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Report

Iraq

Sanctions Against Iraq and Human Rights: a devastating, misguided, intolerable method

A Legal Analysis

Summary

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FOREWORD

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The international embargo imposed on Iraq since 1990 constitutes in itself a series of systematic violations of human rights. These are further aggravated by the way they have been exploited by Saddam Hussein's regime. The effects of the embargo go completely against the aims professed by the United Nations Security Council, and have had devastating consequences for the people of Iraq, while at the same time helping to keep in power a dictatorial regime.

Since 1992 the FIDH has condemned embargoes that "have direct and indirect consequences for the civilian populations, whether they are imposed by a government or the international community, and whether they apply indiscriminately or are accompanied by humanitarian safeguard measures". (31st FIDH Congress, 25 January 1992). The FIDH again called for the lifting of the embargo against Iraq at its 34th Congress in January 2001 in Casablanca.

While it is necessary and legitimate to denounce the embargo, this should not serve as an excuse for saying nothing about the terrible repression inflicted, by the Iraqi regime itself, in particular on its own populations, in violation of its international commitments. Nor should it be forgotten that this repression was one of the reasons for inflicting international sanctions in the first place.

These populations, who have already deeply suffered from the deadly deprivations inflicted on them in the name of the "international community" and from the criminal repression enforced by a despotic regime, are also the victims of the effects of the unilateral approach of the "pro embargoes" and the "anti-embargoes" which results in total lack of action.

For the FIDH any prospect of improving the situation - which is certainly not easy - requires that all dimensions of it first be systematically and objectively documented.

That was the rationale behind the FIDH approach when, with Human Rights Alliance, it gathered testimonies of the victims of the Iraqi regime, which constitute the corner-stone of the report entitled "An Intolerable, Forgotten and Unpunished Repression". The report highlights the horrors of a scarcely mentioned on-going repression of the Iraqi population.

Such is also the rationale behind the FIDH report on the sanctions, entitled "The sanctions against Iraq from the point of view of Human Rights: a devastating, unjustified and unacceptable method". The legal analysis shows that the sanctions imposed are completely contrary to international Human Rights law, which in this case should take precedence over the law on the maintenance of international peace and security.

For several years the FIDH has constantly requested authorisation to carry out an international enquiry on the Human Rights situation, including the consequences of the embargo, without ever receiving an answer from the Iraqi authorities. In 2001 the request was reiterated, without success. The FIDH reaffirms its readiness to carry out such an enquiry.

Things being as they are, the obstacles raised against an objective evaluation of the situation in the field make it even more justified to denounce the situation facing the Iraqi populations. The sole aim is to carry the voice of the desperate calls for help from the victims, all the victims.

Sidiki Kaba

Introduction

1) Multilateral sanctions imposed in application of Chapter VII of the United Nations Charter and set out in a Security Council resolution

Sanctions against Iraq represent a substantial change in the manner sanctions are meted out by the Security Council. Up to 1990, economic sanctions had been imposed as a result of Security Council resolutions on only two countries, viz. South Africa[1] and Rhodesia[2]. In the case of South Africa, early sanctions were voluntary and were welcomed by opponents to apartheid. After 1990, sanctions become more varied, as concerned the targeted countries, the objectives, and the ways and means adopted. The following countries were concerned: Iraq, Libya, former Yugoslavia, Haiti, Somalia, Angola, Rwanda, Liberia, Sudan, Cambodia, Afghanistan, Eritrea, and Ethiopia.

Sanctions had various effects. In the case of the Federal Republic of Yugoslavia, it is generally agreed that they effectively contributed to changing the behaviour of Slobodan Milosevic, but the economic embargo had serious effects on the domestic situation and on the standard of living of the population at large[3]. On the other hand, sanctions against Sierra Leone aimed at bringing President Kabbah back to power were limited and are not to be blamed for triggering the problem of widespread famine[4]. It was not the sanctions that brought President Kakkah back to power.

In general, efforts are made to adapt sanctions to the targeted goal. In the case of Angola, sanctions were levied on a party to the peace process which did not respect signed agreements. The resolutions combined sanctions on the part of the country controlled by UNITA[5] and pressure to bring all parties back to the negotiating table[6]. Sanctions were levied on Libya because of its involvement in international terrorism. Resolutions 748 (1992) and 883 (1993) were aimed at diplomatic posts and airlines in order to break up networks that supported terrorist groups. A resolution was drawn up concerning Eritrea and Ethiopia because of the conflict between these two countries, but the sanctions only concerned weapons[7]. Lastly, resolutions against Taliban Afghanistan, inter alia, set out sanctions for non respect of human rights[8].

Footnotes:

1. The first measures again South Africa were not binding on the states and were set out in resolutions 181 (1962) and 182 (1963). Sanctions that were compulsory for the Member States were: 418 (1977), 473 (1980), 558 (1984), 591 (1986), 919 (1994).
2. Resolutions: 216 (1965), 217 (1965), 221 (1966), 232 (1966), 253 (1968), 460 (1979).
3. Christakis, T. "Les Mesures économiques, politiques et diplomatiques contre la Serbie et le Montenegro" (1992-1996), pp. 117 and 121 in Mehdi, R. dir., Les Nations Unies et le sanctions: quelle efficacité? Pédone, 2000. Resolutions 757 (1992), 787 (1992), 820 (1993).
4. Domestici-Met, M.-J., "La Sierra Leone", pp 139 and 140, in Mehdi, R. Idem, Resolutions: 1132 (1997), 1171 (1998), 1305 (2000).
5. Resolution 864 (1993) forbids all states to sell or supply weapons, military assistance and oil except at points of entry specified by the Angolan government.
6. Resolution 890 (1993).
7. Resolution 1298 (2000).
8. Resolutions 1267 (1999) and 1333 (2000).

2) Background

The international community reacted almost immediately when Iraq invaded Kuwait on 2nd August 1990. That same day, Resolution 660 (1990) of the UN Security Council observed that "there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait"

The Council condemned the invasion, demanded that Iraq withdraw immediately and that negotiations be started with Kuwait to settle the long-standing border dispute which the Iraqi Head of State, Saddam Hussein, had used as a pretext for the invasion. On 6th August 1990, Iraq's refusal led to sanctions of unprecedented scope (Resolution 661). All States were to avoid importing any basic commodities or products from Iraq and Kuwait, prevent any transactions involving nationals from these countries, and prohibit all transfer of funds for trade with these states. They also were to prohibit all exports, except medical supplies and foodstuff.

Economic sanctions made it necessary to set up a Committee to monitor sanctions, hereinafter called the Committee. The Committee was created through Resolution 661 (1990) as a subsidiary body of the Security Council responsible for monitoring the application of the embargo[9]. Resolution 670 (1990) expanded its role to include certain humanitarian needs. Derogations to the total ban on transport of commodities by aircraft include: "food in humanitarian circumstances". The Committee was responsible for granting authorisations on a case by case basis. Its role was expanded again through Resolution 687 (1991) which marked the end of the armed conflict.

That date was the start of the post-Gulf War management, marked by permanent application, even, in some way, aggravation, of the international sanctions against the Iraqi regime. A distinction needs to be made between (a) the embargoes explicitly established by the UN Security Council, which is binding on all UN Member States, and (b) the establishment of no-fly zones, and aerial bombing zones for certain States, based on a controversial interpretation of certain Security Council resolutions. Actually, public opinion often confuses the two when talking about "sanctions against Iraq", although these are fundamentally very different. The confusion is understandable because States applying both types of sanctions sustain the confusion in order to justify both, by combining justifications applicable to either one.

