

## THE UNITED NATIONS SANCTIONS POLICY AND INTERNATIONAL LAW

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### I. Sanctions Viewed in the Light of General Ethical Principles (The Problems Associated with the Utilitarian Approach):

Article 41 of the United Nations Charter provides for economic and other kinds of non-military measures for maintaining or restoring international peace and security, without using the term sanctions to designate such measures.<sup>1</sup> These coercive measures bind all member states.<sup>2</sup> They are listed in connection with the maintenance of peace in Chapter VII of the Charter<sup>3</sup> and have become familiar to a broad public in the wake of the 1991 Gulf War.<sup>4</sup> The use of economic coercion is a prior step to military

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<sup>1</sup>Concerning the legal problem of sanctions in general, cf. Vera Gowlland-Debbas, "Security Council Enforcement Action and Issues of State Responsibility," in: *International and Comparative Law Quarterly*, vol. 43 (1994), pp. 55-98. Cf. also Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law. United Nations Action in the Question of Southern Rhodesia*. Dordrecht/ Boston/ London, 1990, Chapter 6: "The Adoption of Collective Measures within the Framework of Chapter VII," pp. 423ff. Cf. also C. Lloyd Brown-John, *Multilateral Sanctions in International Law: A Comparative Analysis*. New York/ Washington/ London, 1975.

<sup>2</sup>The coercive nature of these measures follows especially from Article 25 of the Charter.

<sup>3</sup>"Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression".

<sup>4</sup>The International Law Commission of the United Nations has attempted to define the concept of sanctions, which is not used in the Charter. The

force as provided for in articles 42 et seq.<sup>5</sup> Interestingly, the Charter grants the Security Council a sort of monopoly over definitions in this field; the Security Council decides on its own whether a threat to peace, a breach of peace, or an act of aggression exists.

It remains undisputed that sanctions are permitted by law as specific countermeasures to violations of international law and that, in the event of such a violation, contractual obligations to the "law-breaking" state which otherwise apply are invalidated. The problematic nature of this issue has been thoroughly treated by the International Law Commission of the United Nations under the heading "Legitimate application of a sanction".<sup>6</sup> In Article 30 of the "Draft articles on State responsibility" (1979), the Commission recommended a formulation of this normative priority of sanctions in international law; the revised title of this article reads "Countermeasures in respect of an internationally wrongful act".<sup>7</sup>

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Commission claims to reserve the use of this concept "for reactive measures applied by virtue of a decision taken by an international organization following a breach of an international obligation having serious consequences for the international community as a whole, and in particular for certain measures which the United Nations is empowered to adopt, under the system established by the Charter, with a view to the maintenance of international peace and security." (Draft articles on State responsibility: Report of the Commission to the General Assembly on the work of its thirty-first session, in: Yearbook of the International Law Commission, 1979, Vol. II, Part Two, United Nations, New York, 1980, p. 121.)

<sup>5</sup>In fact, however, economic sanctions measures are maintained by the Security Council in particular cases even after the use of military force has been ended. This is highly problematic with regard to the formulation in Chapter VII. Cf. point 32 of the report of the 18th Roundtable of the International Institute of Humanitarian Law: Current Problems of International Humanitarian Law, San Remo, 1993, p. 20.

<sup>6</sup>Yearbook of the International Law Commission, 1979, Vol. II, Part One: Documents of the thirty-first session, United Nations, New York, 1981, pp. 39ff. Concerning the power of the Security Council to impose sanctions cf. pp. 43f.

<sup>7</sup>"The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State." (Yearbook of the International Law Commission, 1979, Vol. II, Part Two: Report of the Commission to the General Assembly on the work of its thirty-first session, United Nations, New York, 1980, p. 93.) Concerning this power of the Security Council in this respect, cf. par. 13 of the commentaries relating to Article 30, p. 119.

Two decisive factors influence the ethical evaluation of such measures: (a) whether the economic sanctions are partial or comprehensive; (b) the special economic circumstances of the country subject to these measures. (The less economic autarky the state has, the greater the impact will be on the living conditions of the affected citizens.<sup>8</sup>) From a legal standpoint, sanctions which represent measures of collective security (multilateral sanctions) - in accordance with the provisions of the UN Charter - are to be distinguished from unilateral sanctions. The considerations of the present ethical and legal evaluation are devoted primarily to comprehensive economic sanctions in accordance with the provisions of Chapter VII of the UN Charter.<sup>9</sup>

It is striking that the formulations of the UN Charter provide for coercive measures only in connection with international peace and security. Human rights are doubly disregarded in this context: (a) they are not given as a reason for imposing coercive measures; (b) they are not taken into account as concerns the impact of such measures upon the living conditions - indeed, upon the chances of survival - of the affected people.<sup>10</sup> In the normative logic of the UN Charter - and especially of Chapter VII - *peace* apparently assumes priority over *human rights*, as has become especially evident in the sanctions policy of the Security Council since the end of the East-West conflict. As regards (a), the Security Council has admittedly drawn an indirect connection between human rights and its sanctions policy in so far as it views grave and systematic human rights violations as threats to international peace (for instance, in the case of the former *apartheid* policy in

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<sup>8</sup>If, in the course of belligerent actions, the economic infrastructure of a country has been impaired, economic sanctions will have a far graver effect than if this infrastructure is intact. If the effects of sanctions are to be adequately evaluated, one must therefore always take into account the general *given conditions* of a country (with regard to economic autarky) as well as its actual *economic situation*. On this whole complex of questions, see now Chapter III/E of the UN Secretary-General's report to the fiftieth session of the General Assembly: *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, Doc. A/50/60, S/1995/1, 3 January 1995, esp. paragraphs 67 and 75.

<sup>9</sup>In the sense of the formulation in Article 41: "complete ... interruption of economic relations".

<sup>10</sup>Claire Palley refers unmistakably to these effects in a report for the Commission on Human Rights of the United Nations (Sub-Commission on Prevention of Discrimination and Protection of Minorities): "Sanctions imposed by the Security Council have indiscriminately impacted on civilian populations." (*Implications of Humanitarian Activities for the Enjoyment of Human Rights*, Doc. E/CN.4/Sub.2/1994/39, 15 June 1994, par. 14, p. 6).

South Africa). Often, however, it is left to the discretion of member states - led by considerations of power politics - to judge whether such violations constitute a threat to international peace. (Irrespective of this, grave and systematic human rights offenses in a particular state do not necessarily pose a threat to international peace and security.<sup>11</sup>) As regards (b) - the impact of sanctions upon the living conditions of the people - not even an indirect reference is drawn to human rights in either the UN Charter or in the resolutions practice of the Security Council.<sup>12</sup> A report to the Human Rights Commission of the United Nations publicly criticizes this practice of the Security Council's Sanctions Committee.<sup>13</sup> It is precisely these ethical problems which prove decisive for the evaluation of the legitimacy of the relevant measures and of the normative system of international law which allows for such measures.

Comprehensive economic sanctions which heavily impact the life and health of the civilian population need to be analyzed from an ethical standpoint before a normative evaluation of the current practice in international law can be undertaken. Indeed, comprehensive economic sanctions seem to be the "classical" instruments for inducing submission in

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<sup>11</sup>Cf. Lori Fisler Damrosch, "Commentary on Collective Military Intervention to Enforce Human Rights," in: Lori Fisler Damrosch and David J. Scheffer (eds.), *Law and Force in the New International Order*, Boulder/ San Francisco/ Oxford, 1991, p. 217.

<sup>12</sup>Exemptions with regard to the delivery of food and medicines cannot be viewed as taking properly into account the humanitarian consequences if the sanctions deny the country the financial means for procuring such goods. In addition, they cannot be viewed as such if the Sanctions Committee of the Security Council - as has happened in recent practice - administers these exemptions so restrictively that one can only speak of a cynical contempt of the affected population. Cf. particularly the effects of the sanctions against Iraq according to the following sources: the reports of the Harvard Study Team of May 1991; the Committee to Save the Children in Iraq; the UN special envoys Martti Ahtisaari (20 March 1991) and Sadruddin Aga Khan (15 July 1991); the UNICEF delegate Eric Hoskins (*Children, War and Sanctions* [April 1993]); as well as the updated report of OSPAAAC (Madrid), *Contra los embargos y sanciones económicas, Dossier I/2: Irak*. Concerning the more general exemptions of, for instance, the former sanctions against Rhodesia, cf. Goulland-Debbas, *Collective Responses to Illegal Acts in International Law*, op. cit., pp. 591ff.

<sup>13</sup>"It is arguable that the Sanctions Committee does not have adequate information to act promptly to suspend the operation of sanctions when undue suffering is being caused by an embargo on particular commodities." (Claire Palley, loc. cit., par. 14, p. 7).

the power politics of the so-called "New World Order"<sup>14</sup> - instruments whose permissibility must be critically examined from the standpoint of ethics as well as of international law. It does not of necessity follow that a measure praised as the panacea of power politics fulfills the requirements placed on a legitimate international order.

In the first place, coercive measures like comprehensive economic sanctions represent a form of, *collective punishment*<sup>15</sup> and thus do not comply with the ethical principle of individual responsibility, i. e. with the ability to attribute behaviour to an individual. The punishment of people not responsible for political decisions is most akin to a terrorist measure; the aim of such a measure is to influence the government's course of action by deliberately assaulting the civilian population.<sup>16</sup> Purposefully injuring the innocent is, however, an immoral act per se, one which cannot be justified by any construction of utilitarian ethics. In accordance with the conception of Thomas Aquinas, inquiring into the *intention* behind a particular decision is of decisive value for an ethical evaluation.<sup>17</sup> In the present context, several conditions govern the moral permissibility of acts which have dubious effects: (a) that the intended final end must be good in itself, (b) that the means towards its realization are morally acceptable; (c) that the anticipated effects, morally dubious though they may be, are not intended as such; and (d) that the goal which is morally good stands in an acceptable relation to the wrong that is effected,<sup>18</sup> i.e. that the former is important enough to justify the latter.<sup>19</sup> The problematic nature of this utilitarian

<sup>14</sup>Cf. especially the analysis of Chandra Muzaffar, *Human Rights and the New World Order*, Penang, 1993, Chapter 6: "The New World Order: Subjugating Iraq and Libya," pp. 60ff.

