

Iraq, the United States, and International Law: Beyond the Sanctions

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27 August 2002

Transnational Foundation for Peace and Future Research

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What accounts for the obsessiveness of American policy toward Iraq over the course of more than a decade? Is it another Vietnam in the sense that the US Government cannot bring itself to acknowledge the failure of its approach to regime change in Baghdad since the end of the Gulf War, Saddam Hussein having withstood comprehensive sanctions, a variety of covert assaults, and repeated American harassment from the air without flinching? Is it the pique at the White House and Pentagon associated with the electoral removal from the scene of Bush, Sr. contrasting with the persistence of Saddam Hussein, posing a filial challenge to Bush, Jr.? Is it the long deferred payback to Israel for staying on the sidelines during the Gulf War, despite the Scud missiles being fired from Iraq? Is it a matter of securing US control of the oil reserves being linked to periodic displays of regional dominance, especially through the denial of weaponry of mass destruction to those states in the Middle East that might seek at some point to deter or challenge the US in some future crisis? Or is it part of the American empire-building strategy that views Iraq as both an obstacle, but also as an opportunity to demonstrate the extent of military dominance possessed by the US Government and its political will to deal harshly with states that stand in the way? Or is the new cover story frequently repeated by Bush and senior political aides that the Baghdad regime has become more dangerous since September 11 because it may enable al Qaeda to obtain weaponry of mass destruction that would then be used against American targets?

Undoubtedly there is no single correct answer because different members of the Bush inner circle are drawn to various combinations of these lines of analysis and advocacy, and they seem mutually reinforcing in any event. But what is beyond doubt is that American policy toward Iraq since the ceasefire in 1991 that ended the Gulf War has violated the most basic precepts of international law, including the UN Charter, and the fundamental economic and social rights of the Iraqi people. [1] To the extent that the UN Security Council has endorsed American policy, it has weakened respect for the UN around the world. Iraq was defeated in a war, accepted humiliating conditions for a ceasefire, which effectively encroached upon the basic sovereign rights of Iraq as a state. In the ensuing period, Iraq has not been offered any kind of protection by the international community in the event of a threatened armed attack by the United States.

This chapter discusses the changing context of US policy toward Iraq, followed by a consideration under international law of sanctions and war threats, concluding with a criticism of the approach taken by the United States and by the United Nations over this period of more than a decade. In sum, followed for more than a decade, the international community as shaped by the United States, has imposed an extremely punitive peace on Iraq, abruptly forgetting the lessons supposedly learned as a consequence of the disastrous effects of the punitive peace imposed by the victorious powers on Germany after World War I. These lessons were self-consciously applied to Germany and Japan to promote the recovery of these defeated countries in the aftermath of World War II. In retrospect, it seems reasonable to wonder whether that these lessons of Versailles were only meant for those countries associated with the North in some integral way. The South, subordinate in any event, has remained fertile grounds for indefinite punishment of a political actor that challenged the established geopolitical order. Iraq, formerly a strategic junior partner in the maintenance of such an order, including during its long war with the Islamic Republic of Iran during the 1980s, became and remains the arch enemy of this post-cold war American design for the region. Iraq currently faces dire threats of invasion and attack that are openly discussed by American political leaders, with alternative plans for the military operation openly debated in mainstream media. [2] The debate focuses on means, their supposed effectiveness and their anticipated costs and risks, and treats the acceptability of the ends as taken for granted or irrelevant, although in stark violation of the most basic rules of the UN Charter prohibiting recourse to non-defensive force in the setting of an unresolved international dispute. To look sympathetically at the plight of Iraq as a beleaguered state should not be confused with an endorsement of the Baghdad regime, or its brutal and bloody past behavior, both with respect to neighbors and its own internal minorities. In this regard, there is little doubt that Saddam Hussein is indictable for crimes against humanity and crimes against the peace. But the criminality of a head of state or of official policies pursued does not impair the sovereignty of that state, nor does it provide grounds for suspending the application of international law. The reclassification of Iraq as "enemy" and "rogue state" that occurred in the 1990s was purely a consequence of altered geopolitical priorities as the worst excesses of the Iraqi government were committed prior to its attack on Kuwait, and provoked no change of strategic relationship.

The Changing Context

From every perspective except that of geopolitics, American policy toward Iraq since the end of the Gulf War has been a disaster. The imposition and retention of comprehensive sanctions for more than a decade after the devastation of the Gulf War has resulted in hundreds of thousands of civilian casualties, more than a million according to some estimates. [3] This assessment has been abundantly documented by reliable international sources, and affecting most acutely, the very young and the poorest sectors of the Iraqi population. [4] Although regrettably formally backed by the United Nations through a strained interpretation of Security Council Resolution 687, with some modifications in recent years, the cruel impacts of sanctions so appalled the most senior international civil servants of the UN entrusted with administering programs of oil-for-food programs as to prompt that rarest of bureaucratic impulses, successive resignations by the lead administrators on principle! [5] The political objective of this highly punitive diplomacy was justified as a way to destabilize and contain the repressive regime of Saddam Hussain, but the evidence clearly indicated that as the years passed, the government in Baghdad gathered strength while the internal and external opposition seemed ever more inconsequential. The Iraqi people were paying the main price for this continuing encounter between Saddam Hussein and the United States Government.

Throughout this period, as well, American and British planes continued to patrol extensive no-fly zones that had been established in the North and South of Iraq, initially justified by Security Council Resolution 688 as a way to protect endangered minorities, but later maintained as a way to challenge Baghdad militarily on a daily basis, exhibiting its helplessness as a sovereign state. Unlike sanctions, these military incursions lacked clear Security Council authorization, were quite unconnected with their original protective function benefiting the Kurds in northern Iraq and the Shi'ia minority in southern Iraq during the immediate aftermath of the Gulf War during which period Baghdad war seeking revenge against those elements in the Iraqi population that had sided with the American-led military campaign.

At issue, all along was the UN mechanism (UNSCOM) that imposed on Iraq after the ceasefire in the form of an inspection mechanism that claimed extensive rights to oversee the destruction of existing Iraqi stockpiles of weaponry of mass destruction and ensure that no activities were continuing secretly to acquire such weaponry in the future. [6] There was much controversy surrounding UNSCOM activities, associated with alleged Iraqi evasions and denials of access, but also counter-charges by Iraq contending that the inspection procedure was being used for espionage purposes and to harass and humiliate the Iraqi government. Some years ago Iraq refused to grant further access to UNSCOM, creating a new pretext for intervention and the resumption of war, as well as debates about whether such inspection however extensive could ever provide confidence about Iraqi compliance with the conditions of disarmament imposed by UN Security Res. 687. In the years of the Bush II presidency there have been assertions that without inspection a preemptive strike is needed to ensure that Iraq does not pose a threat to the United States in the future, but also assertions from Washington that inspections even if restored would not provide sufficient confidence to overcome the justification for a military attack designed to impose a regime change. Complicating the picture, further, the UN, with strong backing from Kofi Annan, has been seeking to negotiate a renewal of an inspection arrangement positing an UNSCOM

arrangement as an alternative to war, and coupled by some indication that sanctions could be ended if the new scheme worked successfully. Whether such an arrangement, whatever its terms, would be acceptable to Washington is a matter of severe doubt, and thus the inspection issue is a diversion and distraction. If Iraq resists, it validates the need for intervention, but if it assents, then the unreliability of inspection validates the need for intervention, a deadly Catch-22!

In the meantime, a cruel stalemate arising from the imposition of sanctions and intrusive UN claims persists. It had long been apparent to objective observers that these undertakings were not succeeding, but policymakers in Washington lacked the political courage to acknowledge, even indirectly, that their approach had failed to dislodge Saddam Hussein and was doing great damage to the people of Iraq, as well as to the humanitarian reputation and political autonomy of the United Nations. The Clinton Administration had so committed itself to the support of sanctions, as well as the continuation of periodic bombings within the no-fly zones, that it seemed completely unable and unwilling to reevaluate the policy in light of the harm being done to Iraqi civilian society. Such a reluctance was consistent with the overall approach in the Clinton years to exhibit "toughness" in foreign policy, especially in the Middle East, so as to minimize criticism from the hard right that made little secret of its push all along for a renewal of outright war against Iraq with the goal of coercing a regime change in Baghdad. [7] Reminiscent of Vietnam, leaders in Washington could not bring themselves to admit that their policy was a dreadful failure, and so it went on and on, with no end in sight. During his presidential campaign and upon arrival in Washington, George W. Bush announced that sanctions against Iraq would be continued, and intensified.

From the perspectives of international law and morality these policies directed at Iraq were of a highly dubious character, yet their continuation despite widespread criticism from most governments in the region and the world, revealed the extent of American influence within the United Nations, and generally. The whole experience was a demonstration of the primacy of geopolitics at the expense of basic standards of law and morality. Despite the pragmatic and humanitarian misgivings of many governments there was little disposition to challenge openly the American position.

And then came the September 11 attacks on the World Trade Center and the Pentagon, which inflicted heavy symbolic and substantive damage on the United States, and produced a claim to use force in self-defense. Despite some criticisms directed at the way the claim was formulated and applied to Afghanistan, it did represent a reasonable effort to retaliate against the main locus of al Qaida operations and to diminish the prospect of future attacks. [8] In the face of these attacks, President Bush in his September 20, 2001 address to a Joint Session of Congress, outlined the resolve of the US Government to wage an overall war against "every terrorist group of global reach". [9] Iraq was mentioned by name in the speech only to make the point that the character of the war being launched was different than the Gulf War: "This war will not be like the war against Iraq a decade ago, with a decisive liberation of territory and a swift conclusion." True, a generalized warning declared that "[f]rom this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime."

But the hawks in Washington smelled blood from the moment of the al Qaeda attacks. There were early statements by right wing think tank analysts urging the extension of the military

response to Iraq. Leading members on Congress sent a bipartisan letter to the President, coordinated by Lieberman and John McCain, insisting that the war on terrorism could not succeed unless the threat posed by Saddam Hussein was confronted by military force. Israel, as well, made little secret of its wish to extend the battlefields of Afghanistan to Iraq (and Iran). Various efforts to encourage war against Iraq by trying on the basis of slim and unconvincing evidence to show links by Baghdad with al Qaeda agents prior to September 11 or to imply that Iraq was the source of the anthrax distributed via the US Postal Service. Throughout this period there were inconsistent and inconclusive comments deriving from top members of the Bush security team. The Secretary of State, Colin Powell, was seen soon after September 11 as still reluctant to endorse such a belligerent stance, realizing that it would interfere with his diplomatic priority, which involved building up a global coalition against the al Qaeda network and finding some way to dissipate anti-Americanism arising from unresolved Palestinian fate. Such caution seems to have disappeared in the wake of the successful campaign by American military forces to turn the tide of battle within Afghanistan so quickly and decisively in favor of the Northern Alliance, producing the collapse of the Taliban regime, the destruction of the Afghan nerve center of al Qaeda and dispersal of its leadership. This American victory was achieved with almost no casualties sustained during the air campaign. At first, it seemed far more dangerous to be a journalist covering the Afghanistan War than to be a soldier on the American side. Later on, this state of affairs changed somewhat, as American forces were used on the ground to deal with enclaves of Taliban/al Qaeda resistance and some deadly firefights occurred. A new wave of American triumphalism emerged, being painted in vivid colors of geopolitical achievement in the course of President Bush's State of the Union Address on January 29, 2002. [10] This occasion was seized to expand the scope of the war against global terror by extending its goals to include a series of countries, Iraq, Iran, and North Korea, which were provocatively label "the axis of evil." Ever since that speech, the assumption has permeated media treatments and public attitudes that a US decision to wage war against Iraq had been made by the White House, and the only uncertainty that remains is related to the adoption of specific war plans, the extent, timing, and nature of the attack, and the degree of dependence on a ground attack, the availability and relevance of Iraqi opposition forces both inside and outside of the country.

This most recent turning of the screw by the US Government has moved the sanctions debate into the background, shifting attention to the avoidance of war. The UN is still pursuing a course that suggest that the renewal of inspection would avert a second Gulf war. Despite this sidelining of sanctions, it remains important to consider the sanctions regime, which continues to impose hardships on the civilian population of Iraq, from the perspective of international law and morality. The sanctions regime, whatever else, stands before our political understanding as a severe descent into criminality, subjecting it to serious analysis as to whether the wrongdoing and harm amount cumulatively to genocide or not. [11]

The Sanctions Regime

It seems helpful to separate the sanctions regime into five distinct phases, each of which poses the question of legality and morality in a different way:

1. pre-war reliance on sanctions in the months after the Iraqi invasion of Kuwait in August 1992;
2. immediate post-war reliance on sanctions to achieve compliance with Security Council Res. 687
3. persisting reliance on sanctions during the UNSCOM period in the face of growing evidence of civilian suffering
4. shift to "smart sanctions" to deflect criticism of early sanctions regime, and to sustain UN consensus for their imposition
5. maintenance of sanctions as a secondary policy, with increasingly blatant "war talk" as the primary policy, threatening a military attack unless a satisfactory regime change in Baghdad.

