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The Humanitarian Mitigation of UN Sanctions

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Introduction

The renascence of sanctions as an instrument of multilateral collective security enforcement since 1990 has been accompanied by an increased element of humanitarian mitigation built into the very sanctions regimes themselves. This has not, however, been sufficient to provide the degree of mitigation sought, since the increased use of sanctions has also been accompanied by increasing criticism precisely on the grounds that they ultimately impact too harshly on innocent civilian populations and thus are neither ethically sound nor practically meaningful: target regimes can all too easily escape the consequences of sanctions by deflecting their effects onto civilians.[1] Finally, sanctions have disenchanted a number of influential political constituencies both in Western and non-Western societies and these constituencies now oppose or discourage the use of sanctions in general and have taken to stressing their undesirable humanitarian side effects.

This has led both to claims of more precise causal relationships between sanctions and these undesirable effects[2] and to proposals to alleviate or eliminate such side effects by structuring sanctions measures in a more 'targeted' manner. Much of this discussion is crudely polemical and has its origins in political considerations unrelated to humanitarian concerns. Neither are these polemics informed by more precise insights into the actual functioning of sanctions regimes, partly because of the excess

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[1] For a recent general discussion see *David Cortright/George A. Lopez* (eds.), Economic Sanctions: Panacea or Peacebuilding in a Post-Cold War World?, 1995; *see further Manfred Kulessa*, Von Märchen und Mechanismen: Gefahren und Chancen der Sanktionen des Sicherheitsrats, Vereinte Nationen, No. 3, 1996, 89 *et seq.*

[2] According to a study published by the Food and Agriculture Organisation of the United Nations (FAO) in December 1995, 576,000 children had died in Iraq since 1990 as a result of sanctions. The annual report of the United Nations Children's Fund (UNICEF), published around the same time, found that, in the three years in which sanctions were in effect against Haiti, the percent of undernourished children rose dramatically from 27 to over 50 percent. *See* Süddeutsche Zeitung, 12 December 1995, 9. It is doubtful that such precise calculations are empirically verifiable, since no one really knows what the independent variable in the causal relationship is. There has never been a post-sanctions empirical study carried out to establish with what efficiency the sanctions impacted the target economy.

secrecy of central UN bodies, partly because there is practically no empirical research on actual sanctions regime performance. Since there is little likelihood that *ex post facto* research into actual sanctions performance will ever clarify the latter question, the only way to better inform debates on the issue at present is to lift the veil of secrecy on the precise workings of humanitarian waiver provisions in recent UN sanctions regimes.

A discussion from this vantage point introduces an additional problem into the issue, namely that humanitarian mitigation provisions can be and are abused. There is a real dilemma inherent in this problem and it is part of a broader set of phenomena (*e.g.* abuse of asylum provisions by pseudo-asylum seekers, abuse of humanitarian convoys to transport arms). Abuse of humanitarian provisions runs counter to the interests of the vulnerable groups they are supposed to protect. Those legitimately in need of humanitarian largesse must compete with those more powerful and better-resourced for the finite resources available. There would in any case be a built-in trade-off in sanctions between efficiency and humanitarian mitigation. As abuse reduces efficiency even further, it tempts the sanctioning party to dispense with any humanitarian dispensation altogether.

I. Traditional Humanitarian Law

Humanitarian law, as we know it, is largely the law of the conduct of warfare, and hence seeks to ensure a level of needs and considerations that is considerably below that applicable here. Sanctions differ from actual warfare in that they are devoid of physical violence in the usual military sense, but also in that they tend to remain in force and affect civilian populations over longer periods of time. The Geneva Convention structures of humanitarian law are largely concerned with protecting civilians from the immediate effects of military operations and conditions. They are not directly concerned with long-range needs or with needs related to social reconstruction and restabilization.[3] Hence they offer little direct assistance in deciding whether thermostats for brewery vats, tractor clutches, fabrics for school uniforms, cosmetics or wristwatches are to be considered as meeting basic civilian needs. Nor is it clear if, and if so how, they might be applicable to such issues as flights for religious pilgrimage or trans-border payment of social security benefits.

Despite this, traditional humanitarian law does provide some suggestions as to what criteria might be applicable to humanitarian waiver provisions in sanctions. It defines certain population segments as particularly vulnerable; it defines certain

[3] *See Hans-Peter Gasser*, Einführung in das humanitäre Völkerrecht, 1995; *Hans-Peter Gasser*, Protection of the Civilian Population of a State under Embargo, San Remo: 18th San Remo Round Table on Current Problems of International Humanitarian Law, 1993, especially 8 - 11.

types of infrastructural facilities as exempted from military action; it specifically mentions sectors exempted from blockades.[4] It does so by mentioning certain broader sectors or categories of activity rather than by attempting to provide an exhaustive listing of items. Thus humanitarian law does help clarify some of the parameters for distinguishing exemptible humanitarian goods or activities.

Because the level of protection for civilian needs guaranteed by traditional humanitarian law is so low, there is no disputing that UN sanctions regimes currently in force do indeed satisfy their requirements. The International Committee of the Red Cross (ICRC) has stated this explicitly.[5]

II. Security Council Mitigation Strategies and Provisions

1. Humanitarian Mitigation in Sanctions

No sanctions regime has been entirely without some waiver provisions. The basic core of these stems from humanitarian law considerations, notably the non-applicability of sanctions measures to medicines and foodstuffs *stricto sensu*. It has traditionally been held that there is no legal basis for placing embargoes on medicines in the course of sanctions actions, *inter alia* because of their inclusion in the Geneva Conventions. This has meant that medicines, normally described as 'supplies intended strictly for medical purposes', have been outside the ambit of Security Council sanctions altogether.[6] Despite this, sanctions committees have taken over certain administrative tasks with reference to medicines *stricto sensu*. However, as there has never been any obligation on States to notify target States of their medicine shipments, the rights of sanctions committees to put conditions on their administration of such shipments have not been recognized.[7] Sanctions committees have also had certain

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[4] Geneva Convention of 12 August 1949 Relative to the Protection of Civilian Persons in Time of War, Art. 23, 75 UNTS 287, 302 - 304; Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 12 December 1977, Art. 54, 16 ILM 1391, 1414.

[5] *See* remarks by *Hans-Peter Gasser*, Legal Adviser of the ICRC at the Round Table on Sanctions during the UN Congress on Public International Law in New York, 13 March 1995.

[6] Thus SC res. 661 of 6 August 1990, para. 3 (c); SC res. 757 of 30 May 1992, para. 4 (c).

[7] See on this point discussion in the provisional summary record of the 97th meeting of the Iraq sanctions committee, UN Doc. S/AC.25/SR.97. Provisional summary records of the Iraq sanctions committee are here quoted from an electronic database version (COMSR. ASK) that has no pagination. All documents quoted in this article in the series S/C.25/—, S/AC.27/— and S/AC.30/— are so-called 'restricted' documents that are not available in public collections but are available to Council members. The databases and 'internal secretariat docu-

discretionary interpretative powers in drawing the borderlines between 'supplies strictly for medical purposes' and such health-care-related products as fall within the ambit of sanctions regimes (generally: precursors, components, medical equipment, *etc.*). Originally 'supplies strictly for medical purposes' were held to refer only to medicines and medical supplies in their final end-user form, but over time sanctions committees broadened this definition to include surgical instruments and kidney dialysis machines.

There has been less unanimity about foodstuffs, but the only instance of their inclusion in sanctions[8] (against Iraq) was such a dysfunctional fiasco that it was not repeated in later regimes, and presumably will not be repeated in any futures ones. The only previous Security Council sanctions regime under Chapter VII had been imposed on Rhodesia, a net exporter of food. Hence the question was academic. In the case of Iraq, which in recent years had been a heavy importer of foodstuffs, the issue was very tangible. The first sanctions resolution against Iraq used the phrase 'foodstuffs in humanitarian circumstances', which represented a compromise between the original sponsors, who had wanted to ban foodstuffs outright, and several other members, who could not accept this. However the compromise solved fewer problems than expected, because it was not certain who was to decide when 'humanitarian circumstances' obtained, nor did it clarify whether or not foodstuffs are humanitarian *per se*. In ensuing arguments on this question, the Western sponsors claimed that the phrase agreed upon had been intended to mean that foodstuffs as such were not necessarily humanitarian; other members contested this. To solve the problem, a later resolution delegated authority for determining 'humanitarian circumstances' to the Iraq sanctions committee.[9] Between September 1990 and March 1991 it found such circumstances obtaining only for third-State nationals in Iraq (and occupied Kuwait) and did not make a general finding of 'humanitarian circumstances' until the active phase of the conflict had passed. By that time, a draft of the resolution providing a long-term settlement already existed, making foodstuff shipments to Iraq dependent upon notification only.[10]

Western members claimed in 1990 that the intention was to allow for the added economic and logistical burden of deprivation of foodstuff shipments to Iraq to apply pressure to the economy and thus on the national leadership, without such a blockade leading to any actual hunger. If the latter were to occur, this would constitute the 'humanitarian circumstances' under which foodstuffs would then be exempt from the blockade. The bitter arguments that the unclear provisions of Reso-

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ments' quoted are, strictly speaking, not documents at all and are not even available to Council members.

[8] SC res. 661 of 6 August 1990, para. 3 (c).

[9] SC res. 666 of 13 September 1990, para. 5.

[10] SC res. 687 of 3 April 1991, para. 20.

lutions 661 and 666 on this point entailed in the relevant sanctions committee, not to mention public criticism of the Security Council, deterred the Council from banning foodstuff exports to target States in subsequent sanctions exercises.

There are additional broad but not well-defined areas of items that are often exempted from sanctions regimes on less systematic and predictable terms. Here even the basic terminology and principles involved are more variegated and less precise phrases are used such as 'materials and supplies for essential civilian needs' or 'commodities and products for essential humanitarian need', or 'commodities or products for essential humanitarian needs'.[11] But there has been unanimous agreement that these parameters encompass a broader spectrum of goods for a broader spectrum of human activities, those that go beyond mere momentary survival in the midst of military action. The problem here is that these items may be useful for, or used by, different sectors of society; hence their claim for potential inclusion must still be dependent on some assurance that they will be used only in those sectors which legitimately and exclusively enjoy exemption on humanitarian grounds. This raises the question of end-use and end-users. At the other end of the scale there are items of a distinctly non-humanitarian nature. In the middle there is a vast area the borders of which will in most cases be the object of lively debate among those charged with making humanitarian waiver decisions (at present: the members of sanctions committees).

We have seen one reason why traditional humanitarian law is inadequate. Another is that it stipulates obligations in a blockade scenario. The blockading party is obligated to let certain goods pass through the blockade but is fully entitled to inspect transports to ascertain that only those items and no others pass. The UN does not normally exercise any such stringent control over shipments to and from target States. Its sanctions regimes are not trade-control regimes as was, for instance, the former COCOM regime directed at the Soviet Union and its allies.[12]

The irony here is that largesse could more readily be conceded by the sanctioning party (the Security Council) if it exercised greater control. A similar dilemma is present in the case in which decisions must be made on multi-use items and the end-use inside the target State cannot be fully monitored. It is this lack of practical control authority that opens humanitarian waiver provisions up to abuse and normally results in the ironic situation that attempts to alleviate the plight of civilians by excluding more items from any control by the sanctioning party have the effect of enhancing the target regime's ability to circumvent the remaining sanctions.

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[11] SC res. 687 of 3 April 1991, para. 20; SC res. 760 of 18 June 1992; SC res. 917 of 6 May 1994, para. 11; Press Release SC/5974, 12 January 1995.

[12] See on this point *Bernhard Großfeld/Abbo Junker*, Das CoCom im internationalen Wirtschaftsrecht, 1991.

2. *The Role of Security Council Sanctions Committees*[13]

It has elsewhere been argued[14] that UN sanctions regimes proceed from the flimsiest of strategic concepts and run on largely unclarified legal relationships between the key actors; they employ inadequate doctrinal and practical guidelines and primitive working methods and concentrate decision-making in the hands of amateurish diplomats and UN officials. There is little institutional memory and practically no contact with the situation on the ground. The sanctions committees operate in secret and few outsiders really know what they do or how they arrive at their decisions. Indeed, even their decisions are kept secret. Governments have only the foggiest of notions about what procedures and practices are, and less directly involved actors (humanitarian agencies, the press, the public at large) have even less insight into the practice.

The legal premises from which all this proceeds might perhaps be clarified here. The decision to impose sanctions, and almost all ancillary provisions flowing out of that imposition, are supposed to be absolutely binding on all States, but implementation is left to governments. The State under sanction ('target State') is considered a recalcitrant that must suffer some infringement of its sovereignty in that its right to trade is restricted, but it otherwise retains full legitimacy as the bearer of national sovereignty and is treated in most other respects as a full-fledged (*i.e.* equal) member of the community of sovereign States.[15] It thus remains the legitimate representative in international fora of its own civilian population. Both the sanctioning party (the Security Council) and the sanctioned party (the target State's government) are thus supposed to bear responsibility for the necessary protection of civilians in the target

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[13] On the practice of UN sanctions committees, see *Martti Koskenniemi*, Le Comité des sanctions (créé par la résolution 661 (1990) du Conseil de sécurité), Annuaire Français de droit international, vol. 37, 1991, 121 *et seq.*; *Michael P. Scharf/Joshua L. Dorosin*, Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee, Brooklyn Journal of International Law, vol. 19, 1993, 771 *et seq.*; *Paul Conlon*, Lessons from Iraq: The Functions of the Iraq Sanctions Committee as a Source of Sanctions Implementation Authority and Practice, Virginia Journal of International Law, vol. 35, No. 3, 1995, 633 *et seq.*; *Paul Conlon*, Legal Problems at the Centre of United Nations Sanctions, Nordic Journal of International Law, vol. 65, No. 1, 1996, 73 *et seq.*; *Hans-Peter Kaul*, Die Sanktionsausschüsse des Sicherheitsrats, Vereinte Nationen, No. 3, 1996, 96 *et seq.*

[14] *Paul Conlon*, The UN's Questionable Sanctions Practices, Aussenpolitik, No. 3, 1995, 327 *et seq.*; *Martin Ebbing*, The *Conlon* Report: The Trouble with Sanctions, International Report, 26 June 1995.

[15] Exceptions to this were Haiti and Kuwait. In both cases the legitimate governments continued to function and were represented by their normal diplomatic representatives at the UN. In fact, official UN references normally contained the added adjective 'legitimate' to avoid misunderstanding. In these cases the target State (area) was not controlled by its legitimate government.

State. In one respect the target State is treated differently with regard to the sanctions measures. All States are obliged to implement them; this would include the target State. However, it is not realistically expected that it will abide by them. Hence its actions with regard to the sanctions regime imposed against it (but only in this regard) are not presumed to be done in good faith. For this reason the target State cannot assume responsibility for implementation of measures relating to the sanctions. The most important type of measure here is the implementation of humanitarian waivers. Thus target States are not permitted by the sanctions committee to request or receive humanitarian waivers as an importing State. They may communicate their needs or wishes in this respect, but the formal request must come from a third State, generally referred to as the exporting State (though this is inexact).[16] This latter State assumes responsibility for correct implementation of the humanitarian waiver.

It is actually the ramifications of sanctions resolutions *vis-à-vis* non-targeted States that are much more problematic. Their sovereignty has also been infringed because they are obliged to desist from, and even to prohibit, trade with the target State. All their actions with regard to sanctions are assumed to be in good faith. This creates some problems because it is seen as limiting the extent to which the Security Council (or the committees) may question the actions of States with regard to the implementation of sanctions. In practical terms this has made the committees highly averse to asking member States for too much feedback on what happens on the ground. Consequently no sanctions committee has ever tried to elicit information from member States on the extent or details of trade relations with the target States.[17] Sanctions committees do not keep statistics on volumes cleared. Only governments (but normally not the target State) and international organizations are allowed to submit humanitarian waiver requests to the committees.[18] The government

[16] This was alluded to by the chairman of the Yugoslavia sanctions committee regarding a case in which a third State submitted a request on behalf of a citizen of the target State. *See* the provisional summary record of the 23rd meeting (17 July 1992), UN Doc. S/AC.27/SR.32, 14.

[17] This explains the paradox that the sanctions committees may churn out billions of dollars worth of waivers but do not know how much has been delivered. The idea behind this is that the committees may only query States on their violations of the sanctions, and the fulfillment (or even non-fulfillment) of a waiver authorization is not a violation.

[18] A peculiar case is that of the ICRC. It is invariably represented in target States and from time to time ships its own operational equipment there. The UN considers the ICRC bound by Security Council resolutions as any other international organization is. But because of its status under international law, the ICRC has never agreed that it is required to clear such shipments via the relevant sanctions committee. Consequently the wording of its correspondence never suggested that it was requesting permission, which would recognize the committee's right to control its movement of supplies to its own operatives. Rather it informed the committee of its intention to ship. The wording of the committee's reply, in turn, protected

that initiates the action is assumed to be taking responsibility for correct implementation in case of a positive response, regardless of whether or not it actually has jurisdiction over fulfillment.[19] There is no obligation to report on fulfillment of clearances.

Finally the dichotomy between 'decisions' of the committees and 'implementation' by governments leaves three important areas in a legal no-man's land: interpretation, verification and coordination of sanctions measures. Security Council bodies are jealously interested in exercising interpretation functions, but do not in a basic sense aspire to any greater role in verification or coordination.[20] Governments are not free to decide if, for instance, whiskey is to be considered a foodstuff or if surgical gloves are to be considered 'supplies intended strictly for medical purposes'. These definitions are ultimately up to the committees, which, over time, have tended to broaden definitions in borderline cases. Few disputes have arisen from this. But in cases in which the accelerated no-objection procedure is used, the scope of the committees' interpretation authority is even more patent.

3. Humanitarian Mitigation Strategies and Procedures

Let us now look at the exact humanitarian waiver methods used in recent sanctions regimes.

a) Exemptions

The first means is that of simply excluding certain categories of goods from the scope of the sanctions. Medicines, rather narrowly defined as 'supplies intended strictly for medical purposes', have always been so excluded; later the Council moved towards including further products (as yet to be determined) in this category.[21] Although excluded items are often communicated to the sanctions committees

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the latter's own legal claims by treating the matter as if it had been a request.

[19] *Conlon* (note 14), 333 contains an example reproduced here in Part IV section 1.

[20] This creates the vacuum which, in the case of Yugoslavia, has led to the establishment of multilateral verification and coordination structures, Sanctions Assistance Missions (SAMS). These missions were located on the borders of Serbia-Montenegro. A central coordinating unit, located in Brussels, was known as the Sanctions Assistance Missions Coordination Centre (SAMCOMM). See on this point *Richardt Vork*, Les Missions d'assistance pour l'application des sanctions de l'UE/OSCE et le SAMCOMM, in: *Eugenios Kalpyris/Richardt Vork/Antonio Napolitano*, Les Sanctions des Nations unies dans le conflit de l'ex-Yougoslavie, 1995, 75 *et seq.*

[21] This intention was announced in April 1995 in the recommendations of a working group of Council members, UN Doc. S/1995/300.

out of convenience, governments have no obligation to do so. Thus trade in these items to the target State escapes the immediate purview of the sanctions committees.

b) Notification

A slightly stronger form of control applies to those items, normally foodstuffs, subject to notification. There is no general ban on their shipment to the target State, but permission to ship requires notification to the sanctions committees. Normally quantity, value and identity of consignor and consignee are contained in such notifications, but there is no absolute requirement that such be included. The purpose of notification is to provide some minimal control over the definition of items; otherwise governments could extend the scope of items through opportunistic redefinition. Committees in any case apply broad standards such that unappetizing items like soda ash, patchouli leaves, flower bulbs and banana and pineapple plants have on occasion been treated as foodstuffs.[22]

c) No-Objection Items

Further items, variously defined in different sanctions regimes at the level of Security Council resolutions,[23] are subject to a no-objection procedure, which means that a State must request authorization for the shipment. Because the committees work on the basis of consensus decision-making, a single member can block such a request. Reasons are given for rejecting a request, but not for accepting one. The procedure also means that requests are automatically authorized and the authorizations signed by the committee chairman if no objections are communicated by the

[22] Singapore in a letter to the Iraq sanctions committee of 19 January 1993, UN Doc. S/AC.25/1993/COMM.181, notified shipment of 5 tons of patchouli leaves to Iraq; in October 1993 the present Author wrote a memorandum requesting information from the United Nations Special Commission (UNSCOM) on 'Possible Weapons Relevance of Patchouli Leaves'. The response was negative. On flower bulbs, banana and pineapple plants see communication of 27 September 1994 from the Director of SAMCOMM to the Yugoslavia sanctions committee, UN Doc. S/AC.27/1994/COMM.44808, voicing criticism of that committee for allowing 125 tons of flower bulbs and 100,000 plants of each of the indicated kinds to be shipped to Yugoslavia as foodstuffs.

