resolution 687 (1991) broadened the

22. Para. 33.
23. See infra n. 80–81 and accompanying text.
25. UN Doc. S/RES/661 (1990), at para. 6. The sanctions committee consists of all the members of the Security Council. Its meetings are private and decisions are taken unanimously. See L. Oette, *Die Entwicklung des Oil for Food-Programs und die gegenwärtige humanitäre Lage in Irak*, 59 ZaöRV 842 (1999).
27. Id., at para. 5.
28. Id., at para. 3.
29. Id., at para. 4.
humanitarian exemptions in order to provide in the “essential civilian needs.”

Security Council Resolution 706 (1991) reacted to the concerns expressed by an inter-agency mission report about the serious nutritional and health situation of the Iraqi civilian population. It authorized limited oil sales for a period of six months, the revenues of which could partly be used for the buying of foodstuffs, medicines, and materials and supplies for essential civilian needs. The revenues would be paid over in three payments from a special account that was to be administered by the Secretary-General. The Security Council once again committed itself to reviewing regularly whether the payments authorized for humanitarian purposes actually met the needs. This was also reaffirmed in Security Council Resolution 712 (1991).

Security Council Resolution 986 (1995) broadened the humanitarian program by adopting the so-called oil-for-food program. It authorized Iraq to sell up to US $2 billion worth of oil under United Nations auspices every six months. Of this amount, 66% were to fund humanitarian imports. Iraq entered negotiations on implementation of the Resolution in January 1996, and a Memorandum of Understanding was signed on 20 May 1996. It was agreed that the Iraqi government would be responsible for the implementation of the program in the 15 governorates in the center and south of the country. It would have access to 13% of the humanitarian budget for this purpose. The United Nations, which received 53% of the human-

30. UN Doc. S/RES/687 (3 April 1991). Para. 20 also authorized a more simplified and accelerated “no-objection” procedure under the supervision of the sanctions committee. According to this procedure, exemption requests are passed on from the president of the sanctions committee to its members who could then object to them within two weeks. If no objections are raised, the requesting state receives authorization to provide the particular goods. If objections are raised, no authorization is granted and the request remains on the agenda of the committee. Decisions regarding exemptions take place on an individual basis and each member of the sanctions committee has a veto. The requests can be granted, refused, or placed on hold. In the latter case, the requestor is regularly asked to provide the sanctions committee with more information. See Oette, supra note 25, at 844.

31. Report to the Secretary-General on Humanitarian Needs in Iraq by a Mission led by Sadruddin Aga Khan, Executive Delegate of the Secretary-General, S/22799 (15 July 1991). The Report estimated that it would cost US $22 million to restore Iraq’s key sectors, such as power, water, sanitation, food, health, and oil to pre-war levels. It proposed a limited United Nations controlled sale of Iraqi oil to fund a portion of the country’s humanitarian needs. However, the Security Council did not authorize the full amount.


33. Id., at para. 1(c).

34. Id., at paras. 1(d) and 5.


36. The oil-for-food program was initially authorized for 180 days, subjected to review every 90 days, see UN Doc. S/RES/986 (14 April 1995), at para. 4. It has, however, been extended on a continuous basis.

itarian budget, would implement the program on behalf of the Iraqi government in the three northern governorates.\(^{38}\)

In the preamble to Resolution 1153 (1998), the Security Council noted its determination to avoid any further deterioration of the current humanitarian condition. The Resolution also expanded the oil export ceiling to US$5.2 billion every six months, with the same distribution of proceeds.\(^{39}\) As available funds increased, the sanctions committee authorized the expenditure of a greater share of the funds for infrastructure repair. For example, Security Council Resolution 1175 (1998) authorized the use of US$300 million for rehabilitation of the oil sector, recognizing that this was essential in order to sustain funding for the entire humanitarian program.\(^{40}\)

In January 1999, the Security Council established a humanitarian panel,\(^{41}\) involving the participation and expertise from the United Nations Office of the Iraq Program,\(^{42}\) the Secretariat of the sanctions committee, and the United Nations Secretariat. In response to a report presented by the humanitarian panel,\(^{43}\) the Security Council adopted Resolution 1284 (1999), implementing some of the humanitarian panel’s key-recommendations. For example, it removed any dollar ceiling on oil exports, thus allowing increased funding of the Iraq humanitarian program\(^{44}\) and accelerated the procedure exempting humanitarian items from the sanctions.\(^{45}\) It also allowed for a cash component, since oil revenues could be used to purchase local products as well as to train and compensate Iraqi workers for installation and maintenance of items funded by the humanitarian program, including the oil sector.\(^{46}\) Recently, in Resolution 1293 (2000),

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38. Id., Sec. II; UN Doc. S/RES/986 (1995), at para. 8. See also HRW Explanatory Memorandum, supra note 8, at para. 3.
45. See UN Doc. S/RES/1284 (1999), at para. 17. It directs the sanctions committee to “pre-approve” humanitarian items on the basis of lists to be submitted to it by the Secretary-General. Once the lists were approved, its items would be subject to approval by the Secretariat and would not need to come before the Sanctions Committee anymore. See also HRW Letter, supra note 44, at para. 11.
46. UN Doc. S/RES/1284 (1999), at para. 24. However, the provision of the cash component remained contingent on further steps by the Security Council. It had to approve the arrangements made by the Secretary-General in this regard. See also HRW Letter, supra note 44, at para. 11.
the Security Council doubled the sum available for the rehabilitation of the oil sector to US$600 million.47