Pre-war Sanctions

It is of great importance to distinguish sharply between the imposition of comprehensive sanctions by virtue of UNSC Res. 660 prior to the initiation of the Gulf War on January 15, 1991. In the months following Iraq's conquest and annexation of Kuwait in August 1990 the approach advocated publicly by the United States, and adopted by the United Nations Security Council, was to endorse Kuwait's right of self-defense, but to seek a resolution of the conflict by a combination of diplomacy and sanctions. The limited goals of this policy were to restore fully the sovereign rights of Kuwait, and to impose on Iraq the costs of the harm inflicted. The issue of Iraqi actual and potential possession of weaponry of mass destruction was not part of the UN engagement in this phase. Such a response to the Iraqi invasion was widely and genuinely supported, including by the members of the Security Council with the sole exception of Yemen's abstention. Reliance on sanctions, even if imposing hardships on Iraq's population, were seen as a reasonable and appropriate incident to constructive diplomatic efforts to obtain Iraqi withdrawal, and the best way to fulfill the Charter goals of protecting states that have been victims of international aggression while doing everything possible to avoid recourse to war. In this fundamental sense, sanctions prior to the Gulf War were fully consistent with international law and morality, and enjoyed the virtually unanimous backing of the membership of the United Nations, including most of the countries of the Middle East.

Indeed, to the extent criticism was made, it moved in the direction of advocating a greater reliance on the mix of sanctions and diplomacy, especially providing more time to generate effective pressure on Baghdad. A related criticism was that the United States did not genuinely seek a diplomatic resolution of the dispute, and put forward the demand for withdrawal in such unconditional and rigid terms as to ensure that the Iraqi government would respond negatively, thereby building its case for war. The UN Secretary General at the time, Perez de Cuellar, supports the view in his memoirs that a somewhat more flexible approach might well have achieved the stated UN goals without war. [12] But even then, for undisclosed reasons, Washington preferred a military solution that would eliminate Iraq as a

regional power and threat to the Gulf oil reserves and to Israel. Part of this preference was the possibility of connecting the aggression against Kuwait with the quite separate concerns arising from Iraq's efforts to acquire weapons of mass destruction, including biological, chemical, and nuclear weaponry. Only with war, and an imposed ceasefire, could this wider security concern be addressed, as was done in Res. 687 establishing the mandate for destruction and inspection of such capabilities.

Post-war Realities

In contrast, was the perpetuation of sanctions by way of UNSC Res. 678 in the period after the ceasefire and Iraqi withdrawal from Kuwait, was justified initially as leverage needed to ensure compliance with Iraq's various obligations to make various amends for the harm inflicted, as well as to satisfy the most serious disarmament demands imposed on a sovereign state since the end of the two world wars. It is to be noted that after World War II, in contrast to the punitive reparations burdens put on Germany after World War I, the defeated countries were not subject to economic sanctions. On the contrary, despite the terrible harm inflicted, these countries were given help with economic reconstruction, and soon achieved positive economic growth.

The devastation wrought by the war in Iraq was extensive, including to the civilian infrastructure. The former president of Finland, Martti Ahtisaari presented a report to the UN on the basis of a factfinding trip shortly after the military campaign ended that indicated the destruction of Iraq's entire industrial and modern sectors, suggesting that it had literally been bombed back to a pre-industrial reality. [13]. Declassified documents from the US Defense Intelligence Agency confirm early complaints that the United States deliberately targeted the civilian infrastructure of Iraq, especially the water treatment system, with the acknowledged purpose of disrupting civilian life throughout the country. [14] Under these circumstances, the imposition of comprehensive sanctions was legally and morally dubious from the outset. It was perfectly obvious that the war had left Iraq in a situation of great vulnerability to a health crisis of major magnitude, and that increasing pressures by sanctions would exact a heavy toll on the civilian society. [15] To go ahead with comprehensive sanctions under these circumstances would seem certainly to have the foreseeable effect of imposing massive indiscriminate death and illness on the civilian population, with the ironic effect of exempting the military and political leadership of Iraq from harm, and as such would engage the moral, and possibly, the legal responsibility at some level of those countries that supported post-war sanctions. Such an approach to implementing the agreed ceasefire also eroded the legitimacy and moral standing of the United Nations, first, for agreeing to sanctions given its knowledge of their probable effects, and then, extending the ceasefire to cover aspects of coercive disarmament and inspection that were not closely connected with the claim of collective security that was properly put forward as a proper justification for the war.