<sup>15</sup>Cf. also the working paper "L'embargo" (*Les cahiers de Nord-Sud XXI*, n. 1 [Geneva, 1993], Chapter 2: "Violation des droits de l'Homme et des peuples," p. 6): "Le caractère collectif dénature l'application de la sanction et la rend incompatible avec le respect des droits de l'Homme."

<sup>16</sup>See Jeff McMahan and Robert Kim, "The Just War and the Gulf War," in: *Canadian Journal of Philosophy*, vol. 23, n. 4, (December 1993), p. 536.

<sup>17</sup>"Morales autem actus recipiunt speciem secundum id quod intenditur, non autem ab eo quod est praeter intentionem, cum sit per accidens." (*Summa theologica*, II-II, qu. 64, art. 7, vol. 3, ed. Rubers/Billuart et al., vol. 3, Taurini 1932, p. 379).

<sup>18</sup>Cf. the principle of proportionality as formulated by Thomas Aquinas in the context mentioned: "Potest tamen aliquis actus ex bona intentione proveniens, illicitus reddi, si non sit proportionatus fini." (*Summa theologica*, II-II, qu. 64, art. 7, op. cit., p. 380).

<sup>19</sup>Cf. the portrayal by Warren S. Quinn, "Actions, Intentions, and Consequences: The Doctrine of the Double Effect," in: *Philosophy and Public Affairs*, vol. 11 (1989), pp. 334-351.

context of evaluation is plain to view. Are those who suffer under a certain measure to be viewed sympathetically as the victims of the pursuit of a good intention, or is their suffering to be regarded as the deliberate component of a strategy? This debate seems merely to invite hypocritical casuistry. The outcome for the affected population is one and the same.

A "superficial" difference may only be discerned by an ethics of attitude from the viewpoint of the perpetrator. The latter appeases his conscience with reference to the unintentional but "inevitable" side effects. In the Anglo-Saxon tradition, the so-called "Doctrine of Double Effect" was developed, following a distinction made by Thomas Aquinas.<sup>20</sup> It was designed to help clarify ethical questions that arise when a morally good end can only be reached through inflicting harm upon other people.<sup>21</sup> In the concrete instance of comprehensive economic sanctions in accordance with Chapter VII of the UN Charter, the moral good that is aspired is the maintenance or restoration of international peace; the wrong that is thereby effected is the suffering of the civilian population (including sickness and death as results of the mass suffering that accompanies the breakdown in the distribution of essential commodities). According to Quinn's ethical analysis, it is necessary to take into account the relation which the aspired goal has to the foreseen wrong that results from it.<sup>22</sup> In this context, Quinn refers to the difference between "terror bombing" and "strategic" bombing in war: in the first instance, the suffering of the civilian population is deliberately intended; in the second, the possibility that the population will suffer is merely tolerated. In the first instance, harm is directly inflicted, in the second case indirectly. (In accordance with the currently valid rules of international humanitarian law, which we will later examine more closely, terror bombings are strictly prohibited, for the civilian population is never allowed to be the direct target in a military conflict.) Economic sanctions, however, are in line with the first case mentioned above: harm is directly and deliberately inflicted so as to force the government to alter its course of action.

Comprehensive economic sanctions, then - continuing with the comparison above - have the ethical quality of terror bombings: the civilian population is explicitly taken hostage in the framework of a security strategy of power politics. It is self-evident that this kind of political instrumentalization of the human being - as the citizen of a community that is a

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<sup>20</sup>"nihil prohibet unius actus esse duos effectus, quorum alter solum sit in intentione, alius vero sit praeter intentionem." (*Summa theologica*, II-II, qu. 64, art. 7, p. 379).

<sup>21</sup>Cf. Warren S Quinn, "Actions, Intentions, and Consequences: The Doctrine of the Double Effect", *op. cit.*

<sup>22</sup>*Op. cit.*, p. 338.

subject in international law - is not compatible with his or her status as an autonomous subject, i.e. with human dignity.<sup>23</sup> People have a natural right not to be sacrificed for a strategic purpose over whose formulation and realization they exercise no influence. As Quinn says, "They have a right not to be pressed, in apparent violation of their prior rights, into the service of other people's purposes."<sup>24</sup> In the area of ethics, the so-called "Doctrine of Double Effect" secures every person's right to veto "a certain kind of attempt to make the world a better place at his expense."<sup>25</sup> It attacks the purely utilitarian approach (the maximization of usefulness) which, in the case of sanctions, could sacrifice the health and prosperity of a whole people for the sake of the external political purposes of member states in the Security Council or of another state coalition. (This could be clarified case by case in such measures as the sanctions placed against Iraq, former Yugoslavia, Haiti etc.).

The sacrifice of a whole people for the sake of the strategic interests of a superpower or of a coalition of states (as may be formed within the Security Council) would appear to be in no way ethically justifiable.<sup>26</sup> Assertions to this effect have already been made in connection with the sanctions against South Africa: if there are no general criteria for morally evaluating a particular political strategy, then those who have to bear the primary costs of measures such as sanctions should be able to decide whether they are to be imposed.<sup>27</sup> The general ethical principle guiding the use of sanctions should thus be that consideration be taken of the affected population in the formulation of such measures. Precisely this principle, however, is excluded by the nature of the coercive measures in accordance with Chapter VII of the UN Charter. As American authors have illustrated in an evaluation of the sanctions policy in the wake of the Gulf War, economic sanctions cause the civilian population to be held hostage in its own country.<sup>28</sup> Measures such as those which explicitly intend to harm the

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<sup>23</sup>Cf. the author's *Democracy and Human Rights: Do Human Rights Concur with Particular Democratic Systems?* Vienna, 1990.

<sup>24</sup>*Op. cit.*, p. 350f.

<sup>25</sup>*Op. cit.*, p. 351.

<sup>26</sup>The individual has a *prima facie* right not to be sacrificed for the sake of the settlement of conflicts between states. In this context, there is no ethical justification of the worn-out dictum that the end justifies the means.

<sup>27</sup>See Robert Paul Wolff in: "The moral dimensions of the policy of anti-apartheid sanctions," in: Mark Orkin (ed.), *Sanctions against Apartheid*, Cape Town/Johannesburg/London, 1989, p. 108.

<sup>28</sup>Jeff McMahan/ Robert McKim, *op. cit.*, p. 536. Concerning the morally problematic nature of the Gulf War, cf. also David E. Decosse (ed.), *But*

population are to be judged as *immoral*,<sup>29</sup> for "one cannot intentionally cripple an economy without intentionally affecting the people whose working and consuming lives are partially constitutive of that economy."<sup>30</sup>

## II. Sanctions Policy within the Normative System of Modern International Law:

When we view sanctions from the standpoint of moral philosophy, we must of necessity inquire into their legitimacy within international law, especially since the current doctrine of international law presupposes that *human rights* constitute the *jus cogens* of general international law.<sup>31</sup> (As above, we will be limiting ourselves here to considering the problem posed by comprehensive economic sanctions - both unilateral and multilateral - since specific sanctions, like those placed on military goods, do not affect the fundamental rights of the citizens as gravely.) The measures of the UN Security Council are also obliged to comply with human rights.<sup>32</sup> As we

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Was It Just? Reflections on the Morality of the Persian Gulf War, New York, 1992.

<sup>29</sup>This is also the viewpoint which the Catholic Church has repeatedly expressed. Cf. the quoted statements by the Archbishop of the Roman Curia Alois Wagner, "Embargos treffen nur die Armen," *Standard* (Vienna), 11 March 1994, p. 5.

<sup>30</sup>McMahan/Kim, *op. cit.*, p. 540.

<sup>31</sup>In the modern theory of international law, *jus cogens* - in accordance with the definition in Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969 - refers to the peremptory norms of general international law. Article 53 of the Convention states that "a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." (Cf. also Alfred Verdross/ Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis*, Berlin [3rd ed.], 1984, p. 331). The fundamental human rights are unanimously held to be part of this *jus cogens*, which therefore has "absolute validity ... so that it cannot be abrogated either by customary international law or by the agreements between individual parties" (Verdross/ Simma, *op. cit.*, p. 331). From our point of view, the absolute validity of the norms of the *jus cogens* implies that the Charter of the United Nations, too, must only be applied in accordance with human rights. This provides a clear frame of reference for the Security Council with respect to the structuring of the sanctions policy, i.e. it considerably restricts its freedom of judgment based solely on the considerations of power politics.

<sup>32</sup>This is stressed by Robert Charvin with reference to the sanctions policy in his working paper "L'embargo" (*Les cahiers de Nord-Sud XXI*, no.

have discussed elsewhere, human rights form the foundation of validity, not only for every state's internal legal system, but also for international law.<sup>33</sup> Despite the normative connection between human rights and international law, a remarkable disparity nevertheless remains between the rules of modern international law conforming with human rights (such as the ban on the use of force in international relations in connection with the abolishing of the traditional *jus ad bellum*) and relics of old international law motivated by the principles of power and national interest. The latter manifest themselves not only in the right to veto exercised by the permanent members of the Security Council; they additionally assert themselves in the provision regarding comprehensive economic sanctions in accordance with Article 41 of the Charter. The "complete interruption of economic relations" which this article mentions without any restrictive clause is fully in line with the tradition of medieval military sieges, i.e. the starvation of the civilian population in the interest of the respective power.<sup>34</sup> The Security Council can impose such sanctions in the event, for instance, of a threat to international peace. The existence of such a threat is determined by the Council itself, resulting in the problem of the arbitrariness of an interpretation motivated by mere power politics.<sup>35</sup> In accordance with the

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1, Geneva, 1993, p. 6): les droits de l'Homme "ont pleine vigueur et doivent ne pas être mises en cause par la sanction prise ... En aucun cas, leur violation ne peut être justifiée par le droit d'exercer des sanctions". Concerning the complex legal problematic nature of the sanctions, cf. also Charvin, "L'embargo," in: Nord-Sud XXI. Droits de l'Homme - Liberté, no. 5 (1994), pp. 123-132.