[23] For Iraq: 'materials and supplies for essential civilian needs as identified in the report of the Secretary-General dated 20 March 1991 (S/22366)'; For Yugoslavia: 'commodities and products for essential humanitarian need'. See note 12 for source in both cases. The report of the Secretary-General referred to above was widely referred to as the 'Ahtisaari Report', and did not contain criteria for which items were needed, but rather which broad economic and social sectors were to be considered for humanitarian treatment. In these cases as well as Haiti, sanctions measures were general but allowed exceptions. In the case of Libya the situation was reversed: selective sanctions were imposed against a background of general 'permitted' trade.

stated deadline. There is thus no requirement for positive approval action on the part of members. While one observer has argued that "all committee members are basically called upon to participate in examination and decision,"[24] of humanitarian waiver requests, another has complained that the general passivity of most members gives grounds to question the legal soundness of the decisions.[25]

In most sanctions regimes, decisions on no-objection items are not made on a purely categorical basis, but take other factors into account, particularly end-use and end-user. Furthermore, the Iraq sanctions committee based much of its earlier work on considerations, not of the actual items requested, but of the *sectors* in which they were to be used.[26] While this occasioned charges that committee practices were arbitrary, the basic reasoning was correctly perceived by the target State and potential exporters, who began to manipulate their item descriptions accordingly. The matter is exacerbated by the fact that the committees do not coherently communicate any reasons to the requesting party. The Iraq sanctions committee, via its chairman, originally did so but the volume of waiver traffic soon made it impossible to maintain this practice. The committee at one point granted authorizations of spare parts for ambulances and tractors, but not for private vehicles. Similarly construction materials specifically intended for hospitals, schools, houses of worship and even low-income housing projects were approved, while those for more general end-users were not. Requests for goods used in certain sectors (medical care, agriculture, water supply, refrigeration, food processing, education, religious worship) tended to be approved, while those for others (construction, industry in general) were not. Certain sectors, notably sports and culture,[27] were not recognized as covered by human-

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[24] *Kaul* (note 13), 100.

[25] *Conlon*, Legal Problems (note 13), 86.

[26] It might be noted that periodic aggregations of authorizations compiled by the present Author for the Iraq sanctions committee classified items according to sector. Thus in an internal secretariat document 'Consolidated Report on the Shipment of Foodstuffs, Medicines and Materials and Supplies to Meet Essential Civilian Needs: Status for Period 1 January 1992 through 30 June 30 1992' (24 July 1992), 3, the following explanation was given: "a refrigerator for hospital use will be listed under 'Medical and Hygienic Articles', whereas a refrigerator used in a food factory will be listed under 'Food Processing'. In contrast to previous reportings, agricultural vehicles are now included under agriculture, and not [under] vehicles; similarly vehicles used in water and sewage systems are likewise [found] under their respective heading."

[27] At the 104th meeting of the Yugoslavia sanctions committee, the Russian Federation argued that cultural exchanges were not prohibited by para. 4 (c) of Resolution 757. The United States disagreed, pointing out that para. 22 of Resolution 820 made authorization necessary. See provisional summary record, UN Doc. S/AC.27/104, 6. At the 102nd meeting of the Iraq sanctions committee on 14 October 1993, a request from Iraq to allow a ship with football supporters to dock in Qatar, where the national team was playing a play-off match, was not granted, despite a general consensus that it was a humanitarian matter, *see* the provisional

itarian principles, presumably because they were not so considered when classical humanitarian law instruments were drawn up. Because committees follow regime-specific criteria and are not bound either by precedent or by the practices of other sanctions committees, this mode of operation has the advantage that it can take into account regional or cultural differences. Thus hard liquor was considered a basic humanitarian item for shipments to Yugoslavia but not to Iraq. The Iraq sanctions committee, influenced by economic warfare considerations, which are not part of the UN Charter's scenario for sanctions, tended to block non-finished industrial inputs in favor of finished goods. One reason is that finished goods are easier to control than pre-finished components. This practice was particularly objectionable in the case of textile fabrics, because households in that part of the world frequently sew their own clothes from fabric. In the case of Yugoslavia, which alone among sanctions target States had a more advanced and variegated economic structure, it was feared that unlimited exports of prefabricate and precursors would enhance its ability to produce end-products for export and thus thwart the purpose of the sanctions. One member, the United States, used such an argument against a proposal to disallow exports of pharmaceutical raw materials, but eventually had to yield to pressure.[28]

The system contains the rational core of an attempt to define more clearly which sectors and activities should benefit from humanitarian mitigation considerations, but it could not be developed into anything more coherent. Given the huge volumes of cases and the rudimentary administrative facilities of the UN secretariat, sanctions committees could not keep track of their own practice. This obviously led to many arbitrary and inconsistent decisions. However the practice was by no means as arbitrary or insensitive to humanitarian considerations as its enemies have claimed.

There have been frequent complaints about delays in handling such requests. UN officials do not scrutinize, evaluate or even collate such requests; they merely process them for further transmission to members. The latter are not required to give positive approval for a request to be authorized; it suffices if they remain passive and do not register any objection to it. It is hard to see how this could be done faster. Scrutiny of the requests and discussions on their acceptability are the domain of members interested in objecting (most members passively accept all requests). Delays are rather the result of this and the huge request volumes.

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summary record in UN Doc. S/AC.25/SR.102. The same general tendency ran throughout extensive discussions of Yugoslavian participation in the 1992 Olympics in UN Docs. S/AC.27/SR.22, S/AC.27/SR.23 and S/AC.27/SR.24.

[28] *See* the remarks of the U.S. delegate, *Graham*, on this subject in the provisional summary record of the 21st meeting of the Yugoslavia sanctions committee on 14 July 1992, UN Doc. S/AC.27/SR.21, 7.

Occasionally there are gentlemen's agreements to 'consider favorably' items in certain broad sectorial categories, although even here there are no coherent item lists and there is no binding obligation to abide by the agreement. Thus within the Iraq sanctions committee there was a 'gentlemen's agreement', framed by the then-ambassador of Zimbabwe on behalf of the non-aligned members. Their original intention had been to obtain the transfer of certain sectorially defined items to notification status. The more hard-line members rejected this but instead agreed that they would 'generally look favorably on requests' within certain categories (*e.g.* civilian clothing, supplies for babies and infants, spare parts and materials for water treatment and sewage disposal plants).[29]

d) Financial Controls

Freezing assets of a target State has been a common sanctions measures but generous loopholes have always been provided. The granting of clearance for shipments is divorced from considerations on their financing, and asset freezes generally do not apply to goods for which clearance has been given. The Yugoslavia sanctions committee, by granting clearance for upwards of US$ 50 billion worth of goods thereby unfroze an amount assumed to be in excess of what was originally frozen. The sanctions regime against Iraq was particularly rigorous in that the original unfreezing of frozen assets for the purpose of paying for humanitarian waivers was later countermanded by Resolution 778.[30] This then imposed a total ban on the unfreezing of any frozen assets, except under certain limited conditions having to do with an escrow account controlled directly by the UN. But the relevant sanctions committee had no functions mandated under that resolution, and continued to authorize and administer waiver shipments without taking the provisions of that resolution into consideration. In general control of assets has been an aspect of sanctions regimes in which the UN has been notably unsuccessful.

III. Actual Practice in Humanitarian Waivers

1. Sanctions-Committee-Administered Waiver Clearances

Statistics will shed some light on the major problems involved here. In 1994 the Iraq sanctions committee handled about 6,000 humanitarian waiver clearances of all

[29] Text contained in the provisional summary record of the 66th meeting of the Iraq sanctions committee, UN Doc. S/AC.25/SR.66. The original listing was in a letter from the ambassador of Zimbabwe to the chairman of the committee of 23 December 1991, later reprinted in UN Doc. S/AC.25/1994/INF/1.

[30] SC res. 778 of 2 October 1992.

kinds. It cleared US$ 1.2 billion in foodstuff notifications and US$ 215 million in medicine notifications along with US$ 2.8 billion in authorized no-objection item requests. The total for all clearances was thus US$ 4.2 billion. An additional US$ 925 million worth of no-objection item requests were still undecided as of about March 1995. Of all no-objection item submissions in 1994, US$ 3.3 billion were rejected by the committee. If all waiver actions submitted had been cleared, the amount involved would have been US$ 8.4 billion. The average acceptance rate for no-objection items was 45.7 percent. Jordan, the Republic of Korea, the United Kingdom, Turkey and Finland were Iraq's top five waiver trade partners, followed by Germany, Egypt, France, the Netherlands, Pakistan, Bulgaria and Portugal. Of all clearances, 18 percent had been submitted by Security Council members, 14 percent by permanent and 4 percent by non-permanent members. Of all clearances about US$ 57 million (or 1.3 percent) were submitted (and paid for) by various UN sections and agencies.[31] In 1993 the same committee had handled about 5,000 requests and cleared a total of US$ 3.4 billion. Waiver clearances were thus rising, but the rate of increase was gradually levelling off. In 1993 Security Council members had done no less than one-fourth of all the waiver trade with Iraq. The level probably rose again in 1995 and 1996 as Germany was then a non-permanent member of the Council.

Nobody knows exactly what the equivalent figures for the Yugoslavia sanctions committee were, but in calendar year 1994 an estimate of US$ 30.6 billion was calculated on the basis of a random sampling. It broke down into US$ 16.1 billion for food, US$ 2.5 billion for medicine and US$ 12 billion for no-objection items. The general acceptance rate was 65 percent. By monetary volume, just under 71 percent of the clearances were submitted by Bulgaria; Romania accounted for 4.6 percent and Hungary for 3.8 percent. The remaining trading partners in the sample (twenty

[31] The figures were calculated from data in 94COMMS.DB, the relevant committee's correspondence and case management Paradox database. For involved methodological reasons the calculation is an underestimate rather than an overestimate, and all value figures reflect what the submitting parties claimed. The value of medicines may be understated, since much medicine was cleared in small gift shipments sent (or taken) by businessmen; these were frequently marked 'ncv' or 'no commercial value' and thus did not enter into the calculation.

countries) had negligent 'market shares'.[32] The total number of correspondence items was about 20,000.

Fulfillment rates are unknown but have been estimated at about 10 percent (by value) for Iraq and at about 2 percent (by weight) for Yugoslavia.[33] Bulgaria on one occasion admitted that it had made use of only 0.7 percent of its clearances for 1993.[34] Analysis of requests to both committees over the years generally showed that at least 95 percent of the requests were purely commercial. 'Humanitarian' deliveries, *e.g.* donations from humanitarian, non-governmental organizations (NGOs) such as Save the Children or Oxfam, and aid from international organizations such as the World Food Programme (WFP) or UNICEF were somewhere around 2 - 5 percent of the total.[35] Certain categories of goods were over-subscribed: thus food notifications to Iraq between May 1991 and December 1993 totaled over 23 million tons (approximately ten years' worth of food imports in normal times).[36] Turkey in the first half of 1994 alone requested clearance for over 48 million drinking vessels

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[32] The figures are taken from a memorandum prepared by the present Author, 'Annual Volume of Commercial Clearance of the 724 Committee', and dated 5 December 1994. The random sample was of 1 percent of all submissions between 1 January and 15 November 1994; this is the lowest acceptable sampling level for such an extrapolative estimate. For methodological reasons, in cases of doubt all figures were biased towards the lower end, meaning that the estimate is more likely to be an underestimate than an overestimate. The figures obtained for Bulgaria would indicate that that country's total waiver clearance for the year was US$ 21.6 billion. Of the correspondence picked up in the random sample, 39 percent came from Bulgaria, and its acceptance rate was lower than average, but the average value of a Bulgarian submission was twice as high as the remaining sample. If all waiver submissions for the year had been cleared, the total would come to US$ 47 billion.