2.1. Making the UN embargo last

The economic embargo against Iraq is maintained because it is supposed to serve as a guarantee that Iraq will respect the commitments it made further to Resolution 687 (1991). But this resolution have essentially three objectives: establish a permanent border between Iraq and Kuwait, compensate damage caused by Iraq, and partial disarmament of Iraq. Only the first of these three objectives has been completely - and rather quickly - achieved. The demarcation commission which was established through Resolution 687 (1991) demarcated the boundary between Iraq and Kuwait, as confirmed through Resolution 773 (1992) of 26th August 1992. Questions of compensation for damages caused by Iraq and disarming Iraq remain unsettled.

As concerns compensation, paragraph 16 of Resolution 687 (1990) reaffirms the responsibility of Iraq for all "damage, including environmental damage and the depletion of natural resources and all prejudices.....(a completer)

. The resolution which was accepted by Iraq, determines its international responsibility and the terms and conditions of compensation for damages. It also sets up a fund to pay compensation, financed by Iraq, and requests the Secretary General to determine how compensation will be calculated and to settle disputes, should they arise. These terms and conditions were set out in Resolution 692 (1991), which set up a Commission to examine complaints from nationals, corporations and Governments for damages following Iraq's invasion of Kuwait. The Commission has been very active since 1991 in processing files, but compensation has been delayed considerably because of the fund's financing system. The fund is fed from sums subtracted from petroleum exports that Iraq is authorised to make by virtue of the embargo derogations. But this sales mechanism, which is controlled by the Committee took some time to be set up, and hence, the first payments were only made in 1997.

Through Resolution 687 (1991), effective control of disarmament in Iraq was entrusted to a United Nations Special Commission, (UNSCOM), a subsidiary body of the Security Council. This commission was instructed to inspect Iraqi sites and destroy dangerous weapons. Its prerogatives and missions have been defined in later resolutions, namely, 707 (1991), 715 (1991), 1051 (1996) and 1060 (1996). In the beginning, the Commission used visits and inspections, but in 1994, built an inspection and verification centre. Adding to its responsibility for destroying weapons, it set up a highly sophisticated "system for continuous monitoring and

verification" - inspections to check that the list of sites to monitor was complete, site verifications by controllers, examination of sensors installed on the various sites. The Commission also had air surveillance capacity thanks to a U2 high altitude plane and helicopters. Furthermore, the Commission established a system for checking import and export of sensitive substances to replace the general embargo once it would be lifted. It was clear that the disarmament system under consideration was to be a lasting one, thus indirectly bringing up the question of respect for Iraqi sovereignty. The Commission did a considerable job in destroying weapons, yet it met with some problems because of chronic lack of co-operation from the Iraqi government and the discovery of unimaginable stocks of chemical products. During this same period of time, the Iraqi authorities blamed UNSCOM for lacking impartiality and independence, in particular because of the large number of staff members from Anglo-Saxon countries. A serious crisis erupted in Spring 1997, when the Iraqi government prevented the UNSCOM inspectors from entering the so-called "presidential" sites. Tension steadily heightened, despite the attempts by the UN Secretary General to work out an agreement between the UN and Iraq. At the end of 1998, Iraq announced that it was breaking off all co-operation with UNSCOM. This is what motivated the onset of the operation called "Desert Fox"[10]. Anglo-American raids made Iraq more determined than ever to reject inspection, which, thus, brought control measures to a halt.

Because of the difficulty in achieving its objectives, the embargo was maintained. Yet, the catastrophic effects on the civilian population led to parallel thinking that sanctions should be reduced, an idea considered earlier through a proposal that a very comprehensive embargo should be maintained, but that there should be more derogations, under the control of the Committee. The technique was expressed in the formula, "oil for food", which authorised Iraq to sell a certain amount of petroleum via the UN Committee, in exchange for food for the Iraqi people. Proceeds from the Iraqi oil sales are placed into an escrow account from which payments can be made only if the Committee approves. The value of this mechanism, in theory, was clear: money in the account would only be used to meet civilian needs, and not to rearm Iraq. This idea had already been proposed to Iraq through Resolutions 706 and 712 (1991), but the Iraqi government had rejected it. It was reiterated in Resolution 986 (1995) of 15th April 1995, which Iraq finally accepted on 20th May 1996 in a Memorandum of Understanding. Resolution 986 (1995) authorises the export, under very strict conditions, of petroleum products of a value not to exceed one billion dollars. This system was extended by resolutions 1111 and 1129 (1997). Through Resolution 1153 (1998) of 20 February 1998, the half-yearly export quota for petroleum products was increase to 5.256 billion dollars. The "oil for food" equation was renewed regularly thereafter for limited periods of time so that the Security Council could re-examine the situation. Generally renewals were for six months, although sometimes only for 15 days (Resolution 1275 of 19th November 1999) or even one week (Resolution of 3rd December 1999). The periods were short when they overlapped periods of intense negotiations, as the Security Council tried to find some other system. Thus it was that Resolution 1284 (1999) of 17 December 1999 created a new disarmament inspection mechanism, called UNMOVIC which was supposed to be the successor to UNSCOM. To make inspections more acceptable to Iraq, sanctions were reduced for 120-day renewable periods during which the limitations on exports of crude oil were removed, the Committee no longer judged the purchase of spare parts for the petroleum industry and contracts to buy food and pharmaceuticals, and embargoes on flights to Mecca were lifted. Iraq, nonetheless continued to refuse to co-operate with UNMOVIC. A further reduction in sanctions was set out in Resolution 1293 (2000) that raised the sums that could be spent on buying materials to reconstruct the infrastructure of the Iraqi petroleum industry from 300 million to 600 million dollars every six months. To free itself of the "sanctions deadlock", the Security Council started thinking about introducing "smart sanctions", later renamed "targeted sanctions"[11], but they were severely criticised by Iraq which preferred the former system[12]. Because of the opposition of certain Members of the Security Council, either the US and the UK or, more recently, Russia, it has been impossible to change the system of sanctions. Now, however, since Resolution 1382 of 29th November 2001 incarnates an agreement among the members of the Security Council, it may be possible to introduce some changes during the second half of 2002.

The formula, "oil for food" not only makes it possible to adopt a "...temporary (sic) measure to provide for the humanitarian needs of the Iraqi people"[13], but also to finance the various institutions that are still working to achieve the objectives set out in Resolution 687 (1991). Since the formula was adopted, proceeds from the sale of Iraqi petroleum products have been used as follows:

- Purchase of "humanitarian goods" by the Iraqi Government: 19.563 billion dollars and 5.349 billion euros;
- Purchase of "humanitarian goods" distributed directly by the UN Bureau responsible for the Iraq Programme in the three provinces in the north that are not under the control of the

Baghdad Government: 5.768 billion dollars;
- UN Compensation Fund: 13.360 billion dollars;
- UN operations and administrative costs: 855.8 million dollars;
- Operating costs for UNSCOM and then UNMOVIC: 333.2 million dollars;
- Costs for transporting oil and petroleum products through Turkey: 919.2 million dollars;
- Payments into the escrow account: 139.5 million dollars.

This gives a total of some 37.334 billion dollars and 9.411 billion Euro[14].

Pending new solutions, the whole sanctions scheme was extended for 180 days through Resolution 1330 (2000) of 5th December 2000, and then until 3rd July, by Resolution 1352 (2001) of 1st June 2001, and then for another 150 days through Resolution 1360 (2001) of 3rd July 2001. Resolution 1382 (2001) of 29th November 2001, took over and renewed the period for another 180 days.

Footnotes :

9. Similar committees had been established to monitor the embargo against Southern Rhodesia in 1966 and during the embargo on delivery of arms to South Africa in 1977. But in recent times the functions of the Sanctions Committee have been substantially enlarged to cope with the more inclusive nature of the sanctions. The Security Council delegated considerable powers to this Committee, especially with regard to exceptions to the sanctions for humanitarian reasons, granted on a case by case basis by these committees when the principle was provided for in resolutions of the Security Council.