<sup>33</sup> Cf. the author's *The Principles of International Law and Human Rights: The Compatibility of Two Normative Systems*, Vienna, 1981.

<sup>34</sup> McMahan/Kim have characterized the current sanctions against Iraq in a similar way (*op. cit.*, p. 536).

<sup>35</sup> Many jurists, however - especially in "dissenting opinions" in connection with rulings and opinions of the International Court of Justice - have referred to the fact that the margin of discretion of the Security Council is not unlimited and that a threat to peace and international security should not be allowed to be arbitrarily concocted for the sake of other ends. Cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa] Notwithstanding Security Council Resolution 276 [1970]*, Advisory Opinion of 21 June 1971: I.C.J. Reports 1971, dissenting opinion of Judge Fitzmaurice, p. 294, par. 116. In his dissenting opinion, he views it as necessary to restrict the power of the Security Council "because of the all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one." (*ibid.*) The course taken by the Security

formulations of Article 41, the Security Council is in no way restricted in its power to impose sanctions; it need not justify form and extent of the sanctions.<sup>36</sup> The Charter's phrasing in this context includes no reference to human rights considerations, i.e. to the protection of the civilian population. Indeed, comprehensive sanctions specifically target the latter.

The resolutions practice of the Security Council until now shows that as a last resort - and when in particular the interests of the permanent members so dictate - the Council is not beyond concocting a supposed threat to international peace so as to plausibly impose measures of intervention. (The sanctions against Haiti have been a clear case in point: the USA saw to it that the problems of democracy and human rights in the country's interior were declared a threat to international peace.) Sanctions are used increasingly by the Security Council as a means to discipline "unruly" régimes (or those viewed as such by the USA). *De facto*, however, they share the nature of collective punishment - for the actions of the régime are attributed to the whole population - and above all are viewed in this manner by the population in question. To this extent, economic sanctions prove counterproductive with regard to the proclaimed goal (and in accordance with the Charter the sole permissible one) of maintaining or restoring peace. Through such sanctions, the resentment of the population is often awakened, for the latter feels unrightfully persecuted. This resentment can easily give way to new conflicts. Measures such as those taken against Iraq - several years after the end of the occupation of Kuwait - betray an underlying intent of punishment and revenge, regardless of the proclaimed purpose of the resolutions.

In addition, a pronounced *sense of injustice* is awakened in the population of the affected countries in the face of the selective imposition of sanctions. Whereas in one case the occupation of foreign territory is ignored for decades by the Security Council, the same behaviour in another case is punished even years after the occupation has ended. Whereas in one case the most grave human rights offenses and a systematic violation of the basic rules of democracy are not regarded as a threat to international peace (there are innumerable examples to support this claim), in another case, not merely economic but also military measures of intervention are weighed. The

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Council against Haiti is clear proof of the problematic nature of an unrestricted freedom of judgment.

<sup>36</sup>The validity of the resolutions of the Security Council in this regard is to be seen, however, in connection with the formulation of Article 25 of the Charter, which expressly refers to the carrying out of the decisions by member states "in accordance with the present Charter". This implies a restriction of the Council's power with regard to the other provisions of the Charter. This line of argumentation was more thoroughly expanded by Sir Gerald Fitzmaurice in the dissenting opinion cited above: *I.C.J. Reports 1971*, p. 293, par. 113.

interests of the permanent members of the Security Council, involved as they are in power politics, determine the respective measures. One need not wonder that such a "policy of double standards" - the unofficial credo of the "New World Order" - produces a sense of injustice within the states subject to it, especially as the fate of the present and future generations is decisively marked by the measures which the Security Council can impose.

In this context, the philosophically-minded person takes note of how the conventional doctrine of international law makes power politics particularly *taboo*. In the Western world, hardly a single expert on international law has seriously dealt with the problematic nature of the human rights offenses caused by the sanctions policy of the Security Council.<sup>37</sup> It is the task of legal philosophy to break the *taboo* placed on power politics by the doctrine of international law and to expose the inconsistencies in the normative logic of the current practice of international law in every instance where such inconsistencies are willfully overseen due to the interests of states acting according to the rules of power politics.<sup>38</sup> This is especially the case as concerns the whole sphere of collective security, which has become the prized playground for the advocates of the "New World Order". "Human rights" and "democracy" are the slogans of their various ideological legitimizations. There is a peculiar contradiction in the current sanctions policy of the United Nations, albeit one that can be explained through the interests of power politics: whereas a violation of human rights can constitute a ground for imposing sanctions (a threat to international peace is asserted),<sup>39</sup> detrimental effects upon human rights as a result of the

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<sup>37</sup>This deficit is especially blatant in the programmatic treatise by Theo van Boven, the former Director of the UN Centre for Human Rights, "The Security Council: The New Frontier," in: *The Review* [International Commission of Jurists], no. 48, June 1992, pp.12-23. - Cf. however Hans Peter Gasser, "Protection of the Civilian Populations of States under Embargo Measures [Summary of Statement]," in: *Current Problems of International Humanitarian Law* [International Institute of Humanitarian Law], San Remo, 1993, pp. 41-43. Cf. also the report of the 18th Roundtable of the International Institute of Humanitarian Law, "The Protection of Populations of States which are under Embargo," in: *Current Problems of International Humanitarian Law*, pp. 19ff. Both reports carefully and indirectly criticize the sanctions policy of the Security Council.

<sup>38</sup>Cf. this accurate characterization in the publication of the International Institute of Humanitarian Law: "... a certain inconsistency was noted in the United Nations action: on the one hand imposing an embargo and on the other hand developing modalities to assist the victims of such measures" (*Current Problems of International Humanitarian Law*, p. 21).

<sup>39</sup>The concept of the threat to international peace is interpreted in a very vague sense in the tradition of the Security Council resolutions, as Verdross/Simma also point out (*op. cit.*, p. 148).

imposition of sanctions are ignored. On the one hand, the doctrine of "humanitarian intervention" is celebrated as a significant achievement of modern international law<sup>40</sup>; on the other hand, amidst the euphoria over the supposed restrengthening of the United Nations as an instrument of collective security, a rigorous sanctions policy is permitted, one which *de facto* invalidates the fundamental human rights of the affected population. This contradiction, arising from the use (or abuse) of international law in power politics, practically forces the theoretician to reflect anew on human rights as the foundation of international law.

Even if the opposite impression is made by the formulations of the UN Charter and the resolutions policy of the Security Council, human rights nevertheless constitute the normative foundation of every legal system, and hence of international law as well. International peace should also be defined as a norm from the standpoint of human rights, because a state of war threatens or negates the fundamental human rights (including the right to life). The General Assembly of the United Nations has also explicitly stated this in its *Declaration on the Right of Peoples to Peace*.<sup>41</sup> As with democracy,<sup>42</sup> peace should be defined as a *function of human rights*;<sup>43</sup> it is not an end in itself, independent of the individual's right to self-realization.

Similarly, a hierarchical order exists within human rights. Within this order, the right to life assumes primary importance. Rights such as those to health, peace and development can be derived from the right to life.<sup>44</sup> These fundamental human rights, which are also fundamental

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<sup>40</sup>Cf. Tom J. Farer, "An Inquiry into the Legitimacy of Humanitarian Intervention," in: Lori Fisler Damrosch/ David J. Scheffer, *op. cit.*, pp. 185-201.

<sup>41</sup>Resolution 39/11 of 12 November 1984, par. 4: "life without war serves as the primary international requisite ... for the full implementation of the rights and fundamental freedoms proclaimed by the United Nations."

<sup>42</sup>Cf. the author's *Democracy and Human Rights*.

<sup>43</sup>Concerning the relation of human rights and peace in the system of norms of the UN Charter, cf. the working paper of the Commission on Human Rights/ Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-sixth session, item 14 of the provisional agenda: **International Peace and Security as an Essential Condition for the Enjoyment of Human Rights, above all the Right to Life: "Interrelationship between human rights and International peace"** (supplementary working paper prepared by Mr. Murlidhar Bhandare) Doc. E/CN.4/Sub.2/1994/29, 22 June 1994, esp. par. 22.

<sup>44</sup>Cf. Samuel S. Kim, "Global Human Rights and World Order," in: Falk/ Kim/ Mendlovitz (eds.), *The United Nations and a Just World Order*, Boulder/ San Francisco/ Oxford, 1991, pp. 370f.

economic and social rights, are the precondition for the validity of fundamental rights and freedoms in the classical European sense (civil and political rights).<sup>45</sup> The former may hence not be sacrificed for the sake of the latter. This is precisely what occurs, however, when the Security Council imposes comprehensive sanctions for the (pretended) sake of defending human rights or democracy in certain countries ("selected" by the USA - as for instance, Iraq and Haiti). In order to secure the population's political rights, measures are introduced which violate this population's fundamental economic and social rights. This normative contradiction does not further trouble the Security Council, whose real intent is to test the strength of the régime in question by taking the population hostage. The talk of human rights or the maintenance of peace serves merely to veil the true motives of power politics, regardless of whether these be the attempt to overthrow the régime of the country in question (which international law prohibits) or the altering of the régime's policy.

Due to the absence of explicit provisos in the UN Charter with regard to human rights,<sup>46</sup> and in view of the consequences of the comprehensive sanctions policy described above, a general interpretation of the Charter's provisions must be undertaken from the standpoint of international law. Such an interpretation is especially called for in light of the fact that the Charter's norms do not lie beyond the bounds of international law or stand above the comprehensive normative system of international law. On the one hand, we must inquire into the provisions in Article 41 of the Charter as well as into the measures of implementation and the practice of the Sanctions Committee of the Security Council (1) in view of their compatibility not only with the Charter's human rights goals, but more importantly with the *jus cogens* of general international law. On the other hand (2), we must analyze the sanctions policy with regard to specific instruments of international law, such as conventions and treaties. Finally (3), we must apply by analogy the generally recognized principles of international humanitarian law to the area of sanctions; our central concerns here are the unity and consistency of the normative system in international law, without which the sanctions policy would lose its legitimacy. (The incompatibilities to be analyzed under the second point are valid for the imposition of sanctions in general; in particular, they are valid for the unilateral sanctions policy of the USA, which seems to consider this instrument to be a

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<sup>45</sup>Cf. the author's analysis in *The Principles of International Law and Human Rights*.