[33] Iraq's imports in the years 1993 - 1994 are assumed to have been in the area of US$ 800 million to US$ 1.2 billion. However an unknown (but apparently substantial) portion of that went for purchases that were not *per se* cleared by the sanctions committee, though committee clearance documentation may have been used to smuggle them. It was on this basis that the figure of 10 percent was arrived at. For Yugoslavia see *Vork* (note 20), 95 - 96. The figure 2 percent is by quantity, taking into account partial fulfillment of some shipments. Some 88 - 91 percent of all committee clearances were never used for any trans-border shipment. This means that about 30,000 of the clearance documents issued by the sanctions committee in New York were wasted effort.

[34] Letter from Bulgaria to the Yugoslavia sanctions committee, 28 June 1994, UN Doc. S/AC.27/1994/COMM.35671, mentioned by the chairman at the committee's 106th meeting on 1 July 1994, *see* provisional summary record of the meeting in UN Doc. S/AC.27/SR.106, 7. The letter used the term 'duly notified', implying it meant food and medicine.

[35] *Paul Conlon*, Committee Administration of Authorised Exports to Iraq, 21 August 1992, 4 (internal secretariat report).

[36] Calculated from FOOD.ASK, the relevant committee's food notification askSam database. This was discontinued after December 1993 because waiver statistics for 1993 and 1994 were collated on the basis of monetary value.

(water glasses, teacups *etc.*) and for over 160,000 tons of soap and detergent for Iraq.[37] The number of shoes cleared for Yugoslavia in a seventeen-month period (120 million pairs) would have sufficed to provide eleven new pairs of shoes for the entire population (including infants).[38] The chairman of the Yugoslavia sanctions committee, the Brazilian ambassador, was forced to spend a weekend in April 1994 affixing his signature to several hundred letters with a total clearance value of US$ 700 million.[39] Remarks by the secretary of the committee at a later meeting give an indication of the Alice-in-Wonderland nature of the business transacted.

> Mr. *Ilitchev* (Secretary of the Committee) noted, in connection with the problem to which the Chairman had referred, that sugar exports from Bulgaria had totaled US$ 379 billion [in 1991], which worked out to a unit price of US$ 12 per pound, or approximately four times the average market price. From the standpoint of the quantities being imported, the consumption of eggs in Yugoslavia would be three times the average annual consumption in the United States. The information that SAMCOMM could provide would help to clear up those types of anomalies.[40]

Ironically enough, medicine notifications for Iraq in 1993 and 1994 were only US$ 223 and 215 million respectively, below the minimum of 365 US$ million that the World Health Organisation (WHO) considered an acceptable level.

2. Manipulative or Inappropriate Humanitarian Waivers

Statistically speaking, abuse prevails over legitimate use of this humanitarian mitigation system, because only 2 - 10 percent of the clearances are used for the humanitarian purposes recognized by Security Council resolutions. What happens to the rest is anyone's guess, and while it is probable that many simply go unused, a portion of these are obviously being used for manipulative and presumably illegal purposes. The phenomenon persisted over several years, showed no sign of abating by itself and even began to appear in embryonic form in the work of the Haiti sanctions committee.

Even the application of the term 'humanitarian' to these waiver actions is misleading. Most of them are purely commercial transactions carried out under normal 'what the market will bear' conditions. Charging US$ 10 for a water glass or GB£ 1 for a light bulb (wholesale prices!) would not normally qualify as 'humanitarian'.

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[37] Internal secretariat document, Statistics on 1994 No-Objection Requests from Turkey, 13 June 1994.

[38] Communication from SAMCOMM to the Yugoslavia sanctions committee, UN Authorization of Shoes, 18 November 1994.

[39] *See* the provisional summary record of the 103rd meeting of the Yugoslavia sanctions committee, 29 April 1994, in UN Doc. S/AC.27/SR.103, 3.

[40] Provisional summary record of the 113th meeting, 1 December 1994, UN. Doc. S/AC.27/SR.113, 11.

Many commercial actors simply want to re-open trade with the target State and seek to obtain permits under the only headings permissible; some of them may have been led to believe that target-State markets are particularly lucrative. In order to obtain permits, manipulative item descriptions are used. Expensive Reebok sneakers were cleared to Yugoslavia as 'shoes for disabled persons and handicapped children'[41] and building materials approved for a low-income housing project in Basra were said to have been diverted to other use by the Iraqi authorities.[42] Pre-fabricated or more general source-stocks are approved under the guise of more acceptable end-use descriptions. Thus a shipment of PVC granulate to Serbia was cleared as 'PVC materials for food packaging'.[43] Granulate could be used for all products containing PVC, most of which have nothing to do with food packaging. Similarly, computers were disguised as 'office furniture'.[44] One of the most interesting examples is coffin cloth. Allowed by the Iraq sanctions committee originally because funeral accessories are considered humanitarian,[45] the committee was later inundated by clearance requests running into the thousands of tons. Presumably these were nothing but textile fabrics.

Many of the commercial interlocutors requesting clearances in the millions (and occasionally even billions) are obscure firms operating out of residential or postbox addresses. A Swedish multinational exporting tires and spare parts to Iraq turned out to be a neighborhood grocery store. A jewelry shop in Germany, disguised as an oil company, came within a hair's breadth of obtaining US$ 1.3 billion worth of clearances, and would have obtained the clearances had it not been imprudent enough to arouse suspicion with a unit price for detergent of US$ 4 per ton.[46] The

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[41] *See* note 38.

[42] *See* provisional summary record of the 93rd meeting, 5 May 1993, UN Doc. S/AC.25/SR.93.

[43] The authorization had been granted to Bulgaria in UN Doc. S/AC.27/1994/OC.30175; communication from SAMCOMM to the Yugoslavia sanctions committee, 'PVC Material', 12 December 1994.

[44] *Vork* (note 20), 107.

[45] *See* provisional summary record for the 78th meeting of the Iraq sanctions committee, UN Doc. S/AC.25/SR.78.

[46] The applications, dated 14 February 1994, were submitted by Germany, UN Docs. S/AC.25/1993/COMM.1756 - 1757; *see* Der Spiegel, No. 14, 1994, 104 - 105.

Iraq sanctions committee was even willing to deal with *Marc Rich*[47] and *Saddam Hussein*'s son *Uday*.[48]

A further unedifying phenomenon, which is problematic because it cannot be stopped, is that the humanitarian exemption categories also cover luxury items. Thus for several years fresh meat was flown into Baghdad from Khartoum (a three-and-one-half-hour flight) several days a week. This questionable trade was marginally even subsidized by UNDP. On one occasion the Iraqi regime boldly requested permission for 1,000 cases of expensive Scotch. The committee refused, but not after considerable arguing, and more members supported the request than opposed it.[49] In the Yugoslavia sanctions committee the United States, in particular, frequently fought against authorization for what it considered luxury items and argued that cigarettes and liquor should never have been made notification items in the first place.[50]

3. Presumed Abuses of Waiver Clearances

In general, while humanitarian waivers seek to satisfy basic needs of civilian populations, and especially of vulnerable groups, it is ultimately the target regime itself that must order the goods and arrange for payment. It can thus prioritize certain

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[47] At the 73rd meeting of the Iraq sanctions committee on 9 July 1992, the U.S. delegate expressed his government's reservations about Switzerland's application to place the name of one of *Marc Rich*'s firms on the list of oil companies approved for trading with Iraq under the original oil-for-food scheme. However, two other companies owned by *Rich* were accepted by the committee (and its U.S. delegate) without comment. *See* the provisional summary record of the meeting in UN Doc. S/AC.25/SR.73. The more or less complete list of all approved oil companies was published by *Tom Ashby*, Oil Firms no longer Notifying UN Panel on Iraq, Reuters, 21 February 1996.

[48] *See id.* The British trading company, Worldwide Ltd., reputed to belong to *Uday*, was on the same list. The Iraq sanctions committee in the course of the years cleared huge amounts of cigarettes and frozen chicken, commodities in which *Uday* was said to have a monopoly concession. *See Michael Theodoulou/Christopher Walker*, Baghdad 'New Mafia' Tightens Grip on Vital Supplies, Times (London), 4 September 1992. In 1992 the company received authorization for a single transaction (tractors, steel piping, water pumps) worth GB£ 148 million. *See* application of United Kingdom, 20 March 1992, UN Doc. S/AC.25/1992/COMM.256.

[49] *See* provisional summary record of the Iraq sanctions committee, UN Doc. S/AC.25/SR.79. The request is contained in UN Doc. S/AC.25/1992/COMM.1065.

[50] *See* statement by the U.S. delegate in the provisional summary record of the 104th meeting of the committee on 25 May 1994, UN Doc. S/AC.27/SR.104, 5. *Scharf* was one of the U.S. State Department's desk officers for the Yugoslavia committee and has mentioned this issue in his coauthored article (note 13), 784, as well as in his comments at the Round Table (note 5).

goods over others, or even try to use the option for purposes not permitted by the humanitarian provisions.

Many of these excessive waiver clearances are merely speculative. The tentative deal falls through, most probably for lack of financing. However, this simple scenario does not explain the persistence and ubiquity of this phenomenon, even less the magnitudes involved. What then are the exact abuses that presumably lie behind these bizarre transactions?

The simplest abuse is pure commercialization of the clearance documents themselves. They have been bought and sold on the curb in relevant venues (Amman, Zagreb) by those wishing to smuggle goods to the target States. They may also be convenient ways of gaining clearance for transport desirable for other reasons. This was clearly one of the main motives behind the Sudan meat flights. Similarly, one Bulgarian factory obtained clearance for 10,000 truckloads to Iraq by notifying a donation (!) of some 265,000 tons of foodstuffs worth about US$ 100 million.[51] More relevant is abuse directed at releasing frozen assets. There are two ways of doing this. In the literal case, the goods obtained are resold. However, this is costly. It is simpler and cheaper to obtain clearance documentation from the committee directly (or from a document broker), obtain release of funds from a bank in the amount of the invoice, then cancel the deal and keep the money.