10. See Introduction B.

11. See II.2

12. See also "Le Monde" of 21 June 2001 ("L'Irak et l'illusion des sanctions intelligentes"), The Economist of 7 July 2001 ("Smart Exit"), the International Courier of 12 July 2001 (translation of Al Hayat's article).

13. Security Council Resolution 986 (1995).

14. Report presented by the Secretary General in application of paragraph 5 of Resolution 1360 (2001). Document UN S/2001/919, 28 September 2001, Annex I.

2.2. The no-fly zones and the air strikes

The creation of no-fly zones in Iraqi airspace is not based on any express provision in a United Nations Security Council resolution. Instead, the States that proclaimed and enforce the no-fly zones claim to be acting on an "implicit authorisation" from the Security Council. This theory is difficult to justify in law. It nevertheless received a relatively favourable response at the time, for ethical and political reasons.

The starting point was Operation Provide Comfort, conducted by the US, the UK and France in April 1991 to protect the Kurdish populations in northern Iraq. Officially, the operation derived its mandate from Security Council Resolution 688 (1991). However, this resolution does not in fact give express legal authorisation. It is only a recommendation, in which the Security Council "condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas" (§1), "demands that Iraq... immediately end this repression" (§2) and "insists that the Government afford immediate, unrestricted access by humanitarian workers to all those in need of assistance" (§3). The most ambiguous passages are those that refer to the threat to international peace and security caused by the humanitarian crisis and the appeal "to all Member States and to all humanitarian organisations to contribute to these humanitarian relief efforts" (§6). However, a legal authorisation for the use of force is usually an explicit authorisation in a resolution passed under Chapter VII of the United Nations Charter, which is not the case of Resolution 688 (1991). At the time, the legitimacy of the Western intervention in Iraqi Kurdistan was hardly challenged, because of the bloody repression of the civilian population by the Iraqi government. The no-fly zone gave humanitarian organisations access to Iraqi territory and protected the population against government air strikes. This later appeared as the first example of an implicit authorisation to use force, on the grounds of the threat to international peace and security mentioned in the resolution. But this interpretation is disputed. Most lawyers continue to think that, in law, an explicit authorisation is necessary to justify the use of force.

The no-fly zones were subsequently extended unilaterally by the same States, in the north and south of Iraq and now cover around 65% of Iraqi airspace (above the 36th parallel in the north - since June 1991 - and below the 32nd parallel in the south - since August 1992). The official objective is the protection of the Kurdish populations in the north and the

Shi'a and minority populations in the south, all victims of repression by the Iraqi government. France was involved in the protection of the Kurdish populations at the outset, but stopped taking part in the surveillance missions of the northern zone on 1 January 1997 and stopped all participation at the end of 1998.

Between 1991 and 1998, skirmishes with Iraqi aircraft and anti-aircraft fire led to sporadic missile fire in retaliation. The 4-day Operation Desert Fox, launched by British and US armed forces on 16 December 1998, was on another scale altogether. It was presented as part of a unified approach to the sanctions. According to the two States involved, the operation was a legitimate reaction to Iraq's failure to meet its commitments under Resolution 687 (1991). Because this resolution implemented a conditional cease fire, they interpreted Iraq's refusal to co-operate with the United Nations as a breach of the cease fire. This meant a return to the legal situation prevailing before Resolution 687 (1991), i.e. the authorisation to use force against Iraq granted by Resolution 678 (1990). The US and the UK considered that this empowered them to act as the defenders of international legality, including by use of force.

It is important to stress that this reasoning does not hold up from a legal point of view. The authorisation to use force granted by Resolution 678 (1990) was related to the annexation of Kuwait and not to the conditions of Iraq's disarmament, which were defined later. Furthermore and above all, use of force is considered illegal unless there is an express authorisation from the Security Council under Chapter VII of the Charter. The extended interpretation of previous United Nations resolutions by some Member States to justify a violation of international law is unconvincing. More worrying, it causes considerable confusion by presenting the unilateral use of force as a legitimate method for obtaining compliance with a United Nations objective, which it is not.

The British and US forces have also conducted air strikes against Iraq on the grounds of legitimate self-defence, i.e. independently from any United Nations activity and in a highly contestable manner. The first case occurred in April 1993, after an assassination attempt against President George Bush in Kuwait. Acting alone, US forces bombed the headquarters of the Iraqi secret services in Baghdad. After Operation Desert Fox, the British and Americans considerably intensified responses to violations of the no-fly zones. Since 1999, they have been striking not only the military sites from where the attacks against British and US planes are launched, but also, preventively, various military sites and radar installations. The strikes can aim at targets located outside the area corresponding to the no-fly zones.

These unilateral practices have led to a de-linking of methods and objectives. Originally, the method of the economic embargo was intended to achieve the objective of disarmament and compensation, while the method of no-fly zones was designed to achieve the objective of protecting civilian populations and consequently of reducing the control of Saddam Hussein's regime over parts of Iraqi territory. The first category of objectives was clearly presented as a UN mandate. The second category was, more implicitly, part of a "humanitarian" policy by the Western powers, which was tolerated by the United Nations. The air strikes have blurred these distinctions. The economic embargo now also seems to be a method designed to overthrow Saddam Hussein's regime, which it was not supposed to be, and the Western military interventions, a method designed to disarm Iraq, which they were not supposed to be. This confusion over methods and objectives inevitably raises more serious doubts in the public mind: do United Nations methods serve the objectives of Western powers as much as Western powers claim to serve the objectives of the United Nations?

This report looks only at the compatibility of the sanctions policy with human rights. Our conclusion is that the human rights violations resulting from the sanctions policy (I) call for a re-assessment of the sanctions against Iraq (II).

I. Violations of human rights resulting from the sanctions policy

1) Deterioration of the Iraqi population's living conditions and human rights violations

For nearly ten years, the Iraqi people have severely suffered from comprehensive international sanctions and an economic embargo. No one denies that living conditions have worsened since the imposition of sanctions against Iraq. This has been documented by various NGOs and by UN agencies themselves,[15] and the statistics quoted have not been challenged. All the reports published by international organisations describe the disastrous deterioration of living conditions in Iraq and the disintegration of the economic, social and cultural fabric of the country. According to a joint report by UNICEF, WHO and FAO in 1995, some four million people were completely dependent on the rations provided by the State and one million were at risk of starvation.

This situation led to the implementation of Security Council Resolution 986, known as "oil for food", in 1995. The proceeds from oil sales are deposited in a special United Nations account (escrow account) : 53% are used to pay for Iraqi imports of food, medicine and some civilian needs, 13% go to the three northern provinces no longer controlled by the central government, and the remainder is allocated to the compensation fund for the victims of the war against Kuwait (30%) and to various expenses stemming from the embargo and United Nations operating costs[16].

While the application of this resolution has brought some improvement to the humanitarian and health situation in Iraq, particularly in the Kurdish regions no longer controlled by the government in Baghdad, it falls far short of addressing the enormous humanitarian needs of the Iraqi people. The UN Sanctions Committee's system of controls often obstructs or causes excessive delays in the approval of contracts, but above all, the resolutions are limited to humanitarian assistance and do not provide for the investment needed to maintain and reconstruct the country's dilapidated economic and social infrastructure or to restore the productive base. For example, the programme does not provide money to rehabilitate the drinking water supply, sewerage system and electricity grid, or to reconstruct and modernise the hospitals. In a report, the UN Secretary General himself indicated that the situation was so serious that, even if the ceiling of $5.2 billion was attained, this "would be insufficient to address... all the humanitarian needs of the Iraqi people"[17].