<sup>46</sup>The purposes in Article 1 (3) and the corresponding demands under Article 55 (c) can only be applied in a limited way as an "internal frame of reference" for the evaluation of the resolutions procedure of the Security Council. This is the case because purposes regarding human rights seem in the context of the Charter to be merely equally ranked to those regarding the security policy.

legitimate means of foreign policy. These incompatibilities are only partially valid for measures in the area of collective security, i.e. sanctions imposed by the Security Council, as most of the conventions and declarations we will cite contain provisos with regard to the UN Charter.) On the whole, the standpoint of moral philosophy retains its relevance even in this legal context; the status of the human being as subject along with the fundamental rights he or she thus possesses constitutes our primary concern, one at the heart of every ethical question.

All three elements of our analysis are founded on the principle that the legitimacy of an international legal system is provided only when (a) the central principles of human rights are respected, i.e. when the respective normative provisions are formulated with regard to the universal validity of human rights, and (b) when the same legal principles are valid everywhere. This would prohibit the selectivity of power politics in the application of norms - contrary to the current "policy of double standards" exercised by the Security Council.

If one accepts the fact that comprehensive economic sanctions negate or gravely encroach upon the rights to life, health, etc. of the affected population (the concrete economic factors of the country must be weighed in this context), then the general provisions of Article 41 of the UN Charter need to be interpreted with regard to the entire normative system of international law, and restrictions must accordingly be placed on the Security Council's margin of discretion.

#### A. Concerning the Compatibility of Sanctions with Human Rights as the *jus cogens* of General International Law:

Sanctions which invalidate the fundamental economic and social rights of the population (and in many cases even the right to life) are - in view of human rights as the *jus cogens* of international law<sup>47</sup> - impermissible.<sup>48</sup>

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<sup>47</sup>Concerning the embodiment of human rights in modern international law, cf. the comprehensive documentation by Paul Sieghart, *The International Law of Human Rights*, Oxford, 1983; reprint 1992.

<sup>48</sup>Concerning the theory of human rights as *jus cogens* in connection with the problem of sanctions, cf. also Robert Charvin, "Droits de l'Homme: une exigence de clarification," in: *Nord-Sud XXI. Droits de l'Homme - Liberté*, no. 5 (1994), pp. 5-8. Concerning the current discussion about this problem (in connection with the imposition of a state of emergency), cf. also the Seventh Annual Report of the Special Rapporteur of the Commission on Human Rights (Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-sixth session, item 10 [b] of the provisional agenda: *The Administration of*

Not even the powers in accordance with Chapter VII of the UN Charter entitle the Security Council to take measures of this sort. The Council must, in fact, in accordance with Article 24 (2) of the Charter, comply with the Purposes and Principles of the United Nations when discharging its duties. One of the United Nations' foremost aims, stated explicitly in Article 1 (3),<sup>49</sup> is that of promoting respect for human rights and fundamental freedoms "for all without distinction".<sup>50</sup> Thus, an "internal" conflict appears to arise between the rules and principles on which the Security Council's actions are based.

Even this body, then, does not stand above the law; the legitimacy of its resolutions is founded on the universally binding norms of international law.<sup>51</sup> The problematic tendency of the Security Council to place itself above the law must be decisively countered. Not even the special responsibility its members have for the maintenance of international peace (Article 24 [1] of the Charter) gives rise to an absolutist right of this kind. Under the auspices of the "New World Order", the verifiable abuse of power which this body has been guilty of since the end of the East-West conflict has been increasingly made taboo. This development is unfortunately abetted by such supreme organs of the United Nations as the International Court of Justice, which indirectly recognized the Security Council's *legal* primacy in an Order relating to the sanctions on Libya.<sup>52</sup> From the perspective of legal

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**Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency).** Doc. E/CN.4/Sub.2/1994/23, 3 June 1994, Chapter I: "Question of Inalienable or Non-derogable Rights".

<sup>49</sup>Cf. also the formulation of purposes in Article 55(c) and the collective "pledge" stated in Article 56.

<sup>50</sup>Cf. also the detailed report by Claire Palley for the Commission on Human Rights, *op. cit.*, par. 13ff. The author of this report accurately states therein that measures to maintain international peace "potentially conflict with other United Nations mandates," particularly with the purposes laid out in Article 1 (3), to which the promotion of human rights belongs (par. 13, p.6).

<sup>51</sup>The delegate of Zimbabwe has made accurate reference to this in the Security Council debate concerning the Lockerbie dispute: "Any approach that assumes that international law is created by majority votes in the Security Council is bound to have far-reaching ramifications which could cause irreparable harm to the credibility and prestige of the Organization, with dire consequences for a stable and peaceful world order." (United Nations, Security Council, Doc. S/PV.3063, 31 March 1992, p. 54)

<sup>52</sup>Ruling of 14 April 1992 (1992, 14 April, General List No. 88/Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie [Libyan Arab Jamahlriya v. United Kingdom], Request for the Indication of Provisional

philosophy, one cannot accept this Order of the International Court of Justice, dictated as it is by power politics; this would merely grant recognition within international law to the principle of power politics - as expressed in the dictum of the "normative power of the facts" - and thereby undermine any legal certainty with respect to the future validity of international treaties and conventions.

From our point of view, we are forced to conclude the following by analogy as regards the legal evaluation of resolutions adopted by the Security Council: just as the disregard of *jus cogens* in the process of their adoption invalidates international treaties, so should those resolutions adopted by the Security Council and standing contrary to the *jus cogens* of international law also be void. The binding norms in question are those of general international law in accordance with the Vienna Convention on the Law of Treaties of May 23, 1969, which confirms these as "accepted and recognized by the international community of states as a whole" as norms "from which no derogation is permitted" (Article 53).<sup>53</sup> This is precisely the case with the supreme principles of human rights.

#### **B. Sanctions Policy with Regard to International Conventions:**

The comprehensive sanctions policy outlined above furthermore runs counter to many international agreements and conventions, of which only a

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Measures). Cf. particularly "Declaration of Acting President Oda", part I, with regard to the Court's exclusive formulation of its ruling on the basis of the resolution of the Security Council ("... I am not in agreement with the Court's taking UN Security Council resolution 748 [1992] as its sole ground in this matter"). Cf. also the contribution to the debate by the delegate of Zimbabwe in the session of the Security Council on 31 March 1992, in which he appealed to the Council to recognize the legal competence of the International Court of Justice in accordance with the Charter and not to impose measures in accordance with Chapter VII before the International Court has announced its ruling: "By taking the Chapter VII route while this case is still pending before the world Court, the Security Council is risking a major institutional crisis. Such an institutional crisis ... would ... sap international confidence in the Security Council's capacity to execute, in a judicious and objective manner, its mandate as provided for in the Charter." (S/PV.3063, 31 March 1992, p. 53).

<sup>53</sup> Vienna Convention on the Law of Treaties (23 May 1969), Doc. A/CONF.39/27, quoted from Vienna Convention on the Law of Treaties with Final Act of the Conference, Declarations and Resolutions, London, 1969, p. 18.

limited number of examples can be cited in this evaluation.<sup>54</sup> (As with the Declaration of Human Rights and the two International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the respective conventions are - surprisingly - only applicable to a limited extent to the sanctions policy of the Security Council. This clearly documents the fact that, in the framework of the United Nations - due to the circumstances of power politics - no priority is accorded to human rights, the *jus cogens* of international law, a fact which we will demonstrate. From the perspective of the theory of international law we propose, provisos in the specific conventions<sup>55</sup> are highly problematic.<sup>56</sup>) To be considered in this regard are

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<sup>54</sup>The approach we have chosen here is also apparent in Claire Palley's report to the UN Commission on Human Rights. The report accuses the Security Council - with, however, the diplomatic caution obviously necessary in this framework - of violating the standards of human rights of the United Nations ("flouting a United Nations standard") in connection with its sanctions practice (Claire Palley, *loc. cit.*, par. 13, p. 17).

<sup>55</sup>The Charter of the United Nations has anyhow taken the necessary precautions in Article 103 and thus claimed the status of *jus cogens* for the norms which it formulates ("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."). The "*jus cogens* of the Charter" must nevertheless orient itself according to the *jus cogens* of general international law; it may thus not conflict with the universal validity of human rights. This was also emphasized in the report of the 18th Roundtable of the International Institute of Humanitarian Law: "Article 103 of the Charter could not be interpreted as justifying a disregard of these principles and rules." (Current Problems of International Humanitarian Law, *op. cit.*, p. 20.)

<sup>56</sup>The reservations are formulated in a more or less specific manner. Article 29 (3) of the Universal Declaration of Human Rights thus states that "These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations." With regard to Article 1 (1) of the UN Charter, this could mean a "normative priority" of the Security Council even in questions of human rights. This is above all the case because the formulation of the Council's obligations in Article 24 (2) (which is binding for the Security Council) expressly refers to its powers in accordance with Chapter VII. The identical reservation in Article 46 of the International Covenant on Civil and Political Rights and in Article 24 of the International Covenant on Economic, Social and Cultural Rights, by contrast, refers solely to the rights protected in accordance with both Conventions. The aim is merely to preclude a contradiction with the other UN provisions "in regard to the matters dealt with in the present Covenant". The situation is very different as concerns the other conventions treated in this analysis. In these conventions, the reservations refer either explicitly to the provisions of Chapter VII or generally to the provisions of the UN Charter. With reference to the

the provisions set out in § 25 (1) of the Universal Declaration of Human Rights (1948)<sup>57</sup> and in §11 (1) of the International Covenant on Economic, Social and Cultural Rights (in effect since 1976)<sup>58</sup> With reference to comprehensive sanctions (as in the case of the oil and economic embargo against Iraq), §1 (2) of the International Covenant is especially relevant: "In no case may a people be deprived of its own means of subsistence." International law, then, clearly permits no derogation from these provisions under any circumstances.<sup>59</sup> These guarantees for human rights are specifically upheld in Article 1 of the Universal Declaration on the Eradication of Hunger and Malnutrition (1974) by the World Food Conference.<sup>60</sup>

The sanctions policy described above is furthermore contrary to the principles of the United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 [XXV] of October 24, 1970). With regard to the fundamental principle of non-intervention, the declaration stipulates among other things that "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."<sup>61</sup> That which the individual state is expressly prohibited from practicing is, in the name of "collective security", granted to the respective group of states in the Security Council. This is the case despite the fact that the resolutions often serve the interests of the

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reservation in the Universal Declaration of Human Rights, Torkel Opsahl accurately speaks of the impression "that the parent organization somewhat self-righteously takes the opportunity to claim priority for its own purposes and principles." (*The Universal Declaration of Human Rights: A Commentary*, ed. by Asbjørn Eide et al., Oslo, 1992, p. 450.)

<sup>57</sup>"Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, ... medical care" etc.

<sup>58</sup>As regards the specific situation of children, Article 6 of the Convention on the Rights of the Child is also relevant.

<sup>59</sup>In this context, we need not make further mention of the fundamental right to life (Article 3 of the Universal Declaration of Human Rights, Article 6 [1] of the International Covenant on Civil and Political Rights).

<sup>60</sup>This Declaration was incorporated by the UN General Assembly into its resolution 3348 (XXIX) on 17 December 1974.

<sup>61</sup>Concerning the definition of the concept of non-intervention in internal affairs, cf. Tomislav Mitrovic, "Non-intervention in the Internal Affairs of States," in: Milan Sahovic (ed.), *Principles of International Law concerning Friendly Relations and Cooperation*, Belgrade, 1972, pp. 219-275.

strongest member country and that the sanctions are *de facto* imposed with the intention of destabilizing the internal politics of a country. In a later paragraph, the declaration therefore expressly negates the validity of its own provisions with regard to the measures authorized in accordance with Chapter VII of the Charter.<sup>62</sup> This proviso empties the declaration's respective provisions of any content whatsoever; it does, however, shed light on the true intention, one which is motivated by power politics: to uphold the privileges of the Security Council. The provisions regarded as fundamental for the peaceful coexistence of states are all inapplicable to the Security Council. It is obvious that the permanent members profit the most from such exemptions.

A rigorous sanctions régime has been and continues to be practiced against Iraq by the Security Council; this policy also manifests itself in the unilateral US sanctions against Cuba. Such a policy in effect hinders the affected governments in fulfilling their duties in accordance with the Charter of Economic Rights and Duties of States (Resolution 3281 [XXIX] of the United Nations General Assembly of December 12, 1974).

A sanctions policy of this kind runs especially counter to Article 7 of this Charter, which details the responsibility of each state towards promoting the economic and social development of its citizens.<sup>63</sup> Article 32 authoritatively formulates the prohibition of the use of economic measures "to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights." (This rule was already included in the 1970 Declaration.) But here, too, power politics have stipulated a proviso (in Article 33): no provision of the Charter should be construed as "impairing or derogating from the provisions of the Charter of the United Nations."

In a separate resolution, the United Nations Conference on Trade and Development condemned the application of economic coercion, especially when the latter is used against developing countries; it furthermore referred to the fact that such measures "do not help to create the climate of peace needed for development." In Resolution 152 (VI) of July 2, 1983, entitled Rejection of Coercive Economic Measures, the conference stipulated that "all developed countries shall refrain from applying trade restrictions, blockades, embargoes and other economic sanctions incompatible with the provisions of the Charter of the United Nations ... against developing countries as a form of political coercion which affects their economic, political and social development." (This resolution and those described below are especially

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<sup>62</sup>"Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security."

<sup>63</sup>"Every State has the primary responsibility to promote the economic, social and cultural development of its people."

pertinent as concerns the United States, which have made comprehensive, unilateral sanctions one of their foremost foreign policy instruments in their efforts against countries which oppose the hegemonial interests of the USA.)<sup>64</sup> Without a doubt, the collective actions of the "developed" countries under the leadership of the USA against Iraq, Libya and Haiti, and especially the unilateral sanctions imposed by the USA against Cuba, are contrary to the spirit of this resolution. In all of these cases, a threat to international peace, human rights or democracy has been concocted; what is really meant is the refusal of the state in question to subject itself to Western hegemonic strategies. "Human rights", "rule of law" and "restoration of democracy" merely serve as pretexts for unilateral measures of the USA - with cover generally provided by multilateral resolutions - which aim at destabilizing the régime in question or replacing it with one which bears the US seal of approval.

The General Assembly has repeatedly condemned economic coercion as a means of achieving political goals, most sharply in Resolution 210 (XLVI) of December 20, 1991, entitled "Economic Measures as a Means of Political and Economic Coercion against Developing Countries". Point 3 of this resolution's catalogue of measures requires the industrial nations to reject the use of their superior position as a means of applying economic pressure "with the purpose of inducing changes in the economic, political, commercial and social policies of other countries." This repeated condemnation of such sanctions measures by bodies which - when compared with the Security Council - enjoy a more democratic legitimization reveals one possible reason why the USA refrains from the exclusive imposition of unilateral sanctions and instead increasingly prefers to seek the Security Council's cover (which, in the shifted constellation of world politics, is also easier to come by). This endows the U.S. administration with a kind of legal immunity for its power politics, an immunity which it needs so as to deflate the argument that such measures violate international law. The advocates of comprehensive economic sanctions ("punitive sanctions") will only succeed with a line of argument which upholds the primacy of the Security Council if the doctrine of a *jus cogens* with principles binding upon *all* organs of the United Nations is abandoned and if the Security Council is placed above, i.e. beyond the bounds of the law. This would, however, be tantamount to an "anarchy of sovereignty", the beneficiaries of which would be the member states equipped with the right to veto, and would carry the idea of an "international rule of law" *ad absurdum*. The resolutions practice of the Security Council since the end of the East-West conflict has greatly fostered this kind of development.<sup>65</sup>

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<sup>64</sup>Cf. *United States Economic Measures Against Cuba: Proceedings in the United Nations and International Law Issues*, Introduction by Richard Falk, Northampton/ Mass, 1993.

<sup>65</sup>Cf. the author's *Democracy and New World Order*, Vienna, 1993.

By explicitly demanding an exemption with regard to measures in accordance with Article 41 of the UN Charter, a group of United Nations experts - for the benefit of power politics - relativized the various declarations and resolutions which have been passed since the Declaration of 1970 and which condemn measures of economic coercion.<sup>66</sup> This indirectly confirms the full awareness within the United Nations of the problematic nature of the above-mentioned measures in terms of international law, and in particular of the consistency of the normative system as such.

For an evaluation of the coercive economic measures from the standpoint of international law, the Declaration on the Right to Development (Resolution of the General Assembly [XLI] of December 4, 1986) is especially important. Article 1 (1) of the Declaration formulates an inalienable individual and collective human right to development. This right runs counter to coercive economic measures which, as practice proves, often lead to mass suffering. According to this article, "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

After all that we have said up to this point, it should not surprise us that this Declaration, too - under Article 9 (2) - formulates the usual proviso ("Nothing in the present Declaration shall be construed as being contrary to the Purposes and Principles of the United Nations ..."); the reference to these purposes of the United Nations, however, remains in this instance rather vague, as it does not explicitly cite the Charter, not to mention individual provisions therein. All of these exemptions are contrary to human rights, the *jus cogens* of international law. In this context, one may refer to Article 60 (5) of the Vienna Convention on the Law of Treaties. According to this article, provisions which are contained in treaties of a humanitarian nature and which relate to the protection of the human person may not be invalidated on the basis of other circumstances<sup>67</sup> This would mean that the

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<sup>66</sup>... there should definitely be a provision at least recognizing that States could take economic measures pursuant to a Security Council resolution under Article 41 of the Charter of the United Nations." (Report of the Secretary-General, Economic Measures as a Means of Political and Economic Coercion against Developing Countries, Doc. A/44/510, October 10, 1989: Report of the Expert Group Meeting, par. 22).

<sup>67</sup>The Convention speaks - in connection with the question of the termination or suspension of treaties - of "provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals

provisos contained in the respective conventions completely lose their relevance in regard to the specific humanitarian norms contained in the convention.<sup>68</sup>

The United Nations Conference on Human Rights, in Par. 10 of its final document "Vienna Declaration and Programme of Action" of June 25, 1993, also reasserted the right to development as a "universal and inalienable right and an integral part of fundamental human rights." Article 14 of the Declaration specifically states that poverty inhibits the full realization of human rights.<sup>69</sup> Precisely this situation, however, has been and continues to be created in many countries by the Security Council through its policy of economic sanctions. Even the Vienna Declaration does not omit the usual proviso when, in Article 7, it stipulates that the processes of promoting and protecting human rights should be conducted in conformity with the Purposes and Principles of the UN Charter.

The most precise articulation to date (in the framework of the United Nations) of the problematic nature of the sanctions with regard to human rights problems has been undertaken by the UN Commission on Human Rights in its resolution of March 4, 1994. Article 2 expressly maintains that coercive economic measures prevent the full realization of all human rights, with special reference to children, women and the elderly.<sup>70</sup> Directing our attention to the Universal Declaration of Human Rights, the resolution calls on all states to forbear such practices. It above all refers to (in Article 3) "the right of everyone to a standard of living adequate for their health and well-being, including food and medical care, housing and the necessary social services". Article 4 of the resolution explicitly lists restrictions on trade, blockades, embargoes and the freezing of assets as coercive measures constituting human rights offenses; Article 5 expressly stipulates that essential goods such as food and medicines may not be used as means of

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against persons protected by such treaties." (United Nations/ General Assembly, Doc. A/CONF.39/27, 23 May 1969, p. 29)

<sup>68</sup>Cf. also Gowlland-Debbas, "Security Council Enforcement Action and Issues of State Responsibility," *op. cit.*, p. 93. She refers to this provision of the Vienna Convention as restricting the validity of Article 103 of the UN Charter.

<sup>69</sup>"The existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights ... " Cf. also the recommendation of the NGO-Forum, All Human Rights for All, Report by the General Rapporteur, 12 June 1993, Working Group D, Recommendation n. 6: "The recognition of impoverishment of large sectors of the population as a gross violation of human rights - civil, political, economic, social, cultural - in their entirety."