The large volumes sometimes requested seem to be used for camouflaging smaller volumes of prohibited items. SAMS[52] on the borders of Yugoslavia frequently found prohibited items covered with legitimate items for which there was authentic clearance documentation. It should be pointed out that practically all land customs crossings into Iraq and Yugoslavia were undermanned and poorly equipped to allow rigorous inspections. The lack of precision in formulating clearance documentation enhanced the possibilities of fraud here, since quantification was sometimes vaguely stated in terms of weight (thus even things like teacups and coffin cloths were cleared in tons). In the case of Iraq, 'glue' and 'water treatment chemicals' were favorite request categories. Presumably any kind of liquid or viscous chemicals could be packed in plastic containers and cleared across the border with such permits. Some items like spare auto parts could easily be shipped with documentation clearing tractor parts. Thus a permit granted to a firm in London for GB£ 500,000 worth of tractors and combine harvesters was used in an unsuccessful attempt to smuggle GB£ 5 million worth of spare parts for autos into Iraq via Jordan. The shipment was accompanied by an invoice from a non-existent firm in Ontario.[53]

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[51] The request is contained in UN Doc. S/AC.25/1992/COMM.1660.

[52] *See* note 20.

[53] The authentic permit is contained in UN Doc. S/AC.25/1993/OC.907, referring back to the request in UN Doc. S/AC.25/1993/COMM.981. This was granted to one United Projects Co. Ltd. in Chiswick (London), registered company number 02304725; the invoice was

Because clearance documentation often did not bother to specify the items covered but employed phrases like 'items as per your attached list', the substitution of a different list for the one cleared was another possibility. Ultimately, bulk item descriptions were often usable without substitution. The items covered being left so vague (*e.g.* greenhouse parts), the clearance could be used with anything that vaguely resembled it. In one case involving 'greenhouse kits' with a unit price of US$ 713, each unit was found to consist of 16 tons of structural parts, one generator, one air conditioner and 20 cartons of electrical accessories.[54]

It also appears that clearance documentation was sometimes used for illegal purposes unrelated to the target State, *e.g.* clearance documents for export of hard liquor to Yugoslavia were useful to those smuggling liquor into Slovenia or Hungary. Neither can it be excluded that some of the permits were simply sought to be used by entrepreneurs seeking export subsidies or other purely domestic advantages. These would constitute abuse of the options offered for humanitarian waivers but are not necessarily sanctions violations. There is political abuse as well. Jordan once harassed the Iraq sanctions committees by dumping large numbers of frivolous requests. This led to administrative chaos, incurred considerable cost and also delayed action on legitimate humanitarian waiver cases for months.[55]

A somewhat patent case will suffice to show how far humanitarian mitigation measures have moved away from their original purpose. In 1992-93 the Iraq sanctions committee was confronted with a number of applications for export of specified glue types to Iraq: 40 tons of 'binding glue for books for sale to the [Iraqi] Ministry of Education', 50 tons of 'binding glue for school books', 100 tons of glue 'for use in schools and households', 100 tons of 'stationery glue' and 20 tons of 'paper glue for bookbinding'.[56] 'Hard-line' members of the committee had already rejected most of these when a row erupted at a meeting, whereupon it was agreed to refer the matter to the United Nations Educational, Scientific and Cultural Organisation (UNESCO) for an expert opinion on how much bookbinding glue Iraq might be in

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from one General Trading Corp. Inc. of Mississauga (Ontario), but the company did not exist. The address and telephone numbers given belonged to private individuals, one of whom belonged to an Iraqi family known for its sanctions circumvention activities.

[54] The permit is contained in UN Doc. S/AC.25/1994/OC.2961 and referred back to the request in UN Doc. S/AC.25/1994/COMM.4384. The latter had been submitted by the Philippines on behalf of the Manila office of an Iraqi-owned firm, Al-Rafidain Trading Co. Inc.

[55] Sanctions Iraq-Jordan, unsigned wire dispatch from KUNA (Kuwaiti News Agency), 25 April 1995.

[56] The requests are contained in UN Docs. S/AC.25/1992/COMM.755, S/AC.25/1992/COMM.1728, S/AC.25/1993/COMM.123, S/AC.25/1993/COMM.284 and S/AC.25/1993/COMM.295 respectively.

need of.[57] The latter eventually responded with an estimate of about 1 - 2 tons annually needed for binding school books.[58] Even then, when it was clear that requested volumes would suffice for close to a century at current consumption levels, more members of the committee argued for approval than against it, one of them with the argument that "the right to culture and education was a right of all human beings."[59] Because the estimate by UNESCO appeared to refer too narrowly to bookbinding glue for schoolbooks, further clarification was sought. When all the facts were in, it appeared that the amount needed globally for education in Iraq might be 60 - 70 tons per year,[60] while the committee in 1992 had authorized exports of 320 tons of glue and rejected or deferred exports of 100 tons; in 1993 the committee had thus far rejected the export of 400 tons of glue and had decisions pending on another 2,310 tons of glue, the latter worth about US$ 2 million.[61] Triumphantly, the 'hard-liners' then proceeded to reject another 3,000 gallons of glue 'for medical belts'.[62]

Similarly unedifying scenes accompanied drawn-out debates over clearance for banknotes between the 41st and 44th meetings of the same committee. Additional to arguments over procedural points that eventually necessitated extensive bilateral consultations and even the advice of the UN Legal Counsel, there was a complete chasm over the issue of whether banknotes qualified as a humanitarian necessity. The United Kingdom held that "the shipment of banknotes could not be considered humanitarian assistance within the meaning of paragraph 20 of Security Council Resolution 687," while Yemen asked rhetorically "what medium of exchange the Iraqis would be able to use to obtain the goods they needed if they were forced to resort to barter, and whether the intention was to force them to the most primitive means in order to survive." Cuba expressed agreement with Yemen "that there could be no thought of forcing the Iraqi people to resort to barter to obtain food. One did not have to know very much about economics to know that money was the essential medium of exchange in modern societies or to see that at the present time the amount of money in circulation in Iraq was insufficient for the trading that had to be done." The Chinese delegate held a similar view: "since money was a necessary medium for the normal functioning of society, paragraph 20 of Security

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[57] *See* provisional summary record of the Iraq sanctions committee's 89th meeting on 5 March 1993, UN Doc. S/AC.25/SR.89.

[58] UNESCO's response is contained in UN Doc. S/AC.25/1993/COMM.635.

[59] Thus the representative of Djibouti in the provisional summary record of the committee's 90th meeting on 5 April 1993, UN Doc. S/AC.25/SR.90.

[60] UNESCO's second reply is contained in UN Doc. S/AC.25/1993/COMM.1471.

[61] Information supplied by the chairman in the provisional summary record of the committee's 91st meeting on 4 June 1993, UN Doc. S/AC.25/SR.91.

[62] Request submitted by Jordan is contained in UN Doc. S/AC.25/1993/COMM.455.

Council Resolution 687 was applicable to banknotes and the Committee should approve the request." Ultimately the matter died because the British company that had printed the banknotes never applied for an export license, and the issue at the core of the dispute was never decided.[63]

4. Political and Practical Problems Impinging on the Work of Sanctions Committees

Excessive polemics and an inability to work on collectively accepted criteria for generic definitions occasionally prevented the committees from settling issues that actually raise interesting humanitarian questions. The sanctions against Yugoslavia contained a block on payments that suddenly affected Yugoslav old-age pensioners deriving pensions from outside the State.[64] Were social security remittances payments for humanitarian purposes? The relevant committee never agreed to such a broad categorization, but many members were more sympathetic to the plight of old-age pensioners. There was an additional problem in that paragraph 5 of Resolution 757 did not require clearance by the sanctions committee for States to make humanitarian payments to Yugoslavia "exclusively for strictly medical or humanitarian purposes and foodstuffs."[65] Unable to agree on a general approach to the question, the committee for a while dealt with such requests on a case-by-case basis. The committee then came under pressure, *inter alia* from the International Labour Organisation (ILO), which respectfully approached it on behalf of those disadvantaged by restrictions on free transfers of pensions, citing its mandate to defend the in-

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[63] The remarks of the British, Yemeni, Cuban and Chinese delegates are taken from the provisional summary record of the Iraq sanctions committee's 42nd meeting on 12 June 1991 in UN Doc. S/AC.25/SR.42. The remarks made on this occasion by representatives of States historically adhering to *Marx*ist economics is illuminating. For a markedly divergent view of the role of money, see *Karl Marx*, Theories on Surplus Value.

[64] The question was whether or not such remittances could be transferred to the target State. The pensioners were not being deprived of their right to the remittances, as they could be paid to them abroad, or held in abeyance pending the lifting of sanctions. The situation is thus akin to problems posed when other types of periodic support payments are blocked or hampered by currency transfer restrictions or by non-convertibility of the currency of origin. The matter was furthermore exacerbated by claims that pensioners in Yugoslavia receiving such remittances were forced by their national authorities to accept them in local currency at artificially unfavorable exchange rates.

[65] SC res. 757 of 30 May 1992, para. 5. Since the phrase occurs together with references to medicine and foodstuffs and since the former even has the qualifier 'strictly' placed in front of it, it is arguable that a very restrictive interpretation of 'humanitarian' in the terms of classical humanitarian law would be called for here. The present Author cannot easily envisage a Western court ruling that pensioners' remittances would be covered by the term in this instance.

terests of workers abroad.[66] Ultimately one State enquired about its right to pay out pensions to its own citizens residing in Yugoslavia (previous discussions had revolved around paying pensions to citizens of the target State). In the debate on this latter request, it became clear that several States, including one permanent member of the Council, had continued to pay out pensions to recipients in Yugoslavia. Against those that took a hard line and did not see pensions as humanitarian remittances (in this case the United States, Austria and Belgium), there were others with a less clear position (United Kingdom, France) while still others simply seized the opportunity to promote their view that the payments were humanitarian and should be allowed in general (India, China, Cape Verde). Faced with the realization that the members could not agree on any common legal or conceptual language for dealing with the issue, and that the committee had no real control over what was happening on the ground, the committee decided to regard the matter as falling entirely within the remit of national governments and washed its hands of the issue.[67]

What is unfortunate in this case, by no means atypical, was that the question remained unsolved, and even establishing some grounds on which it, or others like it, might be solved was not possible. Humanitarian law in its current state was proving to be inadequate for deciding complex issues of trans-border intercourse, precisely of the type that is so characteristic of modern industrialized States. Yugoslavia was the first target State that roughly qualified as such and was profoundly interwoven with other States, as the present case with the pensioners demonstrated.

To some extent the cudgels of humanitarian mitigation have been taken up by those that simply oppose sanctions for more general political reasons. Several variants of this were visible. Some Council members, while they may have voted for the sanctions resolutions or allowed themselves to be persuaded to abstain, did not really support the sanctions measures, normally because of the constellation of their bilateral relations with the target State and/or those States taking a hard line on the issue. Beyond this there was a general aversion on the part of many non-aligned members to any enforcement action of the Security Council. Their reasoning was that it created a new front on which the sovereign prerogatives of their State leadership could be challenged. Since the target States of sanctions measures were then normally entirely undemocratic third-world countries (exception: Yugoslavia), the fear on the part of these governments was that sanctions would be used only against States

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[66] A letter from the Director-General of the ILO to the Secretary-General of the UN, dated 3 August 1992, UN Doc. S/AC.27/1992/COMM.574, was discussed in the 31st meeting of the Yugoslavia sanctions committee on 26 August 1992. *See* the provisional summary record of that meeting, UN Doc. S/AC.25/SR.31, 5 - 9.