Sustaining the Sanctions

As the months and years went by evidence accumulated to confirm what should have been anticipated: the sanctions were exacting an enormous toll among the civilian population, and were doing virtually nothing to hamper the activities and life style of the Iraqi elite. The US Government favored the maintenance of a tough sanctions regime even in the face of the well-documented reports detailing the suffering of the Iraqi people, contending in the notorious words of Madeline Albright in 1996, while serving as US ambassador at the UN, not long before becoming Secretary of State, when confronted by statistics as to the loss of life among Iraqi women and children, "[w]e think the price is worth it". [16]

The humanitarian considerations were only part of the discontent experienced by governments when periodically asked to extend the sanctions under UN auspices. Similar hostility was expressed in various ways by public opinion outside of the United States. Another part of the growing anti-sanctions movement within the UN had to do with the degree to which the United States was seen as throwing its weight around in the UN and elsewhere, without finding a path that could lead to a quick resolution. Closely related here was the European concern that lost business opportunities in the Middle East were being sacrificed for no plausible reason, especially in the context of energy development.

Maintaining sanctions under these conditions certainly seems to run counter to international humanitarian law, as well as to the more general just war doctrine in its application to sanctions. The most basic conception embedded in the law of war at the close of the 19th century, in the Hague Convention, was the idea of agreements by governments that force could be legally used in warfare only if directed against military targets only and the related broad injunction against the "unlimited" use of force against an enemy state. Admittedly, there are conceptual and interpretative issues present. International law is directed at states, not at international organizations such as the UN, the imposition of sanctions in this comprehensive form was initially authorized and periodically reaffirmed by the Security Council. Is the Security Council bound by the restraints of international humanitarian law? There are no clean answers given by existing international law to such questions. By analogy and by moral reasoning, it would seem that the UN as political actor should not be freed from rules of behavior seeking to protect civilians from the ravages and excesses of warfare, but can such an analogy be legally relied upon in the absence of its acceptance by the UN Security Council? Cautiously, then, it could be concluded that the maintenance of sanctions, given the evidence of their effects, is both immoral and in violation of the just war doctrine, involving three separate aspects: sanctions as applied seem indiscriminate, disproportionate, and have little prospect of achieving the ends being pursued. [17]

The Move to Smart Sanctions

In response to the rising tide of anti-sanctions sentiment, especially in Europe, the United States took a series of backward strides from its preferred unyielding position so as to prevent the international consensus from falling apart. It had earlier agreed to an oil-for-food program that allows Iraq to sell its oil on the world market, importing civilian goods, with the use of the revenues by Iraq scrutinized by the UN Office of the Iraq Program (OIP) in

such a cumbersome and restrictive way as to compromise the humanitarian rationale. [18] In May 2001 after elaborate diplomatic negotiations in which the United States did its best to maximize sanctions while retaining support of the Security Council, a much heralded move to "smart sanctions" was finally approved by the UN. [19] Then in November 2001, with the adoption of UNSC Res. 1382, the sanctions regime somewhat modified this focus, banning all traded goods that had military or dual use applications. Any Iraq overseas contract is subject to scrutiny, and rejection by UN administrative action. Any member of the Security Council can delay a contract almost indefinitely by seeking review if any of the challenged items appear on the extensive Goods Review List. The OIP turns any questionable contract with Iraq over to the UN Monitoring and Verification Commission and the International Atomic Energy Agency to determine whether the trade goods are related to Iraqi military applications. The so-called 661 Committee of the Security Council has the last word on whether a contract survives this review process.

In fact, Iraq appears to have circumvented many of the constraints associated with the early years of sanctions via internal adaptation and regional smuggling arrangements designed to sell oil outside the sanctions regime, especially with Syria. Iraq and the UN have played a cat-and-mouse game related to the renewal of inspection, which at times was made to be a bargaining move, exchanging access by inspectors for a gradual lifting of sanctions. Also, the smuggled goods tend to reflect state priorities relating to security and regime stability, and do not emphasize the alleviation of the humanitarian tragedy. While the US has at times seemingly endorsed this approach, it has maintained a degree of ambiguity by stressing the inability to have confidence that inspection will be able to determine whether Iraq is upholding its obligation to refrain from the production, development, and possession of weaponry of mass destruction. In recent months, this ambiguity has almost been entirely suppressed by the unilateralist climate of opinion in Washington that expresses its intention to take whatever steps are necessary to achieve a regime change in Baghdad. As a consequence, sanctions seem of diminishing relevance both to advocates of a hard line on Iraq, who favor a military solution, and advocates of normalization, who favor an end to sanctions.

What became clear long before September 11 is that to the extent that sanctions were seeking political results beyond a punitive effect, their impact was negligible although maintained for more than a decade in the face of strong objective evidence that massive loss of civilian life was being caused on a monthly basis over the course of many years. Consequently, it can be concluded that the indiscriminate civilian harm being caused was not "collateral," especially after the initial period when it might have been reasonable to suppose that over time the sanctions would erode internal support for Saddam Hussein's leadership, possibly stimulating internal and external Iraqi forces to achieve a regime change. Without the intervening reality of September 11, despite this assessment, and by making adjustments of the sort involved in the adoption and administration of smart or selective sanctions, American led policy toward Iraq would in all likelihood have maintained its futile course indefinitely, squeezing the people of Iraq without any realistic hope of achieving political objectives. Of course, some supporters of the US approach argue that sanctions did succeed to the extent of keeping Saddam Hussein pinned down, within his box to use Beltway jargon. [20] And further, without sanctions, Iraq would have by now acquired a formidable arsenal of weaponry of mass destruction. Even if this latter conjecture is accurate, there is no reason to doubt, particularly in light of the Gulf War and US/Israeli regional security policy,

that containment and deterrence would be relied upon, with every prospect of success, to minimize the risk of Iraqi expansionism. A careful examination of Iraqi behavior under Saddam Hussein discloses an ambitious approach to the use of power in regional settings, but also a rational approach to gains and losses, and a willingness to back down rather than to engage in self-destructive warfare. In effect, then, sanctions after 1991 were essentially punitive, and although supported by the UN, seemed to violate the most fundamental values embodied in international humanitarian law, and arguably raise plausible allegations of genocide, as well as serious attempts to show that although atrocities the sanctions do not qualify as genocide because there is no showing of specific intent. [21]

From Sanctions to War

There is no doubt that September 11 created an opportunity for those seeking regime change in Iraq to acknowledge tacitly the failure of the sanctions approach, yet escalate their demands with respect to Iraq. Recourse to war against al Qaeda gave the Bush Administration a wide berth in foreign policy. There were attempts in the immediate aftermath of the attacks to intimate that there were Iraqi connections with al Qaeda, a supposed meeting in Prague between an Iraqi intelligence official and Mohammed Atta, the claim that Iraq was behind the anthrax dispersal, and other more generalized allegations of the connections between Iraq as rogue state and the new threats posed by mega-terrorism.

But the decisive move was made in the 2002 State of the Union address when Iraq headed the list of axis of evil countries, and a doctrine of preemption was set forth by President Bush. Drawing on public anxieties about mega-terrorism, Bush declared that axis of evil countries with the will and capability to produce weaponry of mass destruction posed severe threats, not by the likelihood that such weapons would be directly used, but rather by the prospect that the weaponry would be transferred to al Qaeda and possibly other terrorists groups with global agendas. Without explicitly indicating that an attack upon Iraq was forthcoming, the clear implication of what Bush and others in Washington were saying was that it would do what was necessary to supersede the Saddam Hussein regime achieving a change comparable to what took place in Afghanistan.

It is important to underscore the degree to which such war talk is at odds with the most fundamental rules and principles of international law, as well as being incompatible with the just war tradition that continues to be influential in religious and ethicist circles. Throughout the 20th century, there were major efforts to outlaw non-defensive wars, the core undertaking of the UN Charter designed to fulfill the pledge of the Preamble "to save succeeding generations from the scourge of war." The Nuremberg/Tokyo prosecutions of German and Japanese leaders after World War II proceeded on the premise that aggressive war was a crime against the peace, and that, as such, was the most serious form of international criminality. The Charter was drafted to minimize the role of subjective factors, self-serving explanations by governments as to why war is justifiable. The Nicaragua decision of the World Court in 1986 upheld this Charter approach as also contained in general international law applicable under all circumstances of conflict. It is arguable that the September 11 attacks by al Qaeda cannot be addressed within this template of modern international law as the threat and capability cannot be territorialized, and the idea of defensive force needs to be extended to enable a threatened state to protect its people and

uphold its security. [22] Such reasoning does not apply in the setting of the axis of evil states as deterrence offers an adequate way to reconcile containment with the avoidance of war, the security policy used by both sides in the cold war for over 40 years. In this regard, the war talk directed at Iraq is a direct challenge to the overall framework of modern international law with respect to war/peace issues. If war is unleashed against Iraq, it will establish a dangerous and unacceptable precedent validating recourse to international force in a wide range of circumstances. First of all, anticipatory defense and preventive war would be used as a rationale. Secondly, recourse to war would be undertaken by the United States without a UN mandate, and without even the collective procedures invoked to justify recourse to war in 1999 in relation to Kosovo.

Conclusion

The Iraq experience with sanctions needs to be understood by reference to the five distinct temporal intervals discussed above. No blanket generalizations can be applied to the sanctions regime as a whole. The imposition and maintenance of sanctions after the Gulf War needs to be condemned as a deliberate and indiscriminate policy designed to inflict harm on the civilian population of Iraq. The UN discredited itself by endorsing sanctions, although efforts were made to mitigate the humanitarian catastrophe being caused by initiatives of the Secretary General and others, and the UN generally is no stronger and more accountable under international law than it is leading members permit. In this regard, the United States and the United Kingdom, the most ardent proponents of sanctions and the enforcers of the no-fly zones, bear a particularly heavy political, legal, and moral responsibility for the harm inflicted on the people of Iraq.

Finally, the threatened renewal of war against Iraq again gives sanctions and negotiations for the resumption of inspection a pre-war dimension, but under dramatically different circumstances than existed in 1990. It is Iraq that is now in a position to claim some sort of right of self-defense, and sanctions are not associated with any acceptable demand such as the withdrawal from conquered territory. Despite the lamentable human rights record of the government in Baghdad, there is no foundation in law for recourse to force so as to coerce a regime change. Such coercion would appear to be a flagrant denial of the right of self-determination enjoyed by the people of Iraq, as well as a violation of Iraq's sovereign rights. If military attack proceeds without UN authorization, as now seems likely, this legal assessment would be beyond serious controversy. If the UN were to mandate a humanitarian intervention, it would still appear legally and constitutionally dubious, given the prohibition in Article 2(7) on UN intervention in the internal affairs of states. It is true that there is some legal controversy arising from the international upgrading of the protection of human rights, especially during the 1990s, as it bears on the authority of the United Nations. With respect to Iraq, the political realities are such that it seems extremely unlikely that military action would be authorized, and the legal/constitutional question posed. As such, the war scenario now being debated in Washington seems to be an undertaking impossible to reconcile with international law and morality, and likely to inflict further hardships on the people of Iraq. It is possible that on this latter point, as in Afghanistan, a foreign intervention would be welcomed as emancipatory by the great majority of the Iraqi people, and there is no current evidence of this popular attitude.

Endnotes

1. For excellent overview that covers these issues see Roger Normand & Christoph Wilcke, "Human Rights, Sanctions, and Terrorist Threats: The United Nations Sanctions Against Iraq," *Transnational Law & Contemporary Problems* 11(No. 2):299-343 (Fall 2001).
2. See Eric Schmitt, "U.S. Plan for Iraq is Said to Include Attack on 3 Sides," *New York Times*, July 5, 2002, A1, A6; also editorial, "Battle Plans for Iraq," *New York Times*, July 6, 2002, A26.
3. A valuable overview has been provided by Sarah Graham-Brown, *Sanctioning Saddam* (1999).
4. See early respected assessment of the civilian impact of the sanctions imposed after the Gulf War by the Harvard Study Team that visited Iraq several times during 1991. Albert Acherio and others, "Effect of the Gulf War on Infant and Child Mortality in Iraq," *327 New England Journal of Medicine* 931(1992); see also "Unsanctioned Suffering: A Human Rights Assessment of United Nations Sanctions on Iraq," Center for Economic and Social Rights, May 1996.
5. These two civil servants have become prominent civil society campaigners against sanctions in the years following their resignation. See Denis Halliday & Hans von Sponeck, "The Hostage Nation: Former UN Relief Chiefs Hans von Sponeck and Denis Halliday Speak Out Against an Attack on Iraq," *The Guardian*, Nov. 29, 2001.
6. For accounts of this controversial inspection process under UN auspices see Richard Butler, *The Greatest Threat: Iraq, Weapons of Mass Destruction and the Growing Crisis in Global Security* (Public Affairs, 2000); Scott Ritter and others, *ENDGAME: Solving the Iraq Problem -- Once and For All* (New York: Simon & Schuster, 1999); Tim Trevan, *Saddam's Secrets -- The Hunt for Iraq's Hidden Weapons* (London, UK: 1999).
7. As is the consistently the case when liberal militarism seeks to appease the hard right, the criticisms of Clinton's foreign policy that have surfaced since September 11 have emphasized its reluctance to use force sufficiently to intimidate Islamic extremism. Bernard Lewis and Fouad Ajami have been particularly influential in mounting such lines of criticism, partly to support moves toward waging war against Iraq, and partly to give assent to the approach taken in the Afghanistan War.
8. For an argument along these lines see R. Falk, *The Great Terror War* (Northampton, MA: Interlink, forthcoming 2003).
9. For text see White House website, p. 3.
<http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html>
10. For text see White House website.
<http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html>
11. Compare George E. Bisharat, "Sanctions as Genocide," *Transnational Law & Contemporary Problems* 11(No. 2):379-425 (2001) with Joy Gordon, "When Intent Makes All the Difference in the World: Economic Sanctions on Iraq and the Accusation of Genocide," *Yale Human Rights & Development Law Journal* 5:1-27(2002). Gordon argues against the inference of genocide by stressing the degree to which specific intent is an essential element of the crime, and not present in relation to the sanctions policy.
12. See Javier Perez de Cueller, *Pilgrim for Peace: a secretary general's memoir* (New York, NY: St. Martin's Press, 1997).
13. Ahtisaari, a respected international figure, words in the report are revealing of the conditions prevailing in Iraq when comprehensive sanctions were reimposed: "The recent conflict has wrought near-apocalyptic results upon the economic infrastructure of what had been, until January 1991, a rather highly urbanized and mechanis. Now, most means of modern life support have been destroyed or rendered tenuous. Iraq has, for some time to come, been relegated to a pre-industrial age, but with all the disabilities of post-industrial dependency on an intensive use of energy and technology." *Report to the*