<sup>70</sup>Human rights and unilateral coercive measures: Commission on Human Rights, 56th meeting, 4 March 1994, res. 1994/47.

exerting political pressure. It is not necessary to further elaborate on the fact that, in substance, the circumstances described in the resolution match those of multilateral sanctions imposed by the Security Council (in the framework of measures of collective security).<sup>71</sup> In order, however, to avoid a conflict with the UN Charter, the Human Rights Commission expressly directed its resolution, on a formal level, at unilateral coercive measures ("Human Rights and Unilateral Coercive Measures") despite the fact that the effects of multilateral sanctions upon human rights are far graver (because they naturally "hit home" better). This reveals once more the normative rift in the conscience of the United Nations organs; exempting measures of collective security from the validity of human rights is symptomatic of this rift. Granted, a political conflict in the framework of the United Nations procedures and the United Nations power structures is thus avoided; the contradiction on the normative level, however, remains, as far as concerns the status of human rights as the *jus cogens*, i.e. the foundation of validity, of international law. In actuality, the validity of human rights is made dependent on provisions of international law in the UN Charter. But it is precisely through these provisions that the rights demanded by the Human Rights Commission can be invalidated in the course of *collective* measures determined by power politics. Not even through reference to the priority of peace - as the guarantee of the fundamental right to life - can this normative *circulus vitiosus* be conjured away.

### C. Sanctions Policy and International Humanitarian Law:

For the legal evaluation of coercive economic measures imposed by the Security Council, generally recognized provisions of international humanitarian law<sup>72</sup> can be especially useful. Because measures of this kind do not constitute, from the standpoint of international law, acts of war (even

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<sup>71</sup>The International Progress Organization, before the Commission on Human Rights (Sub-commission on the Prevention of Discrimination and Protection of Minorities) has already (on 13 August 1991) pointed out the violations of human rights brought about by economic sanctions measures with reference to the case of Iraq. The Sub-Commission has also appealed in its Resolutions 1990/109 and 1991/108 to those states participating in sanctions against Iraq that they take into account the fundamental human rights of the Iraqi civilian population - and especially those of the children. Although the Commission on Human Rights has not directed an appeal concerning this humanitarian issue - as demanded by the I.P.O. - to the Security Council, it has nevertheless reflected the I.P.O.'s humanitarian concern in the resolution on unilateral coercive measures quoted earlier.

<sup>72</sup>Concerning the current discussion about the instruments of international humanitarian law, cf. *Bulletin of Human Rights*, 91/1, I: "Human rights and humanitarian law," United Nations, New York, 1992.

though that is what they *de facto* are), the laws of war in a strict sense do not apply to them. The provisions of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (of August 12, 1949) are, however, valid, for they may also be applied with respect to conflicts not expressly declared as war. Thus "the humanitarian restriction also exists for coercive measures in accordance with Chapter VII of the Charter."<sup>73</sup> Article 54 (1) of the First Additional Protocol to the Geneva Conventions is especially significant for an evaluation of comprehensive coercive economic measures: "Starvation of civilians as a method of warfare is prohibited."<sup>74</sup> This provision is also relevant as regards the continuation of comprehensive sanctions against Iraq, a large portion of whose economic infrastructure was destroyed in the course of belligerent activities based on Chapter VII of the UN Charter<sup>75</sup> (and clearly contrary to Article 54 (2) of the First Additional Protocol).<sup>76</sup>

Furthermore, the provisions of articles 48 and 49 of the First Additional Protocol are by analogy applicable to economic sanctions (which often serve as the first step towards or go hand in hand with coercive military measures). In accordance with these provisions, the protection of the civilian population calls for the latter to be distinguished in all circumstances from the combatants.<sup>77</sup> What applies to a military situation must apply all the more to the implementation of coercive economic measures, for otherwise the conduct of war would satisfy higher criteria of justice or human rights

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<sup>73</sup>Verdross/Simma, *Universelles Völkerrecht*, p. 148, § 242.

<sup>74</sup>Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I, signed on 10 June 1977), Article 54: Protection of objects indispensable to the survival of the civilian population. Cf. also the identical formulation in Article 14 of the Second Additional Protocol (with reference to internal armed conflicts). Humanitarian exceptions for comprehensive sanctions (with regard to medical supplies and food) follow from Article 23 of the Fourth Geneva Convention: Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.

<sup>75</sup>Cf. the editorial "Let Our People Live," *The Arab Review* (London), vol. 2, n. 3 (Winter 1994), pp. 2-4. Cf. also "International Law Experts Resolution," *International Symposium on U.S. War Crimes and Embargo Violations of Human Rights in Iraq*, February 5-8, 1994, Baghdad, 1994, pp. 12-15.

<sup>76</sup>"It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population ..."

<sup>77</sup>Article 48, *Basic Rule*: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants ..."

than non-military measures. Comprehensive economic sanctions, however - in contrast to partial sanctions - do not by their very nature allow for a differentiation between the "civilian population" and the government (or specific governmental institutions) whose policies are to be influenced through the sanctions. Comprehensive sanctions make the civilian population the hostage of the Security Council, of the state, or of the group of states implementing the coercive measures. Former American Attorney General Ramsey Clark has fervently drawn attention to this inconsistency between the provisions of international humanitarian law and actual United Nations practice in the realm of economic measures based on Chapter VII of the Charter: "If law prohibits even minimal assault on civilians in time of war, when a government will not surrender, can it permit the assault of an entire nation when its government will not submit, striking the poorest and weakest hardest and killing the most fragile?"<sup>78</sup> It is astonishing to the legal philosopher that the sanctions policy is not measured against the normative rules of international humanitarian law despite the fact that this policy is *de facto* constitutive of a war strategy, i.e. this policy amounts to a strategy to escalate the use of force (even though this force, if implemented under Chapter VII of the UN Charter, is not declared as "war" in terms of international law). As shown by the practice of the Sanctions Committee of the Security Council especially in its handling of the Iraq sanctions since 1990, there are no "humanitarian" scruples, despite the fact that numerous reports (including those of representatives dispatched by the United Nations) document in detail the catastrophic situation brought on by the continuation of the sanctions after the war.<sup>79</sup>

The so-called Martens Clause evokes the general humanitarian principles to which the Security Council is also bound by virtue of *jus cogens* during the implementation of its sanctions policy. This rule was first formulated in the Preamble to the Second Hague Convention of 1899 and was restated in the Preamble to the Fourth Hague Convention of 1907. This provision was decisive for the development of international law. It stipulates that, in the absence of detailed provisions concerning specific areas of the law of war, the civilian population as well as the combatants should "remain under the protections and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the

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<sup>78</sup>"Appeal for Action to Prohibit All Embargoes against a Whole Nation," *Contra los embargos y sanciones económicas*, Dossler I, OSPAAAC, Madrid, [1994], p. 1.

<sup>79</sup>For recent considerations of the precise and binding formulation of the principles of humanitarian action, cf. L. Minear and T. G. Weiss, *Humanitarian Action in Time of War*, Boulder/London, 1993. Cf. also the "Providence Principles of humanitarian action in armed conflicts" (Minear/ Weiss, p. 19).

laws of humanity, and the dictates of the public conscience."<sup>80</sup> (The Martens Clause was explicitly incorporated into the First Additional Protocol to the Geneva Conventions of 1949.<sup>81</sup>) This formulation clearly upholds human rights as the *jus cogens* of general international law. Thus, the humanitarian consequences of the provisions of the UN Charter - especially those in Chapter VII - must be constantly examined with regard to human rights. This rule of interpretation resulting from the Martens Clause is often used in the current discussion of the permissibility of weapons of mass destruction under international law. This interpretation applies by analogy equally to all coercive measures which badly harm the economy and the health of the civilian population and pose a threat to the latter's right to life; this is precisely the case with total blockades, which cause mass suffering and destroy the healthcare system of the country targeted. It would be absurd and contrary to all principles of justice if one were to apply higher humanitarian standards to war than to so-called non-military coercive measures which, like war, can lead to death and mass deprivation.

The lack of consideration granted to provisions of international humanitarian law (which are applicable by analogy) cannot be justified even by reference to the maintenance of international peace according to Article 39 of the UN Charter. The goal of peace does not supersede human rights; on the contrary, peace as the goal of the UN Charter can only be defined with respect to human rights (and especially the fundamental right to life). The restoration or maintenance of a state of affairs which preserves the fundamental human rights cannot be gained by negating these very human rights. On grounds of humanity, there must be normative consistency in this particular context of international law. Otherwise, the normative system embodied in the UN Charter loses its legitimacy. The requirements of power politics should not establish the criteria of interpretation guiding the application of the provisions of Chapter VII; rather, through the analogous

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<sup>80</sup>"les populations et les belligérants restent sous la sauvegarde et sous l'empire des principes du droit des gens, tels qu'ils résultent des usages établis entre nations civilisées, des lois de l'humanité et des exigences de la conscience publique." (Preamble of the Convention concernant les lois et coutumes de la guerre sur terre du 18 octobre 1907, quoted according to *Die Haager Landkriegsordnung [Das Übereinkommen über die Gesetze und Gebräuche des Landkrieges]*. Textausgabe mit einer Einführung von Rudolf Laun, Wolfenbüttel-Hannover, [3rd ed.] 1947, p. 68.)

<sup>81</sup>Protocol I (1977), Part I: General Provisions, Article I (2): "... civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

application of provisions for the protection of civilians in armed conflicts, international humanitarian law should determine such guidelines.<sup>82</sup>

### III. Concerning Collective and Individual Legal Responsibility in Current International Law:

Outlined above is the kind of sanctions policy which either directly causes or acknowledges the violation of human rights and the disregard of provisions of international humanitarian law. In light of this, one particular question necessarily arises: the question concerning the legal and moral responsibility of the states or community of states<sup>83</sup> (as represented by the Security Council) authorizing or carrying out the sanctions. The International Progress Organization raised this question with the UN Commission on Human Rights in connection with the sanctions against Iraq.<sup>84</sup> Until now, however, the doctrine of international law has hardly, or inadequately, dealt with the issue of responsibility; apparently the question of "guilt" has been suppressed in collective security measures, as the many provisos in the previously quoted conventions prove. It seems to be a common belief that these measures are above general international law or that they invalidate every other international law, as can be expressed by the following maxim: "Security (Council) law invalidates *international* law (or the law of human rights)." Clearly, this cannot satisfy the legal philosopher, whose concerns are the universal validity of norms and the legitimacy of legal systems.