[67] A letter from the Netherlands, dated 25 August 1992, UN Doc. S/Ac.27/1992/COMM. 655, prompted these discussions in the 33rd meeting of the Yugoslavia sanctions committee on 4 September 1992. *See* the provisional summary record of that meeting, UN Doc. S/AC.27/SR.33, 3 - 9. On the general subject see *Scharf/Dorosin* (note 13), 787 - 788.

similar to their own. This grouping of members simply wanted to dilute or weaken sanctions, given that the sanctions could not be lifted entirely. They saw humanitarian waivers simply as breaches in the wall of an embargo. In general, calls for humanitarian mitigation of sanctions are frequently heard from those that oppose the sanctions measures on more general grounds.

Commercialism also intruded, even to the extent that some Council members taking a hard line still did not want to forego opportunities to maximize their trade with the target State. With regard to Iraq, the United Kingdom's position bordered on pure schizophrenia: pressing at every turn for tough action against the target State and then indulging in any almost indecent commercial promiscuity with it. In general, too many members of the committees were too much involved in humanitarian waiver trade with the target States. China, which had taken the matter of expeditious delivery of coffin cloth to Iraq very much to heart, ultimately began shipping large volumes of it to the target State.[68] Its status as a permanent member made it impossible for the United States to block its coffin cloth waiver requests.[69] The belief (most probably erroneous) that target States offer particularly lucrative commercial markets exacerbates these opportunistic tendencies.

It is not argued here that the sanctions regimes imposed by the Security Council in recent years are sacrosanct *non disputanda*, but trying to lift sanctions through excessive humanitarian waiver practices is neither ethically acceptable nor politically advisable. This tactic has prevented sanctions committees from developing reasonable humanitarian mitigation practices and principles to protect the interests of civilian populations. It has succeeded, instead, in turning sanctions committees into giant paper mills, churning out billions of dollars of meaningless and counter-productive clearances, thereby weakening the integrity of sanctions regimes and playing into the hands of sanctions evaders, without, for that matter, bringing very much benefit to civilians. UN officials, who know better, have largely connived at this malpractice. The strong element of demagogy and hypocrisy involved further tarnishes the image of UN bodies as trustees of humanitarian law and humanitarian action. Target regimes are also able to initiate demagogic polemics by requesting humanitarian

[68] The Chinese delegate made specific reference to coffin cloth in the 105th meeting of the Iraq sanctions committee on 22 December 1993. *See* the provisional summary record of that meeting, UN Doc. S/AC.25/SR.105. According to 94COMMS.DB (note 31) China in 1994 cleared about US$ 6 million in coffin cloth for shipment to Iraq.

[69] The United States had originally wanted to block a Chinese request for shipment of US$ 4.6 million worth of coffin cloth contained in UN Doc. S/AC.25/1994/COMM.619. At the 111th meeting of the Iraq sanctions committee on 13 April 1994 the U.S. delegate announced his government's agreement to discussing the matter with China; shortly thereafter the U.S. block on the request was lifted. *See* the provisional summary record of that meeting, UN Doc. S/AC.25/SR.111.

waivers of a religious nature and some of the least edifying debates of the sanctions committees have revolved around these requests.[70]

Excessive secrecy has abetted this malpractice. Outsiders, including humanitarian NGOs, international lawyers and other parties with an interest in the question are precluded from knowing what goes on and cannot recommend or take corrective action. Indeed, even other branches of the UN system, including the Department of Humanitarian Affairs, were not allowed access to the humanitarian waiver files of the committees, did not attend meetings and had little understanding of their actual practices. Relations between the Security Council and the humanitarian parts of the UN system were strained. There was no transparency and accountability, and the huge paper flows involved made it impossible for UN sanctions officials to keep track of what the committees had approved or rejected.

There were, of course, political reasons for much of this. There was widespread opposition to sanctions within the UN itself, and the political power-wielders in the Security Council (Western countries) are actually a minority faction in the global UN. Humanitarian constituencies are today almost automatically opposed to Security Council decisions on sanctions. The orientation of delegates towards stringency or lenience in enforcement of sanctions was determined simply by each government's bilateral approach to each particular sanctions regime, which is why the 'hard-liners' in one committee often acted as 'soft-liners' in another committee.[71] In

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[70] Periodic requests by Iraq to have frozen assets released to finance a US$ 10 million Koran printing campaign were a classic in this line. The relevant committee, which had no authority to order release of frozen assets, had agreed in principle to grant permission to any State wishing to release assets to Iraq for such a purpose, but the Iraqis either never pursued the matter, or were unable to find any State that had such frozen assets under its jurisdiction. See on this matter discussion of Iraq's letter dated 17 June 1993, UN Doc. S/AC.25/1993/COMM.1632, at the 97th meeting of the Iraq sanctions committee on 1 July 1993 in the provisional summary record, UN Doc. S/AC.25/SR.97; also discussion of Iraq's letter dated 4 July 1994, UN Doc. S/AC.25/1994/COMM.3805, at the 115th meeting of the committee on 26 August 1994, UN Doc. S/AC.25/SR.115. The Baathist party, the political core of *Saddam Hussein*'s regime, was a secularist movement that early alienated religious traditionalists. Its Iranian and Shiite enemies even today habitually refer to it as the 'atheist clique'.

[71] The delegate from Djibouti, previously quoted (note 59) on the subject of the human right to bookbinding glue, was one of the main spokesmen for the 'soft-line' non-aligned faction in the Iraq sanctions committee for the better part of two years. In the Haiti sanctions committee he on occasion sided with the 'hard-liners', *see* provisional summary record of the 8th meeting of that committee on 1 June 1994, UN Doc. S/AC.30/SR.8, 6. In the Yugoslavia sanctions committee he opposed a request to invite the Yugoslavian prime minister to address the committee, took part in a massive blocking action against humanitarian requests and twice went on record as opposing emergency heating fuel deliveries to Yugoslavia in wintertime. On the first such occasion, at the 90th meeting of the committee on 1 December 1991, he sided with the United States in rejecting stirring humanitarian appeals for fuel deliveries from Russia and Venezuela, *see* provisional summary record, UN Doc. S/AC.27/SR.90, 13:

general those governments that had not wanted sanctions, or that wished to see them lifted, tried to dilute their force as much as possible through a maximally liberal waiver policy and humanitarian arguments were the ones most frequently used. While the Western States, favoring a more vigorous enforcement of sanctions in most committees, seemed to recognize certain constraints, largely patterned on the broad sectorial delineations used in Geneva law applicable to military hostilities and blockades, they differed among themselves on details, and never tried to coherently explain the principles that their case-by-case decisions appear to have been based on. The atmosphere inside the Security Council was not conducive to discussion of basic principles, and the committees were only able to arrive at consensually agreed-on principles in reference to rudimentary procedural matters. More determinative than anything else in this regard was the strategy of the 'soft-line' opposition, which tried simply to extend the concept of humanitarian exemption to everything imaginable and argued for acceptance of all waivers no matter how little they had to do with humanitarian considerations (*e.g.* pineapple trees for Serbia, patchouli leaves for Iraq), and no matter how objectionable they might be from a trade-control point of view.[72] On a few rare occasions, these 'opposition' delegates made a worthwhile point or two in their arguments, but on the whole their attitude was largely unconstructive and they consequently made no contribution to attempts to try to frame a higher level of humanitarian law principles relative to sanctions regimes operating in the absence of traditional military violence.

Attempts to 'humanitarianize' every possible aspect of a sanctions regime is not a mature and balanced way of trying to limit unintended collateral damage to civilian populations, any more than an entirely pacifist approach to war contributes anything to the development of humanitarian law. Philosophically, it is the acceptance of war as a legitimate activity that lies at the core of attempts to civilize its conduct and protect non-combatants from its effects. Development of a further generation of humanitarian law to protect civilian populations under sanctions would require a similar approach.

In addition to political disagreements among Security Council members over the desirability of sanctions in each individual case, the enforcement of sanctions by an

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"His delegation agreed with the United States that the Federal Republic of Yugoslavia had enough fuel, provided that it was not used for the wrong purposes. The situation was so bad simply because the Federal Republic of Yugoslavia had taken its own people hostage. The Committee should not give in to media pressure and must remain objective and fair. It was certainly possible that fuel intended for Sarajevo was being used for non-humanitarian purposes." When the issue of natural gas deliveries came up one year later, at the 113th meeting on 1 December 1994, he took a similarly hard stance, *see* provisional summary record, UN Doc. S/AC.27/SR.113, 7.

[72] *E.g.* the question of infeasibly large foodstuff notifications. See on this point several examples in *Conlon*, Lessons from Iraq (note 13), 641 and fn 45.

international organization clashes with outlooks and philosophies that lie at the core of many humanitarian branches of the UN system and of many NGOs and that inform the daily activities of professional humanitarian relief officials. These sectors of international organizations are not in a basic sense sympathetic to collective security enforcement activities of the Security Council, and even less so to the political bias of the Council since 1990, dominated, as it has been, by Western permanent members. In all sanctions regimes there was constant friction between the Security Council, its sanctions committees and these sectors of the wider UN and NGO communities. Because they have been excluded from any participation in the work of sanctions committees, they could not have made any real contribution to constructively adapting humanitarian law to the age of economic sanctions regimes, but there is little to suggest thus far that they would have gone beyond the strategy adopted by the 'soft-line opposition' in the sanctions committees.

IV. Unsolved Legal Issues in Humanitarian Sanctions Mitigation

1. The Relationship of the Security Council to its Interlocutor States

United Nations organs have no executive powers; even if they had such powers, the Security Council would not be in a position to implement its own decisions. From the very beginning of the Organization's existence it was understood that the member States would be the sole implementers of those decisions taken by central UN organs that require implementation outside the various secretariats of the United Nations and its agencies. The principle is not unsound in itself, nor could one really imagine any other construction of the basic legal relationship between the Organization and its member States. The problem lies in the circumstance that the Security Council is different from other UN organs in its authority, and in the additional circumstance that sanctions measures are far more complex than the simple principle would seem to hold.

Problems are little likely to arise with decisions of the General Assembly or of the Economic and Social Council. Since they are not binding, and normally not very precise, there is no great problem. Member States can therefore be left with wide latitude in how they interpret and implement the decisions. Some of the decisions that sanctions committees make on the basis of mandates contained in sanctions resolutions constitute the exercise of authority in governmental law terms. The no-objection item authorizations certainly qualify as such; even the word 'authorization' should indicate this. This authority of the Council, exercised by the committees, is very widely recognized and respected by member States, and not only in routine cases of humanitarian waiver requests. States were constantly approaching the sanctions committees with requests for 'advice', 'guidance', 'opinions' or even 'instructions' on how to implement the provisions of resolutions or other

Council decisions. It would certainly lead to raised eyebrows, if not actual mirth, for a General Assembly committee to receive a letter from a member State asking for guidance on how to implement one of the Assembly's many exhortatory resolutions from the previous autumn.