The situation is particularly alarming concerning the right to healthcare.

Before 1991, some 97% of the urban population and 78% of the rural population had access to healthcare. There was a national system of social welfare to assist orphans and handicapped children and to provide aid for the poorest families. Now, according to the International Committee of the Red Cross, Iraq's 130 hospitals are in a deplorable state because they have not been maintained since the embargo was imposed and lack basic equipment. Healthcare standards have also dropped dramatically, because of a lack of medical literature and training[18]. According to a UNICEF survey conducted in August 1999, in the south and centre of the country (home to 85% of the population), mortality rates for children under five rose from 56 per 1,000 live births in 1984-1989 to 131 per 1,000 live births in 1994-1999. According to the same survey, infant mortality, which stood at 47 per 1,000 live births in the first period, reached 108 per 1,000 live births in the second[19]. According to the United Nations Population Fund (UNFPA), the maternal mortality rate rose from 50 per 100,000 in 1989 to 117 per 100,000 in 1997. Cases of underweight births increased by 4% in 1990 and affected close to one-fourth of all declared births by 1997, mainly because of maternal malnutrition. The World Health Report ranks Iraq among the countries with the highest mortality rates for children and adults[20].

On this issue, we can also cite the report on Iraq of 16 January 2001 by the new Special Rapporteur of the Commission on Human Rights[21]. This report, which is based largely on UNICEF data, marks a significant change in the agency's position on economic sanctions and violations of the social and economic rights of the population.

The socio-economic situation in Iraq is also disastrous.

The total amount received under the oil-for-food programme is

around $300 per person per year, which places Iraq among the poorest countries in the world, particularly as this money is also supposed to cover civilian spending, such as education, infrastructure maintenance and communications. The country's 15-year-old infrastructure continues to deteriorate. The power stations cannot meet the country's electricity needs, and power cuts frequently destroy the food stocks in refrigerated warehouses[22]. The country's entire social fabric is deteriorating: fewer and fewer children are attending school, the level at universities is plummeting, and illiteracy is increasing. An estimated 30% of children have dropped out of school, compared with a quality public education system that covered the whole country in the 1980s. The vast majority of students cannot find work that corresponds to their training, which is forcing many young people into exile, and has disastrous long-term consequences for the country's reconstruction[23].

Mainly because of its comprehensive nature and unprecedented duration, the economic embargo has affected the Iraqi population very badly. It is also because the sanctions system prevents the reconstruction of the country, completely devastated by the Gulf War.

In the report presented to the Security Council on the execution of Phase VII of the oil-for-food programme, the UN Secretary General mentioned the long-term negative effects of the embargo, which he considers the biggest problem impacting innocent people for years, if not generations, to come and which, in his view, requires corrective measures. The Secretary General also said that "in the case of Iraq, a sanctions regime that enjoyed considerable success in its disarmament mission has also been deemed responsible for the worsening of a humanitarian crisis - as an unintended consequence". He added, “I deeply regret the continuing suffering of the Iraqi people and hope that the sanctions imposed on Iraq can be lifted sooner rather than later. But this demands that we find a way, somehow, to move the Iraqi Government into compliance with the Security Council resolutions"[24].

On the basis of this information, we can establish that the embargo has caused extremely serious violations of Iraqis' economic and social rights.

However, the analysis of the humanitarian situation in Iraq since economic sanctions were imposed by the United Nations does not resolve the question of responsibility for the human rights violations resulting from the sanctions. We can cite certain internationally recognised rights and report a gradual deterioration in the exercise of these rights. This deterioration can be seen as a violation from the point of view of the subjective rights of individuals, if we consider that these rights create obligations on everyone towards all the individual beneficiaries. Thus there is no difficulty in acknowledging the violation of a whole series of economic, social and cultural rights, as recognised in international human rights instruments:

- right to health;
- right to education;
- right to food;
- right to social security;
- right to an adequate standard of living, including food, clothing and housing;
- right to work;
- right to a decent standard of living;
- specific rights of the child and the woman;
- right to life.

However, from the point of view of objective law, the existence of a human rights violation depends mainly on the possibility of attributing responsibility for it to a subject governed by law. This is where major difficulties lie.

Footnotes:

15. The website of Le Monde Diplomatique offers an interesting selection of extracts from these reports (www.monde-diplomatique.fr/cahier/Irak/ong-embargo).
16. See Alain Gresh, "Lente agonie en Irak", Manière de Voir (Le Monde Diplomatique), January-February 2000, p. 63.
17. Review and Assessment of the Implementation of the Humanitarian Program Established Pursuant to Security Council, Resolution 986 (December 1996-November 1998), Security Council, United Nations, New York, 28 April 1999.
18. Commission on Human Rights, report presented by the Special Rapporteur on the human rights situation in Iraq, M. Andreas Mavromatis, 16 January 2001, E/CN.4/2001/42.
19. UNICEF Report on Iraq, 1999.
20. Commission on Human Rights, op. cit.
21. Doc. N.U. E/CN.4/2001/42, §§ 15-17.
22. See Alain Gresh, op.cit, p. 63.
23. Testimony of Dennis Halliday, former head of the UN Humanitarian Programme for Iraq. He resigned in 1998 in protest against the sanctions. See Dennis Halliday, "Guerre non déclarée contre l'Irak", Manière de Voir (Le Monde Diplomatique), November-December 2000, p. 69.
24. Commission on Human Rights, op. cit.

2) The complexity of establishing responsibility

The whole purpose of the imputation process, *i.e*. the establishment of responsibility, is to determine, by reference to the infinite number of causes of a situation, what particular actions were of a decisive nature and deserve to be punished. Each individual legal system will provide rules for the clarification of these two points. However, the case of sanctions against Iraq is particularly difficult, although perhaps not for those who posit on the basis of international politics or the defence of partisan interests. But from the point of view of international law, it is a hard case.

From a legal standpoint, the imputation of States taken *ut singuli* is infinitely simpler than the imputation of the United Nations (or of States viewed as members of that Organisation). Consequently, there are grave legal difficulties to be faced in all incidences where acts harmful to the Iraqi population are seen to be the result of a United Nations "mandate" activity. In the case of a "non-mandate" activity or of an activity that can be dissociated from the mandate, the establishment of responsibility is easier. This is why we shall first address the matter of responsibility of the States and then that of the United Nations.

2.1 Responsibility of the States

a) The responsibility of States operating outside the United Nations mandate in Iraq

Armed interventions in the form of air raids on Iraqi territory, just like all such interventions, are subject to international humanitarian law. Even though armed aggression as a criminal offence has not yet been accurately enough defined in international law, the same is not true for offences relating to the conduct of hostilities and in particular the requirement to only target military objectives. If the latter requirement is not observed, or if the objectives are legitimate but the collateral damage is clearly out of proportion in relation to the expected military advantage, then individual responsibility may be incurred. Similarly, the responsibility of the States may be incurred in accordance with the mechanisms of general international law.

b) The responsibility of Iraq

In the chain of cause and effect leading to the deterioration of the living conditions of the Iraqi people, the Iraqi government was clearly implicated on two occasions: firstly, in the invasion of Kuwait which triggered the sanctions and, second, in the aftermath of the Gulf War and the management of humanitarian aid. Here we shall address solely the latter, as the responsibility incurred by Iraq through its invasion of Kuwait and the Gulf War, was settled by the setting up of the Compensation Commission[25]. This mechanism is basically financed through the 'oil for food' arrangement and depends therefore on maintaining the embargo. However, other financing arrangements could be contemplated and, more importantly, the activity of the Commission is strictly transitional. Its activities might even have to be rapidly ended and a comprehensive financial settlement arrived at.