The considerations layed out by Jean Combacau in his work on the theory of non-military coercive measures typify the conventional standpoint of experts on international law on sanctions and the responsibility

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<sup>82</sup>Cf. Gowlland-Debbas, "Security Council Enforcement Action and Issues of State Responsibility," *op. cit.*, particularly Chapter III: "Limits to the Enforcement Powers of the Security Council," pp. 90ff.

<sup>83</sup>Cf. Bin Cheng, "General Principles of the Law in the Concept of Responsibility, 7: The Principle of Individual Responsibility," in: *General Principles of Law as applied by International Courts and Tribunals*, London, 1953, pp. 208ff.

<sup>84</sup>"It must be said that the members of the U.N. Security Council bear a ... moral and legal responsibility for the grave consequences of the continuation of the sanctions..." (Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-third session, 5-30 August 1991, Presentation by Warren A. J. Hamerman, International Progress Organization): *Summary Record of the 10th meeting, 13 August 1991, Doc. E/CN.4/Sub.2/1991/SR.10/20 August 1991, par. 95, p. 20.*

accompanying them.<sup>85</sup> Combacau completely disregards the ethical aspects of sanctions in connection with the population of the affected country. He elaborates on the moral aspect only in regard to people in neighboring countries who suffer as a result of a sanctions measure. Combacau speaks of "*exigence morale*" as concerns the obligation of solidarity with these victims (among whom, however, the civilian population of the affected country is not included).<sup>86</sup> In connection with Article 50 of the UN Charter, he describes the existence of a legal obligation regarding the neighboring states affected by the sanctions,<sup>87</sup> without, however, addressing the rights of the civilian population directly affected. In his report on United Nations reform, *An Agenda for Peace*, UN Secretary-General Boutros-Ghali also willfully overlooks the question of liability as regards the population of the country affected by the sanctions when he suggests improvements to reparation measures for third countries.<sup>88</sup> In his recent report (*Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*) he addresses, for the first time, the problematic nature of sanctions in regard to ethical questions.<sup>89</sup>

Konrad Ginther has proposed a theory concerning the responsibility of international organizations under international law;<sup>90</sup> however, this theory does not help to resolve the questions of liability raised by the sanctions. He views the United Nations Organization as regards its status in international law as a *universal* organization; Ginther thus regards the measures of the Security Council as being, as it were, *ex definitione* "always in the interest of the entire international community".<sup>91</sup> From this standpoint, there is - "at least theoretically" - no possibility of a collision between the individual interest of a member state (and probably "individual rights" of that state as

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<sup>85</sup> *Le pouvoir de sanction de l'O.N.U.: Etude théorique de la coercition non militaire*, Paris, 1974.

<sup>86</sup> *Op. cit.*, pp. 340ff.

<sup>87</sup> *Op. cit.*, p. 343.

<sup>88</sup> Par. 41: "Sanctions and special economic problems," in: *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peacekeeping*. Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, New York, United Nations, 1992, p. 24.

<sup>89</sup> *Report of the Secretary-General on the Work of the Organization*, United Nations, General Assembly/ Security Council, Doc. A/50/60, S/1995/1, 3 January 1995, esp. par. 70.

<sup>90</sup> *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten*. Vienna/ New York, 1969.

<sup>91</sup> *Op. cit.*, p. 181.

well) and the interests of the community of nations as represented by the United Nations Organization.<sup>92</sup> This interpretation is, of course, supported by the provisions of Article 24 (1) of the Charter.<sup>93</sup> Ginther apparently disregards the fact that the general responsibility of the Security Council for peace and security (as stated in this paragraph) disguises an underlying policy of interests of the permanent members of the Security Council. With regard to the postulated universality, Ginther formulates a fictitious principle which can only be taken cynically by the population whose human rights are affected by the sanctions: "the measure adopted by the organization in conformity with its Charter is always to be regarded as being in the interest of the affected state."<sup>94</sup> Ginther seems not to have considered what consequences this formulation could have for the assessment of coercive economic measures, for the maxim he proposes instrumentalizes the rights of the civilian population (i.e., their human rights) for the benefit of an abstract state; this maxim thereby runs counter to a central area of the *jus cogens* of general international law. From a formal standpoint, Ginther correctly concludes from the universal nature of the United Nations Organization that "the organization alone, to the exclusion of a subsidiary liability of the member states, is responsible for the consequences resulting from a violation of rights by one of its organs."<sup>95</sup> This general statement is problematic, however, with regard to the privileged position of the permanent members of the Security Council, for these members can steer a resolution in a particular direction by means of their veto right.<sup>96</sup> Judging from what has been said, Ginther would probably not apply the principle of liability to the sanctions resolutions of the Security Council, for such measures, from his standpoint, cannot *eo ipso* run counter to the interests of member states. In addition, current international law provides for no mechanism for determining and punishing a human rights violation caused by the Security Council. Neither does Ginther, in his exhaustive considerations on international law, make reference to the problems associated with the damage caused by a comprehensive sanctions policy to the whole population of a country. From the standpoint of conventional international law, the Security Council is apparently immune, due to the philosophy - or rather, ideology - of

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<sup>92</sup>Ibid.

<sup>93</sup>"In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility *the Security Council acts on their behalf.*" (Emphasis added by the author.)

<sup>94</sup>Op. cit., p. 181.

<sup>95</sup>Op. cit., pp. 181f.

<sup>96</sup>Cf. the author's *The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction in the UN Charter and its Consequences on International Relations*, Vienna, 1991.

"collective security"; it is *not possible* for the Council to violate any rights as long as it adheres to the *formal* framework of the Charter's provisions. The ideology of universality does not even allow for a *substantive* (material) examination and normative evaluation of the Security Council's sanctions policy.

We are thus forced to acknowledge that the current theory of international law completely overlooks issues of human rights and issues of liability closely connected with the latter. This deficiency is all the more aggravated by the fact that the sanctions policy in accordance with Chapter VII of the Charter can gravely violate the fundamental human rights of a whole generation of people. A moral-philosophical critique of the current UN Charter is urgently called for, one which considers the latter as it is actually interpreted by the "superpowers" (which above all exploit the provisions of Chapter VII). It is inexcusable that these superpowers escape their responsibility precisely through reference to their special responsibility in accordance with Article 24 and the provisions of Chapter VII and that they furthermore have their "immunity" indirectly confirmed by the International Court of Justice, as occurred *de facto* in the Order on the Libya case cited above. Despite this fact of power politics, we must assert that not only nations defeated in war but also the organs of the United Nations - due to the universal validity of human rights - have a *specific duty to undertake reparations* towards every person whose rights have been affected by sanctions. This is the case because the comprehensive economic sanctions described above are an illegitimate instrument of collective punishment and contrary to the *jus cogens* of international law; they should never have been allowed, in this general form, to become embodied in the UN Charter.

To the extent that - on the basis of human rights - the organs of the United Nations are fully responsible for the consequences of resolutions contrary to the *jus cogens*, the question concerning the applicability of the principles of the Nürnberg Tribunal and of the Genocide Convention can certainly be raised.<sup>97</sup> Why should they not apply? As the delegate of the International Progress Organization maintained in the statement presented to the Human Rights Commission and quoted above, certain sanctions measures of the Security Council represent grave and systematic violations of the fundamental human rights of an entire population of a state.<sup>98</sup>

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<sup>97</sup>Concerning the fundamental issues, cf. the reflections of Hans Kelsen - which preceded the conception of the Nürnberg Tribunal and of the Genocide Convention: "Individual responsibility for acts of State," in: *Peace through Law*, Chapel Hill, 1944, Part II: *Peace Guaranteed by Individual Responsibility for Violations of International Law*, pp. 81ff.

<sup>98</sup>"A grave and systematic violation of human rights and fundamental freedoms is carried out against the entire population of Iraq, in form and

The principles of the Nürnberg War Crimes Tribunal<sup>99</sup> have already been discussed publicly in this regard.<sup>100</sup> Article 6 (c) mentions "crimes against humanity" as wrongdoings to be duly punished as crimes under international law. In accordance with the definition provided by the Nürnberg Tribunal and adopted by the International Law Commission of the United Nations, crimes against humanity<sup>101</sup> encompass not only murder, enslavement, deportation etc.; they also include "other acts done against a civilian population,...when such acts are done...in execution of or in connection with any crime against peace or any war crime."<sup>102</sup> This definition can certainly apply to a deliberate sanctions policy - though only in connection with belligerent acts in the course of which war crimes have been committed. The definition gains relevance especially in cases - such as

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dimensions without precedent ... That such a policy be carried out on the basis of decisions made by a U.N. organ is unprecedented in the history of the U.N. ... A further special feature of this case is that the violation is being carried out not by a national government, but by an intergovernmental body against the population of a member State of the U.N." (loc. cit., par. 95, p. 20).

<sup>99</sup>Originally formulated as "Charter of the International Military Tribunal at Nürnberg" as part of the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of August 19, 1945. It was then affirmed by a unanimous resolution of the UN General Assembly: "Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal" (resolution 95 [1] of 11 December, 1946). Cf. Alfons Klafkowski, *Die Nürnberger Prinzipien und die Entwicklung des Völkerrechts*, Warsaw, 1966.

<sup>100</sup>Cf. particularly the complaint of the Commission of Inquiry for the International War Crimes Tribunal in connection with the Gulf War. This Commission explicitly lists "crimes against humanity" (*Commission of Inquiry for the International War Crimes Tribunal, Initial Complaint*, New York, 9 May 1991, p. 1). Cf. also the judgment of the International War Crimes Tribunal of 29 February 1992, in which the continuation of sanctions is described as a "crime against humanity".

<sup>101</sup>Concerning this concept and its distinction from the concept of war crimes in connection with the definitions of the Nürnberg Tribunal, cf. John Fried, "Observations on the Concepts of War Crimes and Crimes against Humanity," in: *Toward a Right to Peace, Selected Papers of John H. E. Fried* with a foreword by Roger S. Clark, Northampton/Mass, 1994, pp. 43-58.