3. THE SECURITY COUNCIL’S DUTY TO RESPECT HUMAN RIGHTS NORMS

The first question to be answered concerns the particular human rights norms that the Security Council has to respect when adopting enforcement measures. One could argue that the Security Council is, in principle, bound to respect all human rights contained in the Universal Bill of Human Rights. This includes the United Nations Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights (‘ICCPR’), and the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’).48 Although the Security Council is not a party to these treaties by means of ratification, they represent an elaboration upon the Charter’s original vision of human rights found in its purposes (Article 1(3)), and Articles 55 and 56.49

In this context one should keep in mind that the ICCPR and the ICESCR were negotiated under the auspices of the United Nations and the organization created an extensive system for monitoring their implementation.50 By promoting human rights in this manner, the United Nations created the expectation of respect for these rights on the part of the organization itself. This expectation is intensified by the fact that most of the members of the Security Council at any given time have ratified both human rights instruments. Four of the five permanent members of the Security Council have ratified the ICCPR, and the fifth member (China) has already signed it. The ICESCR has been ratified by three of the five members (United Kingdom, Russia, and France) and signed by the United States and China.51 One can therefore argue that organs of the United Nations, including the

47. UN Doc. S/RES/1293 (31 March 2000), at para. 1. In UN Doc. S/RES/1175 (1998), at para. 3, the sum was set at US$300 million.
49. See also, Normand, supra note 14, at 323; Gasser, supra note 18, at 880; Fishman, supra note 3, at 712.
51. See Status of Ratifications of the Principal International Human Rights Treaties, available at www.unhchr.ch/ as of 18 May 2001. Note that the estoppel argument should be distinguished from the submission that organs of international organizations are “automatically” bound to international treaties if and to the extent that (some of) its member have ratified the treaties in question. For the complexities surrounding the latter argument, especially regarding the European Community and its relationship with the European Convention of Human Rights, see R.A. Lawson, Het EVRM en de Europese Gemeenschappen. Bouwstenen voor een aansprakelijkheidsregime voor het optreden van internationale organisaties 55–126 (1998).
Security Council, would be estopped from behavior that violated the rights protected in these treaties.52

In international law, the term ‘estoppel’ usually operates to preclude a state from denying before a tribunal the truth of a statement of fact made previously by that state to another, whereby that other has acted to its detriment or the party making the statement has secured some benefit.53 Although this definition mainly applies to inter-state relations, it can also be used to bind organs of international organizations to their previous actions.54 Within the United Nations the estoppel principle is closely related to the obligation to act in good faith,55 which binds the member states and the organs of the organization.56 Since a violation of good faith would simultaneously result in the non-fulfillment of a legal expectation, one could regard good faith as a particular concretisation of the estoppel principle in the context of international organizations.57 It has an objective nature, in that it would be the objective perception of whether an organ of the United Nations acted in accordance with the meaning and spirit of good faith that matters,58 rather than that organ’s subjective perception of its integrity.59

52. Fraas, supra note 14, at 82. Cf. Akande, supra note 50, at 323. He states that it would be anachronistic if an organ of the United Nations was itself empowered to violate human rights when the whole tenor of the Charter is to promote the protection of human rights by and in states.


55. Art. 2(2) of the Charter.


57. J.P. Müller, Vertrauensschutz im Völkerrecht 228 (1971).

58. Müller, supra note 56, at 93; Müller, supra note 57, at 229–230. But see N. White, To Review or Not to Review? The Lockerbie Cases Before the World Court, 12 LJIL 419 (1999), who submits that a lack of good faith would only be a justifiable limit to Security Council action if it can be explained why all its members went along with the resolution, in spite of them being aware that it was in bad faith. This argument cannot be accepted, since determining the subjective motives for state action is a virtually impossible task based on speculation.

59. Cf. the cautious approach of Herbst, supra note 54, at 363. He states that the principle is applied restrictively in that it does not protect a future expectation of an abstract nature. For example, in para. 2 of UN Doc. S/RES/984 (1995), the Security Council stated that its nuclear-weapon state permanent members will act immediately in accordance with the relevant provisions of the Charter, in the event that non-nuclear weapon states, who are parties to the Treaty on the Non-Proliferation of Nuclear Weapons, are the victim of an act of aggression in which nuclear weapons are used. One could be tempted to read this as a self-imposed, binding obligation to intervene in the case of a nuclear attack on a non-nuclear state. However, Herbst suggests that due to the general and abstract nature of the declaration, it is unlikely that states could rely on the estoppel principle if the Security Council refrained from intervening in the described circumstances.
4. **THE LIMITATION OF HUMAN RIGHTS BY ENFORCEMENT MEASURES**

The question that now has to be answered is whether the Security Council would be allowed to limit human rights when exercising its enforcement powers under Article 41 of the Charter. In answering this question a distinction will be drawn between *ius cogens* norms which include the non-derogable rights in the ICCPR, and those human rights that can be subjected to limitation.

4.1. **The non-derogable rights with specific reference to the right to life**

Article 4(2) of the International Covenant on Civil and Political Rights (‘ICCPR’) contains the non-derogable human rights that have to be respected by states even in times of emergency. The non-derogable rights include the right to life, the prohibition of torture or cruel and degrading treatment, the prohibition of slavery and servitude, the impermissibility of retroactive punishment, the right of recognition before the law, and freedom of thought, religion, and conscience. As these rights are now widely regarded as constituting norms of *ius cogens* within the United Nations, the Security Council would be estopped from regarding them as derogable, regardless of whether all of its members have actually ratified the ICCPR.

The most likely of these rights to be affected by economic sanctions is the right to life. This right, which is protected in Article 6 of the ICCPR, is regarded as the supreme right, basic to all human rights. Although the right to life in the first instance provides protection against arbitrary killing, its scope has gradually been expanded to include a broader range...

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60. Art. 6(1) ICCPR. An exception with respect to the death penalty is provided in Art. 6(2): “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Convention and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.”

61. Art. 7 ICCPR.

62. Art. 8(1)–(2) ICCPR.

63. Art. 11 ICCPR.

64. Art. 15 ICCPR.

65. Art. 16 ICCPR.

66. Art. 18(1) ICCPR.


of aspects such as protection against malnutrition and epidemics. For example, in its general comment 6, the Human Rights Committee considered that the “inherent right to life” couldn’t be understood in a restrictive manner. States parties should take all positive measures to reduce infant mortality and to increase life expectancy, especially by adopting measures to eliminate malnutrition and epidemics.\(^{70}\)

This obligation is reinforced by the Convention on the Rights of the Child (‘CRC’), which recognizes the right to life of every child and calls on states to ensure to the maximum extent possible the survival and development of the child.\(^{71}\) It also calls on states to take appropriate measures to diminish infant and child mortality.\(^{72}\) As the CRC has been ratified by 191 states, including four permanent members of the Security Council,\(^{73}\) it would elevate this obligation to a core element of the right to life.\(^{74}\) As a consequence, there is a strong expectation that a sanctions regime imposed by the Security Council should at the very least not result in denying children access to the basic goods and services essential to sustain life.\(^{75}\) Even though there may be varied interpretations of the positive obligations under the right to life, those imposing a sanction regime may not adopt policies that lead to the deterioration of malnutrition, infant mortality or epidemics amongst children.\(^{76}\)

As far as the rest of the population is concerned, member states and the Security Council would be prohibited from deliberately acting in a way which actively deprives individuals of food and causes hunger and/or starvation.\(^{77}\) The Committee on Economic, Social and Cultural Rights (hereinafter ‘the Committee’), has stressed that the right to food is indispensable for the fulfillment of other human rights enshrined in the International Bill of Human Rights.\(^{78}\) As a result it would not be permitted.

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70. General Comment No. 6, supra note 69, at para. 5; see also Toebes, supra note 69, at 160–161, Segall, supra note 14, at 32. For a restrictive interpretation, see Y. Dinstein, The Right to Life, Physical Integrity and Liberty, in L. Henkin (Ed.), The International Bill of Rights 115 (1981).
71. Art. 6(1) and (2) CRC.
72. Art. 24(2)(a) CRC.
73. The United States has signed the CRC, but has not yet ratified it.
74. See Committee on Economic, Social, and Cultural Rights, General Comment No. 8, The relationship between economic sanctions and respect for economic, social, and cultural rights, E/C.12/1997/8 (5 December 1997), at para. 8, available at www.unhchr.ch/tbs/doc.nsf/. It regards the CRC as having obtained customary law status, since it has been almost universally ratified.
75. Segall, supra note 14, at 33. She submits that a sanctions regime should contain mechanisms for combating infant mortality, malnutrition, and epidemics amongst children.
76. HRW Explanatory Memorandum, supra note 8, at para. 17. Normand, supra note 14, at 33.
77. Segall, supra note 14, at 34.
78. Committee on Economic, Social and Cultural Rights, General Comment No. 12, The right to adequate food (Article 11), E/C.12/1999/5 (12 May 1999), at paras. 1–4, available at www.unhchr.ch/tbs/doc.nsf/(symbol)/.
to adopt a food embargo or similar measures which endanger conditions for food production and access to food in other countries. 79

The only permissible limitation of the right to life 80 is provided by humanitarian law during times of armed conflict. According to humanitarian law, an attack which may be expected to cause incidental loss of civilian life which would be excessive in relation to the concrete and direct military advantage anticipated, is illegal. 81 It is now generally accepted that this and other basic norms of humanitarian law are applicable to all military operations of an enforcement nature which are carried out by forces of the United Nations, or by the forces of member states acting under Security Council authorization. 82 Like human rights law, the rules of humanitarian law form part of the purposes and principles of the organization. 83 Furthermore, many norms contained in Additional Protocol I have acquired 'ius cogens' status. 84 This would include those that protect the basic rights of individuals, as well as the principle of proportional collateral damage to civilian life and property. 85

Thus, where the loss of civilians resulted from a lack of access to food incidental to a legitimate armed attack by United Nations (authorized)

79. Id., at para. 37; Segall, supra note 14, at 42. There is also an argument to be made that the right to food obliges states to supply essential foodstuffs to those in need. See also the last sentence of Art. 1(2) of the ICESCR, according to which a people may in no case be deprived of its own means of subsistence; cf. Köchler, supra note 67, at 24.

80. Apart from the imposition of the death penalty as described supra note 60.


82. See the conclusions to this effect of the Institut de Droit International, Equality of Application of the Rules of the Law of War to Parties to an Armed Conflict, 50 AIDI (1963); id., Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which the United Nations Forces May Be Engaged, 54 AIDI (1971); id., Conditions of Application of Rules, Other than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged, 56 AIDI (1975). See also Y. Dinstein, The Legal Lessons of the Gulf War, 48 Austrian JPIL 9 (1995); Gill, supra note 13, at 80. Note also that in the Gulf War the United Nations authorized forces left no doubt as to the applicability of humanitarian law and the law pertaining to the conduct of military operations. See United States Department of Defense, Report to Congress on Conduct of Persian Gulf War, 31 ILM 612 (1992); Akande, supra note 50, at 324.

83. Gasser, supra note 18, at 880. This can also be concluded from the Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, 1971 ICL Rep. 9, at 55–56. The ICI affirmed that Resolution 276 (1970) obliged states to refrain from entering treaties with South Africa, where the latter acts on behalf of Namibia. However, this obligation did not extend to treaties of a humanitarian character, the non-respect of which would have negative consequences for the people of Namibia. See also Herbst, supra note 54, at 381; Gowlad-Debbas, supra note 24, at 92; Gill, supra note 13, at 83.


forces, this would arguably not constitute a violation to the right to life. However, the Security Council may never authorize forces to deprive civilians deliberately of access to supplies essential to their survival, as starvation is a prohibited method of warfare.86 Civilian loss of life resulting from lack of access to food would only be legal if it were collateral to the military attack and remain proportional to the purpose of the military target.

It is also submitted that this type of collateral damage would only be permissible during times of armed conflict. Where the Security Council only resorts to economic sanctions (whether before or after a period of armed conflict), this may not result in the loss of civilian life due to lack of access to food. The purpose of economic sanctions as opposed to military measures is exactly that it should apply economic and political pressure without endangering civilian lives. This presupposes recognition of the non-derogable and supreme nature of the right to life, in all circumstances short of war.87 The possibility of collateral limitation of other (i.e., derogable) human rights by economic sanctions will be discussed below in Section 4.3.

4.2. The right to life in Iraq

According to the United Nations Children’s Fund (‘UNICEF’), infant mortality in most of Iraq has more than doubled in the nine years since the United Nations sanctions were imposed. In the government controlled central and southern Iraq, home to 85 per cent of the population, the death rate for children under five rose from 56 per 1,000 live births in the period between 1984 to 1989, to 131 per 1,000 during 1994 to 1999. During these same periods, infant mortality has also increased from 47 to 108 deaths per 1,000 live births.88

Furthermore, almost all younger children are affected by a shift in their nutritional status towards malnutrition. A third of all children under five are chronically malnourished, which represents a 72 per cent rise since 1991.89 Since 1997 the extent of chronic infant and child malnutrition has stabilized in the more populous center and south, while in the northern

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86. See Arts. 54, 69 and 70 of Additional Protocol I. See also Arts. 14 and 18(2) of 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) of 8 June 1977 (hereinafter ‘Additional Protocol II’, 16 ILM 1442 (1977); Segall, supra note 14, at 27–28; Gasser, supra note 18, at 882; Kulessa, supra note 67, at 92.

87. For a comparable argument see Gasser, supra note 18, at 900–901.


89. UNICEF Survey, id.; ICRC Report, id., at 3.
governorates the situation has improved somewhat. However, the situation is unlikely to improve substantially unless water and sanitation infrastructure is repaired. It has been in constant decline since the country's power system – which is central for water and sewage treatment – has been crippled during the air campaigns of the Gulf War.

Together with food and medicine shortages, the degradation of the water and sanitation sectors are direct causes of the malnutrition. It also contributes to epidemics such as cholera and diarrhea, which has reappeared for the first time in decades as the major killer of children. This progressive worsening of infant mortality, epidemics, and malnutrition amongst Iraqi children leads one to the conclusion that their right to life has systematically been violated over the last decade. As these consequences cannot be dissociated from the impact of the sanctions regime, the Security Council has made itself guilty of violating one of the principles and purposes of the United Nations, which also constitutes a *ius cogens* norm. As the Gulf War officially ended with the cease-fire agreement of Resolution 687 (1991), the loss of innocent life since then cannot be justified under the principle of collateral damage of the law of armed conflict. The economic sanctions regime is bound by basic human rights norms, including first and foremost the right to life.

Accusing the Security Council of violating the right to life of children in Iraq is not an attempt to deny the Iraqi government’s own callous and manipulative disregard for its human rights obligations towards its people

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92. Ann. II, *supra* note 41, at paras. 20 and 39. The most vulnerable groups have been the hardest hit, especially children under the age of five who are being exposed to unhygienic conditions, particularly in urban centers. Human Rights Watch, Explanatory Memorandum, *supra* note 8, at para. 6.

93. ICRC Report, *supra* note 5, at 2–3. Given the gravity of the nutritional situation, the WFP in February 1999 launched an appeal of US$21 million to help more than one million people in Iraq suffering from the effects of food shortages and poor water supply, including 200,000 acutely malnourished children, of which most were under the age of five. These children have not had proper drinking water or sanitation since they were born.


throughout the period of sanctions.96 It is undisputed that the Iraqi government has greatly compounded and magnified the humanitarian crisis, by, for example, failing to comply fully with Security Council Resolution 687 (1991) and refusing between 1991 and 1996 to implement any oil-for-food arrangement.97 On the other hand, it would be an over-simplification to place the blame for the high child malnutrition and mortality rate only on the Iraqi government. As will be indicated in more detail in Section 4.4, the deficiencies in the sanctions regime and the shortages of revenue in particular, are also directly responsible for the situation.

Moreover, the Security Council’s obligation to act in good faith goes hand in hand with the expectation that its decisions must reflect a respect for the right to life.98 The Security Council therefore has to design its economic enforcement system in a way that minimizes its impact on civilians, in particular on vulnerable groups such as children. This would, inter alia, require the taking into account of predictable strategies of the targeted government to minimize the impact of the economic embargo on itself. After a decade of sanctions against Iraq, it is clear and predictable that the Iraqi government will not hesitate to use the civilian population as a shield to deflect the impact of the sanctions away from itself in order to ensure its own survival.99 Ignoring this fact would amount to nothing less than an act of bad faith and an abdication of responsibility on the part of the Security Council.

This fact is not mitigated by the argument that the Iraqi opposition would be in support of the sanctions regime. It is quite possible that (certain members) of the Iraqi opposition might be in support of some type of sanctions against the current government. Since the opposition is not allowed to protest openly, it is difficult to determine to what extent this is the case. However, even if there were significant support amongst opposition members for a sanctions regime, this would not justify a sanctions system that violates the right to life of Iraqi children. Like the Security Council, the Iraqi opposition as a ‘government in waiting’ would


97. Cf. HRW Explanatory Memorandum, supra note 8, at para. 12. The Iraqi government has also been criticized for excessive warehousing of medicines and failure to order foods specially designed for the nourishment of infants, small children, and nursing mothers. Cf. Secretary-General’s Review, supra note 90, at para. 84; Reisman & Stevick, supra note 10, at 105–106.


be bound to respect the right to life of the Iraqi people. Therefore the opposition’s potential support for sanctions against the current government cannot be interpreted as permitting the Security Council to disregard the legal limits provided by international human rights law.

4.3. Derogable human rights and the principle of proportionality

As far as the derogable rights in the ICCPR are concerned, Article 4(1) allows states to derogate from their obligations in times of emergency. This derogation is, however, subjected to a strict principle of proportionality, since states may only derogate from their obligations to the extent strictly required by the exigencies of the situation. That states are also allowed to limit the rights in the ICESCR follows from a state party’s obligation to take steps, to the maximum of its available resources, to achieve progressively the full realization of the rights in the ICESCR. This formulation acknowledges limitations on economic, social, and cultural rights necessitated by limited resources. However, although this is a flexible criterion for limitation, it does not relieve state parties from a minimum core obligation with respect to each right. Even in times of economic hardship minimum essential levels of each of the rights are incumbent upon every state party.

The question that arises is what the right of derogation in Article 4(1) of the ICCPR and the flexible nature of the rights in the ICESCR would imply for enforcement measures of the Security Council. Stated differently, to what extent is the Security Council bound by a legal expectation not to limit these rights? Since the situations in which the Security Council would resort to Articles 41 and 42 of the Charter would amount to an emergency, it should have the right to limit the rights protected by the ICCPR.

100. Iraq has been party to the ICCPR and the ICESCR since 1971. See status of ratifications, available at www.unhchr.ch. It is also unlikely that an opposition movement that supports a sanctions system that results in the wide-scale violation of basic human rights would enjoy much support within Iraqi society.

101. Art. 4(1) ICCPR. See also Human Rights Committee, General Comment No. 5, derogation of rights (Article 4) (31 July 1981), at para. 3, available at www.unhchr.ch/ths/doc.nsf/. The Comment held that measures taken under Art. 4 are of an exceptional and temporary nature. They may only last as long as the life of the nation concerned is threatened. Also, in times of emergency the protection of human rights becomes all the more important, particularly those rights from which no derogation can be made.

102. Art. 2(1) ICESCR.

103. See Committee on Economic, Social and Cultural Rights, General Comment No. 3, The nature of states parties obligations (Article 2(1)) (14 December 1990), at paras. 1 and 9, available at www.unhchr.ch/ths/doc.nsf/

104. Id., at para. 10. It continues by stating that a state party in which any significant number of individuals is deprived of essential foodstuffs, or essential primary health care, or basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.

105. Fraas, supra note 14, at 83.
Moreover, in order for economic sanctions to achieve their objections, they will almost always have a significant impact on economic, social and cultural rights.\textsuperscript{106} It therefore seems logical that the Security Council has the right to limit the rights protected by the ICESCR.

This still leaves unanswered whether the Security Council would be subjected to a proportionality principle when limiting the derogable rights in the ICCPR and the rights in the ICESCR and if so, what the nature of this proportionality principle should be. After all, the Security Council is a unique institution with authority and responsibilities that differ from those of individual states.\textsuperscript{107} When responding to a threat to international peace and security, the Security Council is reacting to situations that threaten international peace as opposed to the security of one single state. The gravity of the situation coupled with the need of the Security Council to act efficiently may therefore question whether it should be subjected to a (strict) proportionality principle when limiting human rights in terms of Articles 41 and 42 of the Charter.\textsuperscript{108}

The question gains particular significance with respect to economic and social rights, since they are the most likely to be affected by economic sanctions. According to the Committee, the provisions of the ICESCR cannot be considered to be inoperative or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions.\textsuperscript{109} The state targeted with sanctions, and the international community itself must do everything possible to protect at least the core content of the economic, social and cultural rights of the peoples of that state.\textsuperscript{110}

The Committee derives this obligation from the commitment in the Charter to promote respect for all human rights. It also underlined that every permanent member of the Security Council has signed the ICESCR.

\textsuperscript{106} General Comment No. 8, supra note 74, at para. 3. For example, sanctions often cause significant disruption in the distribution of food, pharmaceuticals, and sanitation supplies, jeopardize the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work. See also Segall, supra note 14, at 37.

\textsuperscript{107} Normand, supra note 14, at 28.

\textsuperscript{108} Id. Normand states that the Security Council moves in a gray area between war and peace.

\textsuperscript{109} General Comment No. 8, supra note 74, at para. 7.

\textsuperscript{110} Id., at para. 7. Para. 10 stressed that the imposition of sanctions does not in any way nullify or diminish the relevant obligations of that state party. While sanctions will inevitably diminish the capacity of the affected state to fund or support some of the necessary measures, the affected state remains under an obligation to ensure the absence of discrimination in relation to the enjoyment of these rights, and to resort to all possible measures, including negotiations with other states and the international community, to reduce to a minimum the negative impact upon the rights of vulnerable groups within the society. See also General Comment No. 12, supra note 78, at para. 28. Even where a state faces severe resource constraints, whether caused by a process of economic adjustment, economic recession, climatic conditions, or other factors, measures should be undertaken to ensure the right to adequate food especially for vulnerable population groups and individuals.
although China and the United States have yet to ratify it. This conclusion of the Committee can be interpreted as a reaffirmation of the expectation that the Security Council would act in accordance with core human rights norms that were developed under the auspices of the United Nations, especially with regard to those which have been widely ratified by its members. Consequently one can conclude that the leeway granted to the Security Council to limit economic, social, and cultural rights may not be interpreted as authorization to suspend these rights. For the same reason coercive measures under Article 41 of the Charter may also not suspend the derogable rights in the ICCPR, if and to the extent that such enforcement measures need to limit them.

The Committee also submitted that when considering sanctions, it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country. This seems to introduce a proportionality principle akin to that of humanitarian law, which has found broad recognition in the rules for victims of armed conflicts in Additional Protocol I, that was already referred to above in Section 4.1. The major area where the principle of proportionality serves to limit the permissibility of military actions concerns the collateral damage to civilian populations and objects. The infliction of such collateral damage when attacking legitimate military targets is permissible only to the extent that the harm to civilians is not disproportionate to the value of the military target.

The problem with these criteria is that such norms of humanitarian law are normally only applicable in times of armed conflict. This makes it unclear whether one could apply a proportionality test derived from it in situations where the Security Council resorts to non-military measures, i.e., economic sanctions outside the context of armed conflict. This would be the case in Iraq, since the cease-fire agreement in Resolution 687 (1991). That the Security Council would indeed be bound to the collateral damage principle in times of armed conflict has already been

111. General Comment No. 8, supra note 74, at para. 8. The Committee also notes that most of the non-permanent members at any given time are parties to the ICESCR.
112. Note that the Committee exclusively dealt with the impact of economic sanctions on economic, social, and cultural rights.
113. General Comment No. 8, supra note 74, at para. 4.
114. See supra note 81. The prohibition of unnecessary suffering in Art. 23(c) of the Hague Convention IV of 1907 was the first codification of the principle of proportionality. See J. Delbrück, Proportionality, III Encyclopedia of Public International Law 1142 (1994).
115. See Arts. 48–67 of Additional Protocol I, supra note 81; Delbrück, supra note 114, at 1142; Normand, supra note 14, at 28.
116. Id.
117. Id.
118. UN Doc. S/RES/687 (3 April 1991), at para. 33; Fishman, supra note 3, at 717.
outlined above in Section 4.1. There are several reasons for arguing that the Security Council would also be bound to a similar proportionality principle when resorting to economic sanctions instead of military action.

First, the notion of collateral damage to civilians, especially with respect to their economic, social, and cultural rights, is inherent to both types of measures. Economic sanctions in particular strikes indiscriminately and fails to make a distinction between what can lawfully be targeted under international law and innocent civilians. Second, it is a more flexible proportionality principle than, for example, that provided in Article 4(1) of the ICCPR that permits derogations only to the extent strictly required by the situation. In the light of the leeway that the Security Council needs to act effectively, a more flexible principle for measuring the proportionality of its actions would be justifiable. At the same time the proportionality could not have a lower threshold than that required for military measures. For this would have the extraordinary result that the Security Council were not bound to proportionality when limiting human rights where there exists a ‘mere’ threat to peace, although it would be bound to do so during a full-scale war.

If one accepts this principle of proportional collateral damage in the context of economic sanctions, it would mean that the sanctions must be aimed at the regime and limitations imposed on the civilian population may not be disproportionate compared to the purpose served thereby. One example would be where a sanctions regime deprives a significant segment of the population from access to health care.

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119. International humanitarian law does not deal directly with the issue of economic sanctions decided in the course of armed conflict. None of its provisions mentions economic sanctions or deals in any other way explicitly with the humanitarian issue raised by such measures. The absence of specific provisions does not, however, mean that international humanitarian law is irrelevant for examining their effects. Considerations of humanitarian policy suggest that they also apply to economic sanctions adopted by the Security Council in the course of an armed conflict. The Fourth Geneva Convention of 1949 and the two Additional Protocols comprise a number of provisions that are relevant. For a discussion see Gasser, supra note 18, at 885; Fishman, supra note 3, at 719–720. Cf. R. Provost, Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait, 30 Columbia J. Transnat’l L. 577 (1992).

120. Normand, supra note 14, at 31; Gasser, supra note 18, at 883; see also H. Hazelzet, Assessing the Suffering from ‘Successful’ Sanctions: An Ethical Approach, in Van Genugten and De Groot, supra note 14, at 88; Köchler, supra note 67, at 32; Reisman & Stevick, supra note 10, at 92.

121. Some argue that the Security Council, having the power and moral authority of United Nations member states acting together, should be held to a higher standard of human rights protection than individual states. See Fishman, supra note 3, at 713. However, this argument does not take into account the special nature of the Security Council.

122. Segall, supra note 14, at 34.

123. Normand, supra note 14, at 31; Hazelzet, supra note 120, at 88. See also Herbst, supra note 54, at 380–381, who seems to support the proportionality principle provided for in Art. 4(2) of the ICCPR. Cf. Gill, supra note 13, at 67; Reisman & Stevick, supra note 10, at 128.
In assessing whether this is the case, one has to consider the impact of shortages of medical supplies and the deterioration of the public health system and infrastructure.\textsuperscript{124} One would also have to determine whether efforts have been made to reduce such impact, particularly on the most vulnerable such as the young and the elderly.\textsuperscript{125} These types of assessments involved in a proportionality test would require a certain passage of time, since the extent of the impact of a sanctions regime on the civilian population, as well as the effects of countering measures may not become apparent for some time.\textsuperscript{126}

4.4. Limitation of human rights in Iraq with specific reference to the right to health

After ten years of comprehensive sanctions there is a continuing degradation of the Iraqi economy with an acute deterioration in the living conditions of the Iraqi population and severe strains on its social fabric.\textsuperscript{127} Of particular concern is the impact of the sanctions on the right to health of the civilian population. Iraq’s 130 hospitals, many of them built by foreign companies between the 1960s and the 1980s, have not received the necessary repairs or maintenance since the imposition of sanctions. The buildings are in an advanced state of disrepair, as are the hospital sewage works, the electricity and ventilation systems, and the elevators. Expensive imported equipment or even more basic items are no longer being replaced. As a result, standards of health care in hospitals and health centers have reached appalling levels, despite the doctors’ dedication and high qualifications.\textsuperscript{128} Equally worrying is the state of the primary health centers, which serve the widest sector of the population. The centers cannot function properly owing to the shortage of equipment and material. They often lack the most basic tools such as stethoscopes, sterilizers, and writing paper.\textsuperscript{129}