Sanctions provisions and decisions require such detailed and professionalized implementation that the simple dichotomy is not adequate to guide both parties (Council/committees on the one hand, implementing member States on the other). In addition, the implementation of sanctions committee practice on humanitarian waivers actually involves the member States in an interactive process with the sanctions committees: they must prepare requests by eliciting information about proposed or tentative trade deals and forward them to the committee for decision. They must then implement that decision. For humanitarian waivers, the committees require only that their interlocutors (implementing States) be States that can assume responsibility for correct implementation of Council decisions. This is one of the reasons why non-States are not permitted to deal directly with the committees. The elementary principles involved do not address two other questions: *which exact State* is the proper interlocutor in a specific case, and *what subsequent relationships* evolve between the interlocutor State and other States involved in the further implementation of the decision. Practice has varied, but in general sanctions committees have not had any rules about prioritized jurisdictions for the implementation of humanitarian waiver decisions, nor has any genuine link been required between the waiver transaction contemplated and the State requesting it. The following example will suffice to illustrate what this means in practice.

> A sugar broker in London, arranging for a sugar delivery to Iraq, submits an application for notification to his relevant national authority which forwards it to the Sanctions Committee. After a formal check by the Secretariat, the Committee Chairman issues a letter in which this is confirmed as having been 'duly notified to the Committee.' This establishes a legal relationship between the Security Council, represented by the Committee, and the British Government, something that presumably entails an assumption of responsibility for the transaction by that State. But what does this State have to do with this transaction? Upon receipt of the clearance letter the London broker assigns his rights in the deal to a trading company in the Azores, who in turn contracts with a Brazilian exporter for fulfillment, arranges payment via a letter of credit running on the Geneva branch of an Arab bank and commissions a shipping company in Santander with shipment to Aqaba. In Aqaba the sugar is cleared by Jordanian customs as transit goods and hauled overland to the Iraqi border. Six countries have been involved in this transaction (Great Britain, Portugal, Spain, Brazil, Switzerland and Jordan). But the administrative practice of the Committee only takes the relationship to one of these countries into account, to boot, to that country which is least involved in the transaction. With such practices the Committee is not even in a position to control a single commercial transaction of this kind, even less to monitor the target State's entire trade.[73]

[73] *Conlon* (note 14), 333.

Huge volumes of cereals and staple foodstuff commodities like sugar were notified over the years to the Iraq sanctions committee, most of it by States that could hardly be producing or exporting them. The requesting States were merely the domicile of a broker or trader. Granted, however, that such a State is entitled to request clearance of a humanitarian waiver action, and assumes responsibility for its correct fulfillment, what becomes of that responsibility if and when the further fulfillment of the deal is assigned to an entity in another jurisdiction? This theoretically now involves the requesting State in a further legal relationship: the State to which the waiver has been granted should be responsible for enforcing correct implementation on the State to whose jurisdiction the waiver clearance is assigned. In reality, it is highly unlikely that any State seriously contemplates taking any responsibility for the further fulfillment of a humanitarian waiver outside of its own jurisdiction. In the case of most European States, even domestic law would not provide grounds for any further responsibility with regard to the waiver transaction. Thus in humanitarian waivers a number of baneful practices arose having to do with 'transactional conduits' or 'jurisdictions of convenience' or with an activity that in EU law is sometimes referred to as 'permit shopping'. Deals were structured through several different jurisdictions with an eye to obtaining clearance via one and executing other steps in the same general transaction through other jurisdictions. An example was the case with a series of presumably fraudulent waiver transactions submitted by the German government on behalf of a company registered in the British Virgin Islands but using the address of its beneficial owner in Germany, a German national doing business as a jeweler at that address.[74]

The relationship between the sanctions committees and the member States is further unclear in that it has generally been held that the former may not seek information from the latter on their trade relations with the target State, except in clarification of a specific allegation of sanctions violation. This has prevented sanctions com-

[74] *See* note 46. The applications had not mentioned the name of the beneficial owner, nor made any reference to the company's jurisdiction of registration. When the sanctions committee secretariat was trying to thwart this deal, out of concerns over its manipulative nature and its size (US$ 1.3 billion), the present Author wrote a memorandum on 23 March 1994 to his immediate superior containing the following remarks: "Nothing prevents the German Government from submitting authorization requests on behalf of this individual or of his jewelry business. This would be more acceptable because the identity of the Committee's ultimate commercial interlocutor would be more clearly established, as well as the requesting Government's entitlement to act on its behalf. . . . As things now stand, it would appear that the German Government is acting as intermediary for a company which is not a German company. It is therefore recommended that the Permanent Mission [of Germany to the United Nations] be asked to explain its Government's relation to the beneficiary company in question before any action is taken on the requests."

mittees from trying to monitor the legitimate trade of target States with an eye to ensuring that violations are not occurring.[75]

2. How Prioritized are Humanitarian Considerations?

Sanctions committees normally have a mixture of mandates, for enforcing sanctions as well as for mitigating their effects on the target State's civilian population. To some extent there is even a trade-off in this combination of tasks: rigorous enforcement threatens to do collateral damage to civilians, while excessive or inappropriate humanitarian mitigation threatens to undermine the integrity of the sanctions regime. Which mandate is supposed to take precedence? 'Soft-liners' have consistently argued that there are general implied humanitarian mandates requiring the committees to grant humanitarian mitigation, even without explicit authorization for such mitigatory measures. Claims were occasionally advanced that the committees had been explicitly created to perform humanitarian tasks. Because the humanitarian mitigation provisions are normally embedded in Security Council resolutions largely of an enforcement nature, both sides can quote the same source for their views. Thus Resolutions 820[76] on Yugoslavia and 687 on Iraq have on occasion been interpreted as having established humanitarian mitigation regimes, rather than as having sought to enforce or maintain sanctions regimes. While no one in his right mind would want to interpret Resolution 687 as having had a largely humanitarian mitigation character, it is not unreasonable to see some grounds for taking the view that it imparted a largely humanitarian mandate to the relevant sanctions committee. The only paragraph of that resolution that contained any mandate for the committee was indeed of a humanitarian mitigation nature; it even empowered the committee to make further humanitarian findings on which to base its practice.[77]

A major limitation on a further humanitarian expansion of sanctions committee mandates lies in the circumstance that all discretionary humanitarian authority given to such committees has heretofore been explicitly limited to considerations relating to the welfare of the target State's civilian population at home. On occasion, however, requests have come before the committees relating to humanitarian considerations having to do with populations outside the target States. In particular, the Iraq sanctions committee occasionally dealt with cases of religious groups outside of Iraq wishing to use aircraft to make pilgrimages to Shiite shrines in Kerbala, a city in southern Iraq. There was a similar argument advanced for allowing Iraqi citizens to be paid *per diem* expenses for attending a seminar in Cairo organized by the Eco-

[75] *See* note 17.

[76] China argued this at the 113th meeting of the Yugoslavia sanctions committee on 1 December 1994, UN Doc. S/AC.27/SR.113, 12.

[77] *See* note 11.

nomic and Social Commission for Western Asia, a UN organ. In other cases, religious communities outside the target States wanted to obtain religious articles (in one case a statue, in another case prayer disks). Often these were requests for waivers to export items *from* the target States, and the relevant committees had no powers to grant such waivers. In general, committees were unable to agree to such requests, or under no obligation to agree to them, for humanitarian reasons, as they did not relate to the humanitarian needs of the target State's civilian population. The statue was, however, permitted, after one delegate argued that it did not constitute a commodity.[78]

Finally, even within the framework of a general humanitarian mitigation mandate, one cannot escape facing the issue of how proportionate humanitarian mitigation measures are. It is often forgotten that the criteria of proportionateness are supposed to guide discretionary decisions in sanctions. Sanctions are themselves coming under fire as disproportionate measures in relation to the events and circumstances motivating them. But the matter is more complicated, because the issue of effectiveness of sanctions intrudes. Some sanctions measures are so ineffective that it is hard to see, logically, how they can be proportionate if they have appreciable side-effects on unintended targets while having no effect on their intended targets. But even humanitarian mitigation effects must be judged against their proportionateness. If humanitarian waivers offer little benefit to civilian populations and provide too much opportunity to sanctions busters, then they clearly violate criteria of proportionateness as well.

3. Economic Warfare Strategies in Sanctions Regimes

In deciding humanitarian waiver matters, the Western permanent members in the Iraq sanctions committee occasionally seemed to be proceeding from strategies and premises the admissibility of which is open to question. This has been alluded to in this Article with the expression 'economic warfare' tactics. For example, the policy of trying to force Iraq to buy everything in manufactured form and prevent it from obtaining prefabricated items for its own processing sought to maximize economic deprivation by taking much of the value-added stages of economic activity away from Iraq. It had further ramifications as well. Iraq's industrial infrastructure in the broadest sense (including manpower resources) was marginally forced to lie idle and even to deteriorate for want of pre-products and other inputs, thus further compounding economic damage.[79] Military considerations may have been in play as

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[78] *Scharf/Dorosin* (note 13), 797; *see* remarks of the representative of Austria at the 36th meeting of the Yugoslavia sanctions committee on 8 October 1992, UN Doc. S/AC.27/SR.36, 21.

[79] Ironically, this strategy was in the economic interests of Iraq's trading partners, particu-

well. Whenever the subject of rebuilding Iraq's power grid was mentioned, the Western permanent members were quick to counter that the country's prewar power generating capacity had been too high and allowed for the maintenance of a large military-industrial complex and for uranium enrichment, activities that would now not be allowed. Hence they argued that rebuilding its full prewar power capacity was not permissible. They furthermore blocked certain items used in the petroleum industry on the ground that such exports would only be permitted if Iraq agreed to the oil-for-food scheme in Resolutions 706 and 712. The items in question would hardly have qualified as 'meeting essential civilian needs', but it is not certain how much support this reasoning has in terms of UN Charter law. In general, long-term economic impoverishment or crippling of the target State was compatible with the Western countries' goal of preventing the military resurrection and rearmament of Iraq.

The reason why these 'economic warfare' aspects of sanctions interpretation are questionable is that they are probably too far outside of the originally envisaged Charter scenario for sanctions: the quick massive blow that was assumed to have no long-range effects. Whatever does short-term damage can also do long-term damage and borderlines are not easy to draw, but patently deliberate 'economic warfare' measures aiming at long-term damage to the target State's economic infrastructure would not seem to be permissible. A major strategy of conflict civilization theory (and certainly humanitarian law belongs in this category) is to try to substitute conflict methods that do short-term rather than long-term damage. On this criterion 'economic warfare' is presumably not compatible with the UN Charter's collective security philosophy.

4. Committee Procedures and Ways of Systematizing Practice and Generating Relevant Doctrine

Decisions on humanitarian waiver measures, like almost all decisions on sanctions, are *regime specific*. The only bodies dealing specifically with sanctions administration, the sanctions committees, are regime specific. Only the Council itself can make generic decisions bearing on all sanctions matters, and thus far it has only done so once and within very narrow parameters at the level of a 'presidential statement'.[80] Furthermore, the legislative instruments under which they operate, the

larly neighboring countries.

[80] UN Doc. S/PRST/1995/9 of 22 February 1995, which *inter alia* states: "[The Security Council] agrees that the object of economic sanctions is not to punish but to modify the behavior of the country or party which represents a threat to international peace and security. The steps demanded of that country or party should be clearly defined in Council resolutions, and the sanctions regime in question should be subject to periodic review and it should be lifted when the objectives of the appropriate provisions of the relevant Security Council

resolutions, are highly repetitive but not identical. There is thus much room for divergent practice between different committees. This has already led to criticism,[81] but it may have its advantages as well. It would allow committees to take regional, cultural or developmental differences into consideration when deciding what is 'basic' or 'essential' and even the question of what is a prefabricated item could be judged differently in the light of such considerations (*e.g.* as with textile fabric in the case of Iraq). A 'luxury' product in one region might be an 'essential' product in another. There were discussions over the years about doing away with regime-specific subsidiary bodies and having one general sanctions committee. This would tend to unify practice, but not entirely as the guiding legislative instruments would not necessarily be identical.

On the matter of precedent, there was a general consensus that committees did not work on this basis, but that, nonetheless, there had to be some coherence or consistency in decision-making. Delegates frequently asked the secretariat for information on previous practice, precedents and similar cases in the past. Occasionally delegates consented to decisions they had originally opposed in order not to upset previously established patterns and practices. One delegate summed up the inherent ambiguity by saying that precedent was incompatible with the procedural principle of consensus, which allowed each member a sovereign opinion, but that some coherence in practice was necessary because of constantly changing membership.[82] Not unrelated are such issues as whether or not waiver decisions should be made case by case or on the basis of categories with coherent lists of permitted and prohibited items, or whether or not the principles on which decisions are made should be codified. These in turn lead to questions as to what type of body should be the model for a sanctions committee. *Scharf* and *Dorosin* treated the Yugoslavia sanctions committee as a court, using terminology taken from the realm of court practice and proposing that committee members should be chosen on the basis of legal experience.[83] The present Author has elsewhere[84] pointed out that the basic decision-making principle of sanctions committees, consensus, is almost never a char-

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resolutions are achieved." The constitutional status of a 'presidential statement' is less than that of a resolution; it is furthermore unclear how binding this declaration is on the Council for the future, but it is certainly not without legal significance, particularly in the absence of any further legislative act that contradicts it.

[81] *Scharf/Dorosin* (note 13), 815 - 820; *Martti Koskenniemi* voiced the same criticism on the occasion of the Sanctions Round Table (note 5).

[82] Remark by representative of France at the 86th meeting of the Iraq sanctions committee on 28 January 1993, UN Doc. S/AC.25/SR.86.

[83] *Scharf/Dorosin* (note 13), 821 - 827. The authors are also critical of consensus, and make further proposals on codification of decisions and even periodic publication of digests of decisions.

[84] *Conlon*, Legal Problems (note 13), 27 *et seq.*

acteristic of a judicial court and suggested instead that the appropriate model might be a regulatory permit-granting body at a national or even local level. However, such bodies never work by consensus either. In any case, the use of instructed State delegates has resulted in such poor quality of decisions that it would seem preferrable to switch to a system with individually appointed experts, not representing governments and not necessarily drawn from States serving on the Security Council. There is no requirement in Charter law for the present custom of duplicating the Council's membership in the committees, nor is there any requirement that committees must be made up of instructed delegates of member States.

V. Future Tasks for Humanitarian Law

1. Traditional Counter-Strategies and New Proposals

Most strategies and proposals to enhance humanitarian mitigation are not only self-serving but are even maintained when their intended effects fail to materialize. Most of the more recent and wide-ranging measures seem to have benefited target regimes and commercial interests rather than civilians. This is not hard to understand. In the absence of effective control and verification, the measures open up wider areas of benefit to these beneficiaries than to civilians. The latter, lacking power and direct access to resources, are unable to avail themselves of these measures, or unable to compete with better-resourced groups. Occasionally humanitarian waivers are even used for patently prohibited forms of trade: culture medium chemicals have been exported to Iraq as medicines and arms may have been contained in large agricultural machinery shipments.

Proposals for enhanced protection of civilians invariably suffer from the false premise that existing sanctions regimes are so rigorous, water-tight and efficient that little harm would be done by further humanitarian exemptions. This is by no means the case. Other proposals are based on crude causal scenarios. One such proposal is that boycotts (prohibition on target State exports) are less harmful to civilians because they leave the latter free to obtain necessary commodities.[85] The

[85] *Fred Grünfeld*, The Impact of Sanctions and the Preference for Boycotts over Embargoes, paper presented to the Eighth Annual Meeting of the Academic Council on the United Nations System, New York, 19 - 21 June 1995. *A. P. M. Coomans/F. Grünfeld/K. J. Hartogh/J. F. R. Jansen*, Doorwerking en effecten van sanctiemaatregelen van de Verenigde Naties, Sociaal-Economisch Wetgeving, No. 7/8, 1995, 501 *et seq.*, 513: "In selecting a specific economic enforcement measure we argue that one must take into consideration the possible negative effects on human rights in the target country. In our opinion in the case of an embargo, where the entire population suffers from it because goods necessary for the population are being withheld, human social and economic rights are being violated to a considerably greater degree than what would be the case with a boycott."

case of Iraq would seem to disprove this. The severe shortages of goods there is the result of long-term deprivation of export revenues, not of import strictures. The commodities most often cited as critically lacking (food, medicine, school supplies, anaesthetics, water treatment chemicals, sugar) have not been restricted by sanctions.

Societies have a certain capacity to adjust to outward pressures and ruling elites can attempt to steer this adjustment process. Societies, including those under sanctions, have finite resources at their disposal. The sanctioning parties have largely pre-determined parameters to their willingness to make exceptions. Encouraging waiver applications beyond what can be financed is meaningless. Extending the range of products that can be exempted provides greater options on *what* can be obtained, but not on *how much*. These wider options are more likely to be utilized by target regimes than by their civilian populations. Neither can very much be gained by encouraging lax control procedures. Yet most proposals for alleviation stress widening the scope of exemptions, leaving more items entirely outside of sanctions regimes, 'streamlining' approval procedures and the like. These methods have already been used widely in the last few years and there is no reason to believe that more of the same will have any other effect than what has resulted thus far.

Earmarking of waivers for vulnerable groups is a theoretically correct approach, but raises the issue of in-country monitoring, which in turn raises issues of sovereignty and interference in internal affairs. The legal construction of sanctions regimes limits the sovereignty of action of target States in certain respects (notably trade) but does not otherwise attempt to deprive them of sovereignty. On the other hand, humanitarian law normally stipulates that the handling or distribution of exemption goods be monitored by a neutral third party, normally the ICRC. Iraq refused to cooperate in this in 1990 - 1991. Target regimes normally refuse to cooperate with such schemes. Comprehensive exemption item lists and so-called 'category decisions' by sanctions committees have also been proposed, but by ignoring the question of end-use and volume they threaten to allow more abuse than legitimate use. If the decision-making party, at present sanctions committees, has no control over verification and monitoring of implementation of such decisions, its decision to allow the delivery of x tons of a humanitarian commodity ultimately means the possible delivery of x tons of goods of any kind.

2. The Future

If the instrument of economic sanctions continues to be used, more sophisticated humanitarian mitigation strategies will have to be evolved and applied. It will also have to be recognized that merely vitiating the integrity of sanctions regimes through lax practices, lack of verification controls and pseudo-humanitarian dilution

will not benefit civilians at all. In fact, more control will be needed, not less. This is the gist of the strategy adopted by Western countries against Yugoslavia in creating the SAMS and SAMCOMM to assist in the sanctions effort. This infrastructure was meant to tighten control over traffic across the target State's borders.

The humanitarian waiver practices of recent years have been an attempt to raise the level of protection that international humanitarian law provides for civilian populations above the rather minimal levels envisioned by traditional humanitarian law instruments and this should be supported. This is a form of third-generation or further-generation human rights effort. International lawyers, political scientists and humanitarian activists should be encouraged to contribute to this development, which should not be left to diplomats with their propensities for opportunistic vulgarization and self-serving humanitarian posturing.

More than anything else, doctrine should be developed and the starting point could be the practices of sanctions committees. It is this Author's opinion that the strategy of 'hard-line' or pro-sanction governments that have tried to use such factors as broadly defined societal sectors, end-use, end-user and volumes as decisive criteria contains the rational core of a workable system. On the other hand, the same constituency's preferences for economic warfare strategies should be more critically analyzed to determine where borderlines must be drawn and whether economic warfare is at all permissible in Chapter VII sanctions.

Trying to delimit exemptible categories and items on the basis of functional criteria (economic sector, end-user clusters) would be a good starting point. The question of regional or cultural custom would also have to be tackled in order to ensure that criteria are not geared to inappropriate consumption patterns. This is all the more necessary if protection of civilians is the main concern. A further suggestion would be that exemption strategies be directed at preventing long-term damage to human populations and basic societal infrastructures rather than predicated on a reduction of short-term suffering. Sanctions regimes are becoming protracted economic wars and their capacity for long-term, not easily reparable economic damage should not be underestimated.

Work on these problems presupposes something further. The Security Council's excessive secrecy about humanitarian waiver activities would have to cease.[86] There is no reason in the world why the basic facts of humanitarian waiver clearances

[86] *Kaul* (note 13), 99, even argues for secrecy on the grounds that firms have a legitimate interest in commercial confidentiality of their dealings with target States. It is hard to see why such an interest should outweigh other considerations of a more general and hierarchically prioritized kind. In cases of a general sanctions regime (Iraq, Yugoslavia, Haiti), waivers are precisely that — exceptions to the rule, supposedly motivated by humanitarian considerations. There should be no 'right to trade' with target States so absolute that the Security Council's legitimate interest in effective control has to yield to considerations of this kind.

(goods involved, identity of exporter and consignee, quantities, monetary value) should be kept secret. In fact they should be coherently and systematically gazetted to allow governments, humanitarian NGOs, interested scholars and even other UN agencies to monitor them in order to perform their legitimate functions in seeking to protect civilians from the side-effects of sanctions. Strictures on further unbridled commercialization of humanitarian waiver trade would be necessary in any case.