<sup>102</sup>Formulation of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal: Text of the Nürnberg Principles adopted by the International Law Commission (44th to 49th meetings, 12 to 19 June 1950), United Nations/General Assembly, Doc. A/CN.4/L/2, 24 June 1950, p.2.

the case of Iraq - where, following the strategic destruction of the economic infrastructure of a whole country in the course of belligerent acts (in violation of the Geneva Conventions), sanctions measures deny the population the right to adequate nutrition and appropriate medical care over an extended period of time. With reference to the sanctions imposed against Iraq, former US Attorney General Ramsey Clark has repeatedly and fervently pointed out evidence of a crime against humanity in accordance with the Nürnberg principles.<sup>103</sup>

The resulting personal criminal responsibility of the respective decision-makers of the member states of the Security Council can also be shown with regard to the provisions of the Genocide Convention. In accordance with Article II, the concept of genocide is defined on the basis of acts with the intent to destroy a national, ethnic, racial or religious group; one means among others towards this end is "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."<sup>104</sup> In a petition to the United Nations, the American expert on international law, Francis Boyle, concluded that the Iraq sanctions amount to genocide; accordingly, in the name of the children affected most deeply by the sanctions, he demanded legal measures against those responsible.<sup>105</sup>

In connection with recent attempts to formulate definitions in international law, another document is relevant, namely the draft of the International Law Commission concerning the responsibility of a state for its internationally wrongful acts. Article 19 of the draft defines the term "international crime" as an "internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its

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<sup>103</sup>Cf. particularly the report of the commission which he initiated, namely the Commission of Inquiry for the International War Crimes Tribunal - **Initial Complaint** of 9 May 1991. Cf. also his article in the Los Angeles Times (22 February 1994). Cf. also the statement by Third World Solidarity, "US imposed sanctions and blockades on Third World countries" (London, 23 July 1994): "The sanctions policy is clearly a Crime against Humanity as defined under the terms of the Nuremberg Principles." Cf. also the editorial "Let Our People Live," op. cit., p. 3: "The total blockade is morally indefensible ..." The editorial mentions in this context the "rubber stamping Security Council claiming international legitimacy for genocide."

<sup>104</sup>International Convention on the Prevention and Punishment of the Crime of Genocide (1948), Article II, par. c.

<sup>105</sup>**Indictment, Complaint and Petition by the 4.5 million Children from Iraq for Relief from Genocide by President Bush and the United States of America** [Sept. 18, 1991].

breach is recognized as a crime by that community as a whole."<sup>106</sup> Under paragraph (c), the Commission provides as an example of international crime "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid."<sup>107</sup> In the context of the Commission's codification efforts in international law, the definition applies to the policies of individual states;<sup>108</sup> by analogy, however, it should be equally applicable to acts of a community of states as represented by the Security Council, whereby (disregarding the theory formulated by Ginther) every state should be held individually accountable for its participation in sanctions resolutions that are contrary to human rights. If evidence of genocide as defined above is found, the individual responsibility of the member states of the Security Council would have to be determined in accordance with this definition of "international crime".

A specialist for United Nations reform, Erskine Childers, has drawn attention to other legal issues. He has documented that recent sanctions resolutions have come about with the help of economic pressure and bribery. In his opinion, a practice of this sort, especially when perpetrated by a permanent member of the Security Council, undermines the sovereignty of the member states and thus gravely violates the UN Charter. A member state suspected of such practice should be, in his eyes, held accountable before "a court of international criminal law".<sup>109</sup> However, there exist as of yet no legal instruments which would allow this kind of justifiable demand to be realized. The practice which Childers condemns is blatantly contrary to the provisions set out in the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (1970).

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<sup>106</sup>Yearbook of the International Law Commission 1980, Vol. II, Part Two: Report of the Commission to the General Assembly on the work of its thirty-second session. [Doc. A/35/10] New York, 1981, Chapter III: State Responsibility, p.32.

<sup>107</sup>Ibid.

<sup>108</sup>In the rulings of the International Court of Justice, as well, this specific legal obligation towards the community of states as a whole ("obligations *erga omnes*") - in contrast to the obligation merely towards single states - has been described. An obligation of this sort in current international law - according to the International Court of Justice - results "from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person." (Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p.33.)

<sup>109</sup>"The Demand for Equity and Equality: The North-South Divide in the United Nations," in: Hans Köchler (ed.), *The United Nations and International Democracy*, Vienna, 1995, p. 33.

#### IV. Consequences from the Perspective of Legal Philosophy: Chances for the Further Humanitarian Development of International Law?

If we consider this list of inconsistencies and incompatibilities of sanctions measures with regard to international law - and above all as concerns the universal validity of human rights - and if we furthermore take account of the ethical impermissibility of the sanctions policy described above, we are left to call for the *further humanitarian development* of international law, especially with respect to the rights and duties of the Security Council. Above all, criteria should be formulated within the framework of the United Nations (it would make most sense for the International Court of Justice to undertake this) that would eliminate conflicts between specific purposes and principles of the UN Charter in favor of the primacy of human rights. The Security Council, in accordance with Article 24 (2), should also be bound to these criteria.<sup>110</sup> Coming to terms with the current state of affairs would amount to recognizing the primacy of the Security Council, not merely above the other organs of the United Nations, but also above international law as a whole, including the *jus cogens* to which the community of nations is bound. Should the principles of power politics indeed supersede the general principles of law - as the UN Charter is interpreted in current practice - the legitimacy of international law would be seriously undermined. If the principles of power politics, as manifested in the "policy of collective security" in accordance with Chapter VII of the Charter, violate the *jus cogens* of general international law (as clearly documented by the many provisos in the international conventions cited here), then the talk of the universality of principles of international law loses all meaning whatsoever.

Let us in addition consider the fact that the current sanctions practice of the Security Council in accordance with the security doctrine of the "New World Order" is detrimental to a comprehensive *policy of peace*, for sanctions are in many cases part of a war strategy and abet the preparations towards or the continuation of war. The affected population can only take this as an *act of aggression* on the part of a coalition of states (or war coalition, as in the case of the Gulf War) taking advantage of the Security Council. With this consideration in mind, one is forced to call for a modification of the UN

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<sup>110</sup>The current state of affairs is criticized in a recent report to the Commission on Human Rights: "There are no criteria, developed by the United Nations for guiding decision-making and choice in cases of conflict between duties, functions, rights and values." (Claire Palley, *Implications of Humanitarian Activities for the Enjoyment of Human Rights*, loc. cit., par. 16, p.7.)

Charter to bring about a genuine policy of peace and human rights. If - as the Security Council's current position seems to be - the restoration of a positive order of peace includes "not merely the suspension of war activities, but more importantly the respect for human rights,"<sup>111</sup> then one cannot disregard the most fundamental human rights of the entire population affected by sanctions.<sup>112</sup> While securing political rights and classical civil rights, one must not invalidate economic and social rights - including the right to life and health. The arbitrariness of the Security Council's power politics must be reigned in; the Council at present ignores its responsibility in this regard and bypasses the will of the affected population, directing attention instead to its primary responsibility for world peace in general. Only the principle which stipulates the conformity of all decisions with human rights can be the foundation of a legitimate international legal order, i.e. of the international rule of law.<sup>113</sup> It is especially necessary that a supplementary human rights clause be added to the provisions of Article 41 of the UN Charter so that, in the statutory framework of the United Nations, the conformity of sanctions measures with the requirements of human rights can be explicitly demanded (even if our considerations from the standpoint of legal theory have shown a collective duty of this kind as already applying to the member states of the Security Council).<sup>114</sup> In the current discussion of the practice of sanctions, more radical suggestions have been made with the aim of adopting an international convention to prohibit economic blockades.<sup>115</sup>

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<sup>111</sup>According to Karl Joseph Partsch, "Von der Souveränität zur Solidarität. Wandelt sich das Völkerrecht?" in: *Europäische Menschenrechtszeitschrift*, vol. 18, n. 21-22, 1991, p. 475.

<sup>112</sup>Cf. the attempt to formulate practical rules for humanitarian action, "The Providence Principles of humanitarian action in armed conflicts," in: Larry Minear/ Thomas G. Weiss, *op. cit.*, p. 19.

<sup>113</sup>John Quigley has characterized this international rule of law as follows: "If the brave new world of harmony is to emerge, the rule of law must be central, both at the domestic and international levels. All people must be secure in their person, well-being, and property, and all must be assured a minimum level of food, health care, education and opportunity." ("Prospects for the International Rule of Law," *Emory International Law Review*, vol. 5, n. 2 [Fall 1991], p. 320.)

<sup>114</sup>The International Institute of Humanitarian Law explicitly formulates a "Right to Humanitarian Assistance", which is derived from the fundamental human rights. Cf. the statement of the Institute, *Guiding Principles on the Right to Humanitarian Assistance* (April 1993).

<sup>115</sup>Cf. Ramsey Clark's approach. He recommends an International Convention Prohibiting Blockades and Penalizing Violators ("Appeal for action to prohibit all embargoes against a whole nation," *loc. cit.*, p. 3). Cf. also his commentary, "Iraq Embargo is Killing Kids; End it Now" (*Los Angeles Times*, 22 February 1994) in which he additionally

Regardless of how one judges the actual political chances of such proposals for reform, it is inexcusable - in view of the most recent sanctions practice established by the Western states - to continue placing taboos on the powers of the Security Council. The relics of the old system of international law, which was determined by the concept of power, need to be consistently disclosed for what they are. If - under the auspices of the New Old World Order - the provisions in the UN Charter with regard to collective security present *de facto* a loophole for the old power politics, then we must consistently demand that the use of these provisions conform with human rights. It is inadmissible that medieval methods of siege - and war tactics which include the imposition of complete blockades against countries that are (economically) not self-sufficient are to be regarded as such - are justified as measures for the protection of world peace and human rights. The philosopher of law, if no one else, must refrain from joining the conspiracy of silence obviously constructed by the beneficiaries of the "New World Order".

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demands a convention to define economic oppression against a whole people as a crime against humanity.