The oil-for-food program introduced by Security Council Resolution 986 (1995) has brought some relief to the situation, as it increased the availability of food, medical supplies, and other commodities to the population. As a result, the humanitarian situation in the northern part of the country started to improve, whilst in the south it has stopped or slowed down further deterioration.\textsuperscript{130} However, even in the absence of further

\textsuperscript{124} Segall, supra note 14, at 27, 37.
\textsuperscript{125} Id., at 37.
\textsuperscript{126} Gasser, supra note 18, at 902.
\textsuperscript{127} Ann. II, supra note 41, at para. 43; HRW Letter, supra note 44, at para. 8.
\textsuperscript{128} ICRC Report, supra note 5, at 3.
\textsuperscript{129} Id. Standards of treatment are also falling, as doctors cannot keep their knowledge up to date. Hardly any medical literature has entered the country in the last ten years, as the importation of scientific literature is prohibited under the embargo.
\textsuperscript{130} Ann. II, supra note 41, at para. 32; HRW Explanatory Memorandum, supra note 8, at para. 4; Secretary-General’s Review, supra note 90, at para. 87.
deterioration, the situation continues to have lethal consequences for the
civilian population. The limited available funds have not allowed for
significant improvement in the infrastructure necessary for the provision
of health care. It did not halt the collapse of the health system or the
deterioration of water supplies, which together pose one of the gravest
threats to health and well being of the civilian population. Water borne
communicable diseases that had previously been brought under control
have now become part of the endemic pattern of the precarious health
situation.\footnote{Ann. II, supra note 41, at para. 21; ICRC Report, supra note 5, at 4; HRW Explanatory
Memorandum, id., at para. 25, Secretary-General’s Review, supra note 90, at para. 55; Fishman, supra note 3, at 705.}

It is by now clear that the precarious condition of the infrastructure in
health, sanitation, and power generation is linked to the unprecedented
scope and length of the sanctions regime and cannot be attributed exclu-
sively to the behavior of the Iraqi government.\footnote{Ann. II, supra note 41, at para. 54; HRW Explanatory Memorandum, id., at para. 8.} Even if all humanitarian
supplies were provided in a timely fashion and better co-operation of the
Iraqi government could be secured, the magnitude of the humanitarian
need is such that it cannot be met within the context of the parameters set
forth in Resolution 986 (1995) and succeeding resolutions. These measures
are, at best, of a stopgap nature that can neither meet all the basic needs
of 22 million people, nor ensure the maintenance of a whole country’s
collapsing infrastructure.\footnote{HRW Explanatory Memorandum, supra note 3, at 688, who states that Saddam Hussein and his inner circle
are even more firmly entrenched than before.}

One can therefore conclude that the sanctions regime has limited the
economic and social rights of the Iraqi people and in particular the right
to the highest standard of physical and mental health, in a severe fashion
over the last ten years. As time passes it is becoming increasingly diffi-
cult to justify this limitation as proportional, if the anticipated construc-
tive consequences of the sanctions were the Iraqi government’s compliance
with Security Council demands for disarmament.\footnote{HRW Explanatory Memorandum, id., at para. 46; Secretary-General’s Review, supra note 90, at para. 116; ICRC Report, supra note 5, at 5.} The reality of a decade
of sanctions has shown that the Security Council cannot reasonably expect
that the Iraqi government will comply with these demands, even at the
price of gravely damaging Iraqi society.\footnote{HRW Explanatory Memorandum, supra note 8, at para. 13.} The continuation of the embargo
in its current form would prolong disproportionate suffering amongst the
civilian population. It would also mean that the Security Council is acting
in bad faith by violating a core obligation under the ICESCR, namely,
not to engage in policies that undermine the right of the Iraqi people to
the highest attainable standard of physical and mental health.\footnote{Cf. Fishman, supra note 3, at 688, who states that Saddam Hussein and his inner circle
are even more firmly entrenched than before.} In order to make sure that its actions lie within the parameters estab-

\begin{thebibliography}{130}
\begin{footnotesize}
\item 131. Ann. II, supra note 41, at para. 21; ICRC Report, supra note 5, at 4; HRW Explanatory
Memorandum, id., at para. 25, Secretary-General’s Review, supra note 90, at para. 55; Fishman, supra note 3, at 705.
\item 132. Ann. II, supra note 41, at para. 54; HRW Explanatory Memorandum, id., at para. 8.
\item 133. HRW Explanatory Memorandum, id., at para. 46; Secretary-General’s Review, supra note 90, at para. 116; ICRC Report, supra note 5, at 5.
\item 134. HRW Explanatory Memorandum, id., at para. 24.
\item 135. Cf. Fishman, supra note 3, at 688, who states that Saddam Hussein and his inner circle
are even more firmly entrenched than before.
\item 136. HRW Explanatory Memorandum, supra note 8, at para. 13.
\end{footnotesize}
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lished by basic human rights, the Security Council should, at the very least, implement the recommendations of the humanitarian panel without any conditions or delay.\textsuperscript{137} Although Resolution 1284 (1999) has incorporated some of these recommendations, it was in a form that requires further action by the Security Council or the sanctions committee.\textsuperscript{138} It also did not take into account all the recommendations of the humanitarian panel. In particular, it did not authorize production sharing or other investment arrangements by foreign oil firms that could provide the equipment and maintenance needed to rehabilitate these facilities.\textsuperscript{139} As the rehabilitation of the country’s infrastructure is dependent on oil revenues, the rehabilitation of the dilapidated oil sector is an essential precondition for any lasting improvement in the humanitarian situation.\textsuperscript{140}