Secretary-General on Humanitarian Needs in Kuwait and Iraq in the Immediate Post-Crisis Environment by a Mission Led by Mr. Martti Ahtisaari, Under-Secretary-General for Administration and Management 10-17 March 1991, UN SCOR, Annex, UN Doc. S/22366 (1991).

14. See the devastating account based on these declassified documents by Thomas J Nagy, "The Secret Behind the Sanctions: How the US Intentionally Destroyed Iraq's Water Supply," *The Progressive*, August 2001; also Felicity Arbuthnot, "Allies Deliberately Poisoned Iraq's Public Water Supply in Gulf War," *Sunday Herald* (Scotland), Sept. 17, 2000.
15. As Bisharat observes, note 11, fn 4, 381 beyond other considerations, Iraq's particular vulnerability to sanctions "was increased by its relative geographical isolation, its reliance on oil pipelines, and its limited shipping access, which made an embargo simple to enforce," citing Graham-Hughes, note 3, 73 as source.
16. This statement was made in the course of the following exchange on *Sixty Minutes*: "We have heard that a half million children have died," said "60 Minutes" reporter Lesley Stahl, speaking of U.S. sanctions against Iraq. "I mean, that's more children than died in Hiroshima. And -- and you know, is the price worth it?" Her guest, in May 1996, U.N. Ambassador Albright, said, "I think this is a very hard choice, but the price -- we think the price is worth it." Michael Schwartz, "U.S. Takes Selfish Stance in Relations Throughout the World," *U-Wire*, Feb. 14, 2001.
17. The just war criteria are well expressed in the context of Iraq in an article primarily concerned with the prospect of war against Iraq, but is applicable to the sanctions discussion as well. George Hunsinger, "Iraq: Stop the War," [while the title of the article linked to here is different, the text is identical save the addition of the August 19 Postscript --ratitor] to be chapter in *Robert McAfee Brown in memoriam*, to be published in 2003. See also Drew Christiansen & Gerard F. Powers, "Economic Sanctions and the Just-War Doctrine," in *Economic Sanctions: Panacea or Peacebuilding in a Post-Cold War World* (Boulder, CO: Westview Press, 1995)97-117.
18. See Richard Garfield, "Health and Well-Being in Iraq: Sanctions and the Impact of the Oil-for-Food Program," *Transnational Law & Contemporary Problems* 11(No.2):277-298(2001).
19. See helpful summary assessment by Sarah Graham-Brown, "Sanctions Renewed on Iraq," MERIP Information Note 96, May 14, 2002. See also George A. Lopez, "Toward Smart Sanctions on Iraq," *Policy Brief*, No. 5, April 2001; Marc Lynch, "Smart Sanctions: Rebuilding Consensus or Maintaining Conflict?" MERIP, June 28, 2001.
20. Even *The Nation* in a recent editorial endorsed an approach to Iraq that rests on renewed inspection and selective sanctions, partly as an alternative to war, partly as a containment plus strategy of meeting what it acknowledges to be an Iraqi threat. "War on Iraq is Wrong," *The Nation*, July 8, 2002.
21. See Bisharat and Joy articles referred to in Note 11 for serious scholarly explorations of the relevance of genocide to the sanctions regime.
22. This position is fully developed in Falk, Note 8, Chapters 2 &3.

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