As regards possible Iraqi responsibility in relation to activities after the Gulf War, one has to analyse the way the Iraqi Government implemented the sanctions regime in its territory. It has to be acknowledged that the Iraqi authorities aggravated the effects of the embargo or used it for their own benefit. These actions of the Iraqi Government admittedly took place after the United Nations actions and in the context thereof. However, this does not by any means exonerate Iraq from being held responsible for actions that, by their nature, can be described as violations of human rights.

The Human Rights situation in Iraq has been a constant cause for concern since 1991. The United Nations Commission for Human Rights has adopted a resolution condemning Iraq every year since then[26]. In 1991 it also appointed a Special Rapporteur on Iraq, Mr Max van der Stoel who was replaced in 2000 by Mr. Andreas Mavrommatis. Both rapporteurs examined the management of aid by Iraq.

The Special Rapporteur's report of 10 March 1998 referred to information "according to which the consequences of the embargo are harsher for people belonging to ethnic and religious minorities" and states that "the official distribution of the limited available resources discriminates between rural and urban areas and likewise against the marshland populations"[27]. The report of 26 February 1999 highlighted an important point: the fact that the Iraqi authorities restrict access to food rations to holders of a certificate proving (fixed) residence over the previous six months. Considering the practice of forced displacement of populations in certain parts of the country, this amounts to violation of the rights of the people thus discriminated against[28].

In view of these findings, the Human Rights Commission, in its Resolution 1998/65, requested in particular the Iraqi Government to ensure fair and non-discriminatory distribution of food and to co-operate with the international humanitarian

bodies for that purpose (point m). These requests were reiterated in the following resolutions: Resolution 2000/17 of 18 April 2000 (points j and k of paragraph 3), Resolution 2001/14 of 18 April 2001 (points k and l of paragraph 4). Discrimination in the distribution of aid is unquestionably a violation of human rights imputable to Iraq. As regards economic and social rights, the situation is more difficult to assess. The Special Rapporteur, in his 1998 report, identified certain aspects of Iraqi Government policy during the period 1991-1996 that might incur its responsibility:

"43. Ever since international sanctions were imposed in August 1990, the Iraqi Government had decided not to take advantage of Security Council Resolutions 706(1991) and 712(1991) that had been adopted a few months after recognition by the international community of the specific needs of the Iraqi population; these Security Council resolutions allowed Iraq to sell 1.6 billion dollars worth of oil per quarter in order to import products for humanitarian purposes. Instead, the Government decided to rely entirely on domestic production to meet the humanitarian needs of its population, preferring to leave innocent people suffer while it itself was manoeuvring to have the sanctions lifted. (...)

46. On 14 April 1995, the Security Council adopted Resolution 986(1995) reaffirming and extending the option under the formula "oil for food", the purpose of which was to meet the humanitarian needs of the Iraqi population. However, due to the procrastination of Iraq, it was not until 20th May 1996 that the Iraqi Government and the United Nations signed a memorandum of agreement on the implementation of the said resolution, that is to say, more than a year after its adoption".

Moreover, some of the operational difficulties encountered since 1996 in the implementation of the sanctions regime also seem to be imputable to Iraq. The report continues:

"70. While the Special Rapporteur is aware of the slowness of UN procedures as to the management of contracts for purchase, the Iraqi Government for its part is responsible for facilitating the process of approval (...).

72. The Special Rapporteur has noted that, instead of grasping every opportunity to facilitate the implementation of the distribution plan in order to alleviate the suffering of the Iraqi population, the Iraqi Government is applying itself to arguing about the procedures.
(...)

75. The Special Rapporteur has noted that the Iraqi Government systematically invokes the deterioration of the country's infrastructure in order to eschew its economic, social and cultural obligations while nevertheless the very same government, in its reply to the Secretary General's report of 1st February 1998, spurned the Secretary General's proposals for projects in various areas: health, food, water supplies, hygiene, education, reinstallation, mine-clearing and electrical equipment. The refusal to co-operate in the preparation of a distribution plan, to adopt sustained planning and to ensure the uninterrupted sale of oil are all so many factors that compromise the effective implementation of the provisions of the 'oil for food' programme to the detriment of those who are suffering."

These considerations would seem to justify some qualification of the accusations against the United Nations with regard to violation of the economic and social rights of the Iraqi people. Still, it would be paradoxical to have Iraq bear the entire burden of responsibility for these violations as the context had, to a large extent, been created by the United Nations. Moreover, the approach of the new Special Rapporteur of the Human Rights Commission appears to be less exclusively centred on the responsibility of Iraq. Indeed, in his report of 16th January 2001, he emphasises the need for an overall analysis of the economic embargo including consideration of statistics on the consequences of the sanctions. Likewise, in concluding, he noted the position of the Human Rights Sub-Commission in favour of the complete lifting of the sanctions[29].

2.2 The Responsibility of the United Nations and/or its Members

The main difficulty resides in determining the legal principles applicable to economic sanctions. Indeed, there is no provision in the Charter nor in any other international text regarding the use of sanctions. Articles 39 and the following leave apparent absolute discretionary power to the United Nations Security Council to adopt any necessary measures to maintain peace and international security. In addition, article 103 of the Charter could extend this discretionary power over and beyond the rights of the Charter. It states that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." This means that the very existence of any legal obligations related to sanctions on the part of the United Nations or its member States is uncertain. Careful examination of the international

legal system however, makes it possible to ascertain certain legal principles which must be respected, and which are in perfect keeping with the doctrine of FIDH regarding the primacy of Human Rights over, in this case the maintenance of peace and international security.[30]

One of the most interesting discussions of the applicable legal provisions in the area of economic sanctions is to be found in observation no.8 dated 12 December 1997[31] of the Committee on Economic, Social and Cultural Rights. Analyses of the work of other international bodies and of the doctrines indicate that (a) such legal obligations do exist, and (b) describe the contents of these obligations.

a) The Existence of Legal Obligations

International standards on the protection of Human Rights can be applied in the case of recourse to economic sanctions, but they are never even considered. The Committee has provided two major arguments in this respect.

According to the first: *"The Committee does not in any way call into question the necessity for the imposition of sanctions in appropriate cases in accordance with Chapter VII of the Charter of the United Nations or other applicable international law. But those provisions of the Charter that relate to human rights (Articles 1, 55 and 56) must still be considered to be fully applicable in such cases."*

The reference to articles 55 and 56 counterbalances any possible mention of article 103 of the UN Charter which would underline the primacy of the law of the Charter (and thus include the measures decided by the Security Council) over the Human Rights Conventions. Such an interpretation is not acceptable for two reasons. First of all, the Security Council is required to act in keeping with International Law in general. There are minimum obligations in Common Law, some of which are considered as *jus cogens*. In particular one might mention the respect of the right to life. In addition, as the Committee underlines, in the text of the Charter itself, there are references to Human Rights, which therefore must be respected by the Security Council.

The second argument is more complex and relates to the applicability of the International Covenant on Economic and Social Rights itself:

"7. The Committee considers that the provisions of the Covenant, virtually all of which are also reflected in a range of other human rights treaties as well as the Universal Declaration of Human Rights, cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions. Just as the international community insists that any targeted State must respect the civil and political rights of its citizens, so too must that State and the international community itself do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of that State..."

8. While this obligation of every State is derived from the commitment in the Charter of the United Nations to promote respect for all human rights, it should also be recalled that every permanent member of the Security Council has signed the Covenant, although two (China and the US) have yet to ratify it. Most of the non-permanent members at any given time are parties ... *"When the affected State is also a State party, it is doubly incumbent upon other States to respect and take account of the relevant obligations. To the extent that sanctions are imposed on States which are not parties to the Covenant, the same principles would in any event apply given the status of the economic, social and cultural rights of vulnerable groups as part of general international law, as evidenced, for example, by the near-universal ratification of the Convention on the Rights of the Child and the status of the Universal Declaration of Human Rights."*

The Covenant shall therefore be applicable, at least as regards the provisions reflected in International Common Law.

b) Content of obligations

On the basis of the above reasoning, the Committee considers that the legal obligations deriving from international texts are of two orders. On the one hand there is an obligation upon the State which is targeted by such measures to provide "to the maximum of its available resources" for the respect of economic, social and cultural rights. On the other hand, and this is the aspect of particular interest here, there is an obligation on those who impose the sanctions to define an appropriate regime of sanctions[32]. This obligation imposes restrictive behaviour: respecting economic, social and cultural rights has to be an objective, regardless of circumstances.

This analysis may seem somewhat disappointing. Indeed, attributing responsibility to the United Nations or its member States on these grounds may seem uncertain, in the absence of any precedent along similar lines or due to the imprecision

of the above-mentioned obligation. One may, however, at least use this obligation as grounds for demanding the re-evaluation of the sanctions policy against Iraq by the United Nations, given the disastrous effects of the embargo on the access to economic, social and cultural rights by the Iraqi population; furthermore, the embargo is leading to lasting deterioration of the level of protection of such rights.

And, in addition, because one may also go beyond the position of the Committee for Economic, Social and Cultural Rights, certain general principles of international law may be invoked which could be applicable in the case of economic sanctions in other areas of international law. Such is the case for necessity and proportionality[33]. It is noteworthy that the latter principle is essential in the area of counter-measures, which is a form of decentralised sanctions that are illegal under international law. In this domain, there is considerable jurisprudence. This principle is all the more applicable in the case of centralised sanctions, such as the measures adopted by the Security Council of the United Nations. Given the scope and duration of these sanctions, they may be considered as disproportionate to the intended goals, the essential elements of which have not been attained at all[33a].

Footnotes:

25. See above, introduction

26. Resolutions E/CN.4/RES/1991/74, 1992/71, 1992/60, 1993/74, 1994/74, 1995/76, 1996/72, 1997/60, 1998/65, 1999/14, 2000/17, 2001/14.

27. UN Document E/CN.4/1998/67, § 69.

28. UN Document E/CN.4/1999/37, § 33.

29. UN Document E/CN.4/2001/42, §§ 10-21.

30. Article 103 defines the principle of the primacy of the Charter, the respect of human rights being amongst the main goals of said Charter (Articles 1.3,55 and 56).

31. UN Document E/C.12/1997/8

32. Ibid., §§ 10-14.

33. See W. Michael Reisman and Douglas L. Stevick, "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes", E.J.I.L., vol. 9, 1998, no.1, pp. 128-131.

33a. See above, introduction, et infra II, 2.

II. Re-evaluation of Sanctions against Iraq

Although Resolution 1382 (2001) provides for agreement amongst Member States[34], the absence of a strong consensus within the United Nations Security Council has prevented conclusions from being drawn on the re-evaluation of sanctions. The discussion has focused gradually on the concept of "smart sanctions" and concerns essentially the States and the United Nations (1). Such an approach seems totally insufficient because it presupposes that a mere reworking of sanctions is required. The debate should be extended to include the issue of the maintenance or lifting of sanctions. Such an analysis of the situation, in light of the above-mentioned principles, would lead to a different solution (2).

1) "Smart Sanctions"

The concept of "smart sanctions" as was brought to the forefront in negotiations within the Security Council in May 2001 was used to qualify generalised economic sanctions which apply to the leaders of a country concerned by such sanction but do not harm or endanger the population or penalise neighbouring countries by limiting trade. Smart economic sanctions must not upset local macro-economic fundamentals nor regional trade balance while still reaching the defined goals. They must therefore not allow for instrumentalisation by the regime.

1.1 Emergence of the Debate

The debate on "smart sanctions" was related to the on-going tension-ridden negotiations within the Security Council[35]: tension amongst member States, tension between the representatives of the UN and Iraq; tension between Iraq and certain Member States in the Council. It is generally accepted that these sanctions were to spare the civilian population. However, such is not the only result expected which could lead a State or organisation to redefine the sanction regime. The use of "smart sanctions" is directly related to the interests of those who defend such sanctions.

In the opinion of the Secretary General, one of the main handicaps of "normal" sanctions, is that they cause prejudice to the UN because of the humanitarian situation in Iraq. This new form of sanctions should therefore preserve the legitimacy of both UN action and the Security Council. The Secretary General believes a politically and morally acceptable doctrine must be defined[36]. In the annual reports of the UN as from 1997, the Secretary General refers to this concept, adapts it and makes it more precise. Kofi Annan does not used the expression “smart sanctions” but, as of that year, asks the Security Council to envisage ways and means to make sanctions more effective and less brutal[37]. Later on, the goals are defined more precisely: limit pressure on the population; protect vulnerable groups; provide for the application of the Convention on the Rights of the Child[38]. The ineffectiveness of sanctions is underlined in ongoing debates[39]. It is therefore the deterioration of the humanitarian situation in Iraq and the diverging opinions within the Security Council which lead to the emergence of this new concept. In fact the Secretary General never uses the expression "smart sanctions" on his own behalf; he uses the expression in referring to the fact that many UN Member States are defending the concept[40]. As from 2000, in UN reports, the expression “smart sanctions”is replaced by the expression "targeted sanctions"[41]. This change in vocabulary, "targeted" instead of "smart", is a way of countering the Iraqi discourse which considered the previous sanctions as "stupid"[42]. Along with the change in vocabulary, a new concern emerged: negative effects of these sanctions on the economies of neighbouring states[43]. This also coincided with the setting up of an informal working group in April 2000 to improve the sanction regime. The reports of this group however do not adequately reflect the debate which resulted from the calling into question of sanctions by certain members in the Security Council.

France and Russia request the lifting of the embargo as from 1998, but it was the air strikes and the absence of effect which lead to the debate on the effectiveness of sanctions. Two series of air strikes occurred. In December 1998, the US and UK carried out the operation called "Desert Fox", whose legal basis is questionable[44]. Then another series of air strikes took place in February 2001 which made the discussion on the revision of sanctions all the more urgent. Initially, in January 1999, in light of the absence of results of the operation Desert Fox, France and Russia proposed a new mode of disarmament control disconnected from the embargo[45]. In response to the French and Russian request, the US proposed certain adjustments to the sanctions, including

the removal of the ceiling on oil exports. This measure was of virtually no interest to the Iraqis because they did not have the extraction capacity required to export even limited volumes of oil[46].

Then, in a second stage, it was the British and Americans who considered re-examining sanctions. The ineffectiveness of the February 2001 air strikes, led to a meeting between Tony Blair and George Bush in Camp David to reflect upon more effective means of action[47]. "Smart sanctions" were presented in the spring of 2001 as an innovation by the US and the UK[48] and as a new approach to sanctions[49]. This was also an attempt at an honourable way out for these two countries in light of the wave of criticism regarding the humanitarian effects of the embargo and regarding the usefulness of air strikes. It appears that the "smart sanctions" as proposed by the US and the UK, represents an adjustment of the sanctions regime envisaged in the Resolution which instituted UNMIVOC[50], which was already an adaptation of the "oil for food" concept. Here, for the most part, there was a lightening of sanctions on civilian goods and the removal of the ceiling on oil exports. France felt that facilitating trade did not resolve the humanitarian issues if there were no accompanying measures related to investments in oil infrastructure, to acquire sufficient extraction capacity, and in the electric industry to enable the functioning of water treatment plants[51]. The common element in both positions resides in the relationship to country finances, but France believes that an embargo is not useful in such a policy[52].

Some commentators believed that the US was using "smart sanctions" to serve the interests of their foreign policy more than the interests of the Iraqi population. In fact the content of the project presented by the intermediary of the UK is no different from the existing sanctions, not even the vocabulary is new. In addition, the coincidence between the ineffectiveness of the February 2001 air strikes, and the announcement of a need for better "targeting" of sanctions, then the announcement of a project for "smart sanctions" shows that the US policy was inspired more by the failure of the air strikes than by the situation in Iraq. Thus this new concept is just new windowdressing for a virtually unchanged policy. The threat represented by Saddam Hussein is at the centre of the concerns of the defenders of this new policy[53]. This unilateral purpose is what explains the French refusal to support this policy which goes against its position in favour of putting an end to sanctions[54].

The evolution of the position of the US, which is reflected in the Resolution adopted 29th November 2001, is the result of the need at that time to set up a coalition against Afghanistan. Russia accepted the establishment of a list of goods which would be subject to control, in exchange for US acceptance of the idea of a global resolution and greater detail on the application of Resolution 1284 (2000). Disputes between member countries remained however. France did not seem to apply any conditions linking the application of new provisions (facilitating trade as from may 2002) and the return of inspectors[55], whereas the US did[56].

Regardless of the fact that the concept of "Smart Sanctions" serves the purpose and the image of both the UN and certain member States, it deserves to be analysed separately from the motivations of its proponents. Although the underlying meaning of such a concept may vary, as was made clear in the debates, it could, nonetheless, be of interest and represent definite progress from the point of view of human rights.

1.2 The meaning of "smart sanctions"

"Smart sanctions" may be defined as those which have no negative effects other than the targeted ones. Sanctions which are "targeted" according to the Secretary General must preserve the health and well-being of the population. Kofi Annan considers that the Resolutions could include humanitarian waivers[57]. In addition the protection of the population entails an aid policy which makes up for the social effects of sanctions but which may destroy the local economic fabric[58]. The other notable negative effect of sanctions is the possible harm caused to financial and trade relations in third party countries and business firms[59]. The proposal made by the US and the UK to encourage trade by limiting the list of so-called double-purpose goods (both civilian and military) which would be forbidden, could be a way of stimulating local economies and regional trade.

These "smart sanctions" may be characterised by effective application of the clauses contained in the previous sanction regime. This refers essentially to greater flexibility of the Sanction Committee which has kept a large number of major contracts on the waiting list[60]. In the Anglo-American project of May 2001, the trade contracts are controlled by the UN Secretariat[61]. This aspect is related to the infrastructure requirements; "smart sanctions" would make it possible to take account of the development needs of the country. In addition, civil aviation could resume in Iraq. Passenger traffic was never suspended there but, in fact, it required approval from the Sanctions Committee. The French suggestion in 2000 that it should be possible to allow passenger flights, supported by other countries, probably explains this aspect of the new sanctions regime proposed by the US[62]. In exchange

for the partial lifting of the embargo, the US and the UK have proposed that the UN maintain strict controls of the Iraqi government regarding disarmament and financing. The French Minister of Foreign Affairs believes sanctions are useless and should be replaced by a financial resources monitoring policy and rearmament programs[63]. Such a policy could weaken the black market which nourishes the governing elite,[64] but may also be contrary to the interests of neighbouring countries because of their underground markets which had developed in violation of the embargo[65].

Another form of "smart sanctions" which is often mentioned even in the doctrine, is the adoption of individualised rather than generalised financial sanctions[66]. Sanctions which are targeted on the financial interests of the leaders of a country were applied for the first time after the overthrow of President Aristide in Haiti. Resolution 841 (1993) of 16th June 1993, called for the freeze of assets owned by members of the government or authorities in power or directly or indirectly controlled by them. (§8). The text was even more personalised with Resolution 917 (1994) adopted 6th May 1994, where a list of names was included which was to be kept up to date by the Sanctions Committee[67]. Such sanctions were also adopted in the case of Afghanistan in Resolution 1333 (2000), and Liberia in Resolution 1343 (2001)[68].

Footnotes :

34. In paragraph 6, the Resolution states : "The necessary clarifications for the application of Resolution 1284". France and Russia abstained in the vote on this Resolution considering the wording too vague regarding the suspension of sanctions related to the cooperation of Iraq with the observers.

35. see above, Introduction, A.

36. UN Press Release, DSG/SM/REV.1, 28th October 1998. Financial Times dated 10th August 2000 ("An Embargo on Common sense").

37. Secretary General's Activity Report 1997, paragraph 89.

38. 1998 Report, paragraph 63. 2000 Report paragraph 99. 2001 Report paragraph 85.

39. 2000 Report, paragraph 99.

40. 1998 Report, paragraph 62. 1999 Report, paragraph 124.

41. 2001 Report, paragraph 86.

42. Le Monde, 25th February 2001 ("Bagdad réclame la fin des mesures prises à son égard pour coopérer avec l'ONU").

43. 2000 Report, paragraph 100. 2001 Report, paragraph 85.

44. See above, Introduction, B.

45. Le Monde, 14th January 1999 ("Les propositions de la France pour sortir de la crise en Iraq").

46. Le Monde, 16th January 1999 ("Les Etats-Unis veulent supprimer le plafond des ventes de pétrole irakien").

47. Liberation, 22nd February 2001 ("Londres veut "mieux cibler" les sanctions contre l'Iraq"); Le Monde, 25th February 2001, ("Les Etats-Unis et la Grande-Bretagne souhaitent des sanctions"plus efficaces" contre l'Iraq").

48. The Economist, 26th May 2001 ("Can sanctions be smarter?").

49. Le Monde, 24 May 2001, op. cit.

50. see above, Introduction A.

51. On 2nd July 2001; the permanent members of the Security Council agreed on a draft considered as a step toward "smart sanctions". The threat of a veto from Russia however, prevented the British draft from being put to the vote. It was in fact a list of goods forbidden to import. Investment inflows were to be discussed in the following weeks.

52. CNN interview with Hubert Védrine, Washington, 27th March 2001 (text available on www.diplomatie.fr)

53. Liberation, 22nd February 2001, op.cit.

54. Interview Hubert Védrine, op.cit.

55. Press Conference, Quai D'Orsay Spokesman, November 2001.

56. Le Monde, December 2001, "Le conseil de sécurité a adopté à l'unanimité une résolution su l'Irak".

57. 1999 Report, paragraph 124.

58. Le Monde, 21st June 2001 ("L'Iraq et l'illusion des sanctions intelligentes").

59. 2000 Report, paragraph 100. 2001 Report, paragraph 85. The Economist, 26th May 2001, op.cit. The issue of the financial cost of sanctions for third party countries is not limited to Iraq; it is also the case for the neighbouring countries of the FRY, see T. Christakis, in R. Mehdi, op.cit., p.126 and p.130.

60. Report presented by the Secretary General in application of paragraph 5 of Resolution 1360 (2001), 28th September 2001, p.17.

61. Le Monde, 24th May 2001, ("L'ONU examine un nouveau régime de sanctions contre l'Iraq").

62. In June 2000, a group of French Associations in favour of the lifting of the embargo announce a passenger flight to Iraq. The indirect support of the French Foreign Affairs Minister gave rise to indignation of the US and UK , whereas in fact nothing forbids such a flight in the Security Council Resolutions. Le Monde, 23rd June, 2000 ("Un avion pour l'Iraq afin de briser l'embargo"). Le Monde, 9th August 2000 ("Un avion pour Bagdad : controverse entre Paris et Washington"). Le Monde, 24th September 2000("Très vives réactions au vol Paris Bagdad préparé par une organisation non gouvernementale").

63. Interview of Huber Védrine in the daily Liberation, 27th March 2001 and with CNN, Washington, 27th March 2001. (texts available on www.diplomatie.fr).

64. This may give rise to perverse effects because the black market may support liquidity flows, Le Monde, 21st June 2001, op.cit.

65. The Economist, 7th July "Smart exit".

66. Brigitte Stern in R. Mehdi (dir..), Les Nations Unies et les sanctions? Quelle efficacité?, Pedone, 2000, p.241.

67. See in particular Geneviève Burdeau, "Le gel d'avoirs étrangers", J.D.I., 1997/1, p17 : "Given the ongoing debate about the (lack of) effectiveness of sanctions and the excessive suffering caused to the populations in the case of authoritarian regimes where the people cannot be considered as responsible for the acts and decisions of their leaders, freezing the assets of the leaders can be considered as an interesting mechanism for refining sanctions, especially where it is a known and acknowledged fact that the dictator and cohorts often have considerable assets abroad."

68. 2001 Report, paragraph 86.

2) Maintaining Sanctions or Not

The sanctions policy is now in a dead end. It has missed all its targets, *viz.*:

- Disarmament (the goal of the UN);

- The fall of Saddam Hussein and his regime (American foreign policy objective);

- The protection of civilian populations (goal shared by all parties).

On the contrary the sanctions policy has had counter-productive effects. The UN Secretary General himself in the "Millennium report" stated that when heavy economic sanctions are brought to bear on authoritarian regimes, it is generally the civilian population that suffers and not the political elite. They in fact benefit from sanctions because they can then control black market trade and exploit the sanctions for their own political purposes to eliminate any domestic opposition[69]. In the case of Iraq, international sanctions have clearly been used as an instrument by the Iraqi regime. The regime benefits from the maintenance of sanctions because of media coverage both as regards domestic public opinion and international opinion. At the same time the regime refuses to contribute to the improvement of the living conditions of the Iraqi people. Because it is engaged in an all or nothing tug of war with the United Nations, (complete lifting of the embargo or refusal of any form of co-operation), Iraq is voluntarily excluding any possibility of the sanctions regime evolving. Sanctions have also led to total state-control of the economy and therefore have made the reinforcement of the dictatorship possible as well as the deterioration of human rights in general in Iraq.

The main issue is whether or not smart sanctions could represent a feasible solution, given both the imperfections in the existing regime of sanctions and the goal of protecting human rights. It is noteworthy that in the Security Council debates the latter objective has been overshadowed by the search for greater effectiveness of sanctions. This exclusively technical approach may lead to neglecting the essential: the emergence of a subsistence economy administered in part by the UN and in part by the Iraqi government. And this has been going on for more than ten years! Aside from the material fact that such an economy has developed, and that it is totally opposite to free market economy, the time factor is vital[70] and has been totally neglected in the discussions on "smart sanctions". It is acceptable that, on a temporary basis, a sovereign State be sanctioned by an international organisation for proven violations of international law. Such sanctions should, however, be analysed as international police actions, the purpose of which is to force the State to modify its behaviour and so prevent future violations. Beyond a certain time-frame, one can no longer refer to temporary international police action or prevention but rather repressive enforcement. From then on, the sanctions resemble true legal sanctions, criminal sanctions, in particular when such sanctions question national sovereignty. It then becomes difficult to justify such sanctions from a legal point of view.

In every legal system, the sanction is only imposed when guilt or responsibility of the individual has been established in court. But according to the UN Charter, the Security Council does not have the powers of a Judge. The Security Council is a political body with exclusive, albeit extensive, executive powers. It cannot be both judge and international police. The embargo is legitimate if considered as a police action, as would be an administrative police decision in domestic law, but becomes totally illegitimate if it becomes a criminal sanction. The progression from one to the other is gradual and a question of degree, in the absence of more satisfactory organisation of the international legal system. But because of the scope of the embargo and its duration, it can be stated that the limit has been crossed. Once this limit has been exceeded, the principle itself of the embargo becomes contestable. Sanctions must be strictly adapted to the situation to remain legitimate. This brings us to the same conclusion reached above on the basis of different reasoning, in particular the principle of proportionality which exists in general International Law.

Footnotes:

69. We the Peoples: The Role of the United Nations in the 21st Century, Millennium Report of the SecretaryGeneral of the United Nations, United Nations Department of Public Information, 2000, p.50, §231.

70. Here the Resolutions of the UN Sub-Committees on Human Rights : Resolutions 2000/1, 11 August 2000, 2000/112, 18 August 2000, and 2001/115, 16th August 2001.

III. Recommendations

The above leads to a number of proposals as follows for the Iraqi case, based on the general principles applicable to international sanctions.

1) Complete lifting of economic sanctions. The present regime is no longer acceptable because of the cumulative effects of sanctions over a long period of time. Furthermore, this is the position expressed by the present UN Sub-committee on human rights, in particular in Resolution 2001/115, of 16 August 2001. Reorganisation of the sanctions regime is no longer sufficient to satisfy the obligations of all States regarding the social and economic rights of the Iraqi people.

2) Maintenance of the arms embargo and control of multi-purpose goods. Here we must clearly reaffirm that the fight against proliferation and the arms race remains one of the prime goals in the defence of human rights. The fact that Iraq is a particular target here is justified by the fact that its Government, as shown in the past, has war-faring intentions. Not only has Iraq violated fundamental principles of International Law governing the relations between States, (aggression against a foreign State, followed by annexation), but it has also used banned weapons in violation of the law of war (use of chemical weaponry during the Iran-Iraq war) and violated international Human Rights law (massive repression of its own citizens, in particular the Kurds in the North and the Shi'a in the South. This clearly justifies the maintenance of the embargo related to the military capacity of Iraq, for preventive purposes, as long as such a government is in power and presides over the destiny of the Iraqi people.

3) As a complement to the above, it might be useful to use individual coercive measures, such as freezing the assets deposited abroad of Iraqi officials. These measures would only be justified on the basis of human rights violations in Iraq. However it would be preferable that such measures be applied in a second step after the re-examination of the human rights situation following the lifting of the economic embargo. If such measures were applied before lifting the embargo, we would again run the risk of confusion amongst the goals. As for the previous violations of human rights, the mechanisms which stem from International Criminal Law could be used (in particular the universal competence of domestic jurisdictions).

4) Temporary maintenance of the air ban until the human Rights situation has been re-evaluated in Iraq. If, after a certain time span, the risk of repression still seems to justify the maintenance of a flight ban, this should be specifically authorised by the Security Council and controlled by the Secretary General.

More generally, if it is the case that the international community continues to support wide-ranging sanctions, and this is probable, Human Rights Protection Organisations should exert pressure in order to separate very clearly collective sanctions from individual sanctions, in keeping with the precise goal targeted. From the point of view of human rights protection, only individual sanctions may be considered as legitimate if, after a reasonable period of time, collective sanctions have failed to improve government policy on human rights. The only exception that can be considered is the case where human rights defenders within the State concerned, specifically request the maintenance of economic sanctions (as was the case during apartheid in South Africa).

FIDH represents 115 Leagues or Human Rights organisations

The International Federation for Human Rights (FIDH) is an international non-governmental organisation dedicated to the world-wide defence of human rights as defined by the Universal Declaration of Human Rights of 1948. Founded in 1922, the FIDH has 115 national affiliates in all regions. To date, the FIDH has undertaken more than a thousand international fact-finding, judicial, mediation or training missions in over one hundred countries.

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