Second, the Security Council has to acknowledge that the recommendations of the humanitarian panel only address the immediate threats to the right to life of ordinary Iraqis. It does not contain elements of comprehensive planning and economic revival that are essential in order to reverse the dangerously degraded state of the country’s civilian infrastructure and social services.\textsuperscript{141} Stated differently, it does not contain a lasting strategy for addressing the Security Council’s disproportionate limitation of the socio-economic rights of the population. In principle, it is within the discretion of the Security Council to determine how to restructure the embargo in order to limit its impact on the Iraqi population. However, given the level of deterioration of the infrastructure, it is difficult to see how this could be done without permitting some import of civilian goods and investments in the civilian economy.\textsuperscript{142}

One possibility would be to remove restrictions on the imports of commodities that are not of a dual nature, \textit{i.e.}, that cannot (also) be used for military purposes, and on financial transactions involving civilian sectors of the economy, including foreign investments. At the same time there should be a continued prohibition of all imports and exports of a clearly military nature.\textsuperscript{143} The sanctions committee should also continue to scrutinize import contracts concerning items of a dual-use nature. In order to monitor compliance regarding restrictions on military and dual-use imports, all imported goods should be subjected to international

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\item 138. \textit{Cf. supra} note 45.
\item 139. It merely requested the Secretary-General to appoint a group of oil industry and other experts to develop recommendations regarding this proposal within 100 days. \textit{See also} HRW Letter, \textit{supra} note 44, at para. 9.
\item 140. Ann. II, \textit{supra} note 41, at para. 58; Oette, \textit{supra} note 25, at 852.
\item 141. HRW Letter, \textit{supra} note 44, at para. 7
\item 142. \textit{Id.;} Ann. II, \textit{supra} note 41, at para. 58.
\item 143. HRW Letter, \textit{supra} note 44, at para. 15.
\end{itemize}
\end{small}
inspection at all Iraqi ports of entry. The substantial increase in expenses that this would entail should be funded out of Iraq’s export revenues. To the extent that Iraq would not permit such inspections, one could attain the co-operation of Iraq’s immediate neighbors for this purpose. Since they would all have a direct interest in re-establishing trade with Iraq, it is possible that they would allow their territory to be used for such inspection-purposes.

It remains in the Security Council’s discretion to determine whether this would be the appropriate way for restructuring its sanctions regime. The example is nonetheless important, as it illustrates that it would indeed be possible to relieve the burden on the civilian population, but still exhort pressure on an Iraqi government that continues to pose a threat to international peace. That some restructuring of the sanctions regime in favor of the civilian population is necessary seems evident, if the Security Council intends to honor the core human rights obligations forming part of the purposes and principles of the United Nations.

5. Conclusion

The above analysis has indicated that the Security Council’s sanctions regime currently in place against Iraq is not in conformity with basic human rights norms. As these norms constitute elements of the purposes and principles of the United Nations, and to some extent even ius cogens norms, the sanctions regime in its current form constitutes an act of bad faith on the part of the Security Council and could be regarded as illegal. As a result, they would not bind member states anymore. Such an exercise of the ‘right of last resort’ has to be reserved for exceptional circumstances. Anything else would compromise the efficiency of the United Nations and rob it of an important enforcement mechanism that by its very nature implies a certain amount of hardship for those affected by it. It is submitted that the gravity of the Iraqi situation combined with the lapse of time since the imposition of sanctions constitutes such an extreme situation.

Ten years of sanctions combined with extensive information about the deterioration of the humanitarian crises in Iraq have given the Security Council ample opportunity to restructure its sanctions regime. Even though

144. Id., at paras. 16–17. This can in part address the Security Council’s concern that the lifting of civilian sanctions will increase the Iraqi government’s access to foreign exchange which can be used for the development of weapons of mass destruction. Although there is no way to ensure completely that this greater access to foreign exchange will not be used for prohibited purposes, the present arrangements under the total embargo has also not prevented the Iraqi government from obtaining foreign exchange through, for example, smuggling.

145. Id., at para. 17.

146. Cf. Oette, supra note 25, at 858.
the Security Council has consequently introduced and expanded the oil-for-food program, this has not prevented the sanctions regime from directly aggravating violations of the right to life of Iraqi children, and the right to health of the population at large. This can lead one to the conclusion that the sanctions regime would be illegal and in bad faith of the very principles that it is supposed to enhance.

If several states were to reject openly the legality of the Iraqi sanctions regime, for example through a resolution of a regional organization, it may intensify pressure on the Security Council to restructure it in a way that conforms to basic human rights norms. Arguments to the contrary, i.e., that such rejection would undermine the faith in the Security Council rings hollow in the light of the fact that that organ’s own behavior has hardly strengthened faith in its actions. Furthermore, it is hard to see how a sanctions regime resulting in the deprivation of the civilian society and the undermining of its social fabric would contribute to lasting peace in that region. A restructuring of the sanctions regime would therefore not only be necessitated by legal norms, but also by political considerations.

Finally one has to emphasize that these criticisms of the Iraqi sanctions regime are not aimed at giving support or encouragement to a regime which undoubtedly poses a threat to international peace and security. Nor is it aimed at preventing the Security Council from adopting economic or other enforcement measures in order to eliminate that threat, or at downplaying the extreme brutality of Saddam Hussein against his own people. It is aimed at preventing that lawlessness of one kind is met by lawlessness of another kind which pays no heed to the fundamental rights that underlie the legitimacy of collective enforcement action.147

147. Cf. General Comment No. 8, supra note 74, at para. 16.