

The Impact of Economic Sanctions on the Right to Health:

A comparative study between South African and Iraq

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DECLARATION

I, Nigel Holmes, declare that *THE IMPACT OF ECONOMIC SANCTIONS ON THE RIGHT TO HEALTH: A COMPARATIVE STUDY OF SANCTIONS IMPOSED ON SOUTH AFRICA AND IRAQ* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Date: December 2008

Signed:.....

DEDICATION

This work is dedicated to my father Donald Cecil Holmes. I love you and miss you.

ACKNOWLEDGEMENTS

This thesis was made possible by countless people, institutions and various religions. To my beloved mother, Sylvia Holmes, wise women, no number of words can express my thankfulness for the unconditional kindness, encouragement and confidence you give me. Your belief in my abilities sculpted my very existence. I thank you.

To my children Micaela, Hayden and Zara your smiles keep me going. To my new family, Aimee and Bernice thank you for the support.

To my Supervisor, Prof. Pierre De Vos you are unquestionably the best. Thank you for steering this roller coaster.

Patricia looking for one beautiful thing in my day starts with you. Thank you for your encouragement and support. Thank you for sharing your beautiful life with me.

GLOSSARY

Economic Sanctions	Are coercive economic measures taken against one or more States to force a change in policies, or at least to demonstrate a State's opinion about the other's policies. It is the restriction or stopping of international trade or economic activities taken by one Party (the "sender") in order to influence the behaviour of another Party (the "target").
Target State	State or government against which sanctions are imposed.
Sanctions	An economic limitation or restriction by means of policy or legislation.
Embargoes	Where States refuse to sell goods and to a target State.
Boycotts	Where States refuse to buy goods from the target State.
Apartheid Government	Refers to the government in power in South Africa before the democratic election of 1994
Maternal Mortality Rate	The number of maternal deaths related to childbearing divided by the number of live births (or by the number of live births plus fetal deaths) in that year.
Infant Mortality Rate	The number of children dying under a year of age divided by the number of live births that year. The infant mortality rate is also called the infant death rate.
Child Mortality Rate	The under-five mortality rate or child mortality rate is the number of children who die by the age of five, per thousand live births.

MAIN ABBREVIATIONS AND ACRONYMS

African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
American Protocol/ The Protocol of San Salvador	The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
ANC	African National Congress
Anti-Apartheid Convention	International Convention on the Suppression and Punishment of the Crime of Apartheid
CERD	International Covenant on the Elimination of all Forms of Racial Discrimination
CESCR	UN Committee on Economic, Social and Cultural Rights
Committee on CERD	Committee on the Elimination of Racial Discrimination
CRC	UN Convention on the Rights of the Child
ECHR,	European Court on Human Rights
ECOSOC	Economic and Social Council
GDP	Gross Domestic Product
HRC	Human Right Committee
IAC	Inter-American Commission of Human Rights
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILO	International Labour Organisation
IMF	International Monetary Fund
Iraq	Republic of Iraq
ITL	International Trade Law
OAS	Organisation of American States
OFAC	US Office of Foreign Assets Control

OPEC	Organisation of Petroleum Exporting Countries
PAC	Pan Africanist Congress
SC	Security Council
UN	United Nations
UNDHR	United Nations Universal Declaration of Human Rights
UNICEF	United Nations Children's Fund
UNITA	National Union for the Total Independence of Angola
WHO	World Health Organization
WW1	World War One
WW2	World War Two

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CHAPTER 1 INTRODUCTION

“Let me conclude by saying that the humanitarian situation in Iraq poses a serious moral dilemma for this Organization. The United Nations has always been on the side of the vulnerable and the weak, and has always sought to relieve suffering, yet here we are accused of causing suffering to an entire population. We are in danger of losing the argument, or the propaganda war - if we haven't already lost it - about who is responsible for this situation in Iraq – President Saddam Hussein or the United Nations.”¹

Kofi Annan

1. INTRODUCTION

Under the United Nations Charter, the Security Council may decide what measures, not involving the use of armed force, are to be employed to give effect to its decisions and may call upon member States to apply such measures in order to maintain or restore international peace and security.² One of the measures that can be decided on is sanctions. Sanctions have, to a large extent, been imposed to defend human rights. Economic sanctions were commonly believed to be a mechanism that was a humane alternative to war. During the last decade, the Security Council has applied economic sanctions in several cases that, in turn, have drawn the attention of different United Nations human rights bodies and mechanisms to their possible impact on the enjoyment of human rights.³ Fundamentally, any economic sanctions programme's main objective is to induce dysfunction in the trade and financial systems of the target State.⁴ By doing

¹ Kofi Annan, Press Release SG/SM/7338 IK/292 SC/6834 24 March 2000, available here, < <http://www.fas.org/news/iraq/2000/03/20000324-sgsm7338.htm> > (Accessed 19/10/2007).

² Charter of the United Nations June 26, 1945, 59 Stat. 1031, T.S.NO. 993, 3 Bevans 1153, entered into force October 24, 1945. See articles 24, 39 and 41.

³ See Annexure A attached at the end of this thesis, 19 cases of UN economic sanctions programmes have been imposed on different States.

⁴ Garfield R (1999) 3.

this, it is believed, that the specific goal (if there is one) of furthering the specific human rights objective within that State should be achieved.

Recent studies have indicated that the impact of these economic sanctions is not only undesirable and ineffective but also that the imposition thereof inevitably involves a long-term human cost within the target State.⁵ The human cost of economic sanctions, even if legitimate, is therefore a cause for genuine concern.

The Charter of the United Nations embraces the legal aspects of economic sanctions, however, economic sanctions is to a large extent influenced by the political climate of the sender. In many instances the political will play an important role in terms of the ferocity of economic sanctions. This will be illustrated by the lethargic approach to application of economic sanctions in the case of Apartheid South Africa compared to strict and decisive approach to economic sanctions against Iraq. Broad-based economic sanctions indiscriminately and disproportionately applied negate the legal protection in place to protect human beings more so in terms of the right to health because it is highly conducive to economic challenges.

On the one hand, the broad-based economic sanctions implemented against the State of Iraq have clearly been the most devastating assault by the international community on a State for human rights abuses ever. On the other hand, sanctions implemented against the Apartheid State of South Africa are constantly referred as an example of a successful economic sanctions programme achieving its goal of a new democratic South Africa.

The purported success of economic sanctions as imposed on South Africa had never been placed in context. Limited analysis was done to establish the impact of economic sanctions on the rights of South African citizens. A comparison of data from Iraq and limited data from South Africa is meant to achieve such a context. However to limit the

⁵ See *Iraq Child and Maternal Mortality Surveys*, UNICEF 1999, available at < <http://www.unicef.org/newsline/99pr29.htm> > and < <http://www.unicef.org/reseval/iraq.htm> > released August 12, 1999.

scope of such a contextual analysis, the focus is placed on an analysis of the impact of economic sanctions on the right to health of the population of the target State. The lessons learned from the impact on the right to health and recommendations to reduce the impact could be helpful for similar economic sanctions programmes. The hope is that unnecessary human cost of economic sanctions will be minimal to none.

2. NATURE AND SIGNIFICANCE OF THE STUDY

In normal circumstances a State cannot be expected to provide people with protection against every possible cause of ill health and an unlimited right to receive medical care for any and every illness that may be contracted. The right to health takes account of a holistic approach to health that regards both healthcare and social conditions as being important determinants of health status. These include the provision of safe drinking water, adequate sanitation, and health-related education and information, as well as others such as equitable health-related resource distribution, gender differences, and social well-being. The right to health is highly dependent on available resources and resources are highly problematic in developing States. Economic sanctions pierce at the heart of that problem in that it restricts those resources even further.

As a consequence of the devastating impact of economic sanctions there is a need to re-think the imposition of economic sanctions as a mechanism to combat gross human rights violations committed by renegade government leaders. The result of this renewed thinking should reduce the devastating humanitarian impact as a result of the institution of economic sanctions.

3. METHODOLOGY

The method employed to undertake this research is by way of literature review of the relevant literature. Reliance will therefore be placed on relevant primary and secondary sources, internationally and domestically, that apply to the States concerned. This will include statutes, case law, international rules and principles, books, articles, legal and non-legal and Internet based sources.

4. DELIMITATION OF STUDY AREA

The study will only focus on economic sanctions from a legal perspective and not that of any other profession, for example economics. An in-depth discussion on the complexities of economic sanctions and the different variables that affect the economics of a state will therefore be limited.

The United States of America (US) and the United Nations (UN) are two of the main subscribers to the institution of economic sanctions. The legislation and policies relating to economic sanctions that originate from these two bodies is of added importance to understand the economic sanctions policies that were applied to South Africa and Iraq. Although other unilateral economic sanctions were applied in both cases the scope of this thesis is limited to the US and UN.

5. RESEARCH PROBLEM

Why are economic sanctions imposed against South Africa referred to as a successful programme and the economic sanctions programme imposed against Iraq as unsuccessful? Is the long term impact on human rights taken into account?

6. CHAPTER OVERVIEW

This Chapter attempts to place the research in context and lays the background for the research. Chapter Two is to ascertain the justiciability of international economic, social and cultural rights in general and specifically the scope and content of the right health. Chapter Two is followed by a discussion of sanctions in Chapter Three. In addition to the discussion of sanctions, and specifically economic sanctions, certain possible improvements of economic sanctions and the monitoring thereof are recommended suggested. Chapter Four is an analysis of the economic sanctions programmes in South Africa and Iraq with specific focus on the impact of economic sanctions on the right to health. In addition, Chapter Four gives an indication whether the impact of economic sanctions is taken into account when establishing the successfulness of an

economic sanctions programme. Chapter Five contains conclusions and recommendations regarding the impact of economic sanctions on the right to health and possible improvements to its implementation.

CHAPTER 2: ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. INTRODUCTION

The focus of this thesis is on International Human Rights Law (IHRL), in particular the right to health. International Humanitarian Law (IHL) and International Trade Law (ITL) form an indivisible and interrelated part of the analysis of the impact of economic sanctions on States in relation to the international rights of the civilian populations.

The first part of the chapter entails a general analysis of the scope and content of IHRL and the developments in the sphere of economic, social and cultural rights. This analysis will be done in the context of the historical developments and challenges in the enforcement of economic, social and cultural rights. The second part of the analysis regarding the enforceability of these rights relates to the right to health as an economic, social and cultural right and specific focus will be placed on the scope, content and progressive realisation of the right to health.

The protection of the right to health of people does not stop in peace time: IHL also provides for protection of civilians in times of conflict. The most prominent of instruments regulating international and domestic conflict, the four Geneva Conventions as well as its two Protocols, also makes provision for the protection of the right to health in times of war. The justifiability of the right to health in times of conflict is also relevant to this analysis as economic sanctions are a mechanism employed in times of peace and in times of war.

2. HISTORICAL DEVELOPMENTS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN BRIEF

The origin of economic and social rights is unclear but apparently these rights drew strength from the injunctions expressed in different religious traditions to care for those in need and those who cannot care for themselves.⁶ After the Second World

⁶ Steiner, H.J. and Alston, P.(2000) 242.

War (WW2) and as a reaction to events prior and during the war, the allies⁷, and later the international community⁸, came to believe that the establishment of a new world order should be based upon the commitment to the protection of human rights and fundamental freedoms.⁹ Thereafter the United Nations (UN) adopted important international bills of rights consisting of the United Nations Universal Declaration of Human Rights (UNDHR),¹⁰ the International Covenant on Civil and Political Rights (ICCPR),¹¹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹²

The UNDHR is not a binding treaty and was adopted by the UN General Assembly without legal force. Its purpose, according to its Preamble, is to provide “...a common understanding of human rights and serve as a common standard of achievement for all peoples and nations....”¹³ In context and by implication these standards did not exist at the time but must be achieved to avoid the atrocities of WW2 from repeating themselves. The persuasive nature of this document, at the very least, as Buergenthal *et al* puts it, “*is that the international community attributes a very special moral and normative status to the Universal Declaration that no other instrument of its kind has acquired.*”¹⁴

One of the first debates in the development of international human rights law was whether there should be a single covenant dealing with civil and political rights as well as social, economic and cultural rights. This debate is illustrative of the first political power struggle within the international human rights community between the Soviet Union (former USSR now Federation of Russia) led East and the United

⁷ Major Allies (later: permanent members of the UN Security Council) included: - China; France (03 September 1939) - then (after 1940) Free France; United Kingdom (03 September 1939); Soviet Union from 22 June 1941); United States (from 07 December 1941). Minor Allies included:- Australia; Belgium (invaded May 10, 1940); Brazil; Canada (10 September 1939) Greece (invaded October 28, 1940); Holland (invaded May 10, 1940); Luxembourg; New Zealand; Norway (invaded April 9, 1940); Poland (invaded 1 September 1939); South Africa; Yugoslavia. (Dates added is the date the particular States were deemed to have become part of the WWII) <<http://www.battle-leet.com/pw/his/Allies%20WW1%20WW2.htm>> (Accessed on 29/02/07).

⁸ The international community includes the United Nations and Regional bodies like, the European Union and the African Union and, the States who impose sanctions like the USA and the rest of the developed world.

⁹ Craven, M. (1995) 7.

¹⁰ Adopted and proclaimed by the UN General Assembly in Resolution 217 A (III) of 10 December 1948.

¹¹ Adopted by the UN General Assembly in Resolution 2200 A (XXI) of 16 December 1966 and entered into force on 23 March 1976. The origins of economic and social rights are diffuse but apparently the rights drew strength from the injunctions expressed in different religious traditions to care for those in need and those who cannot care for themselves.

¹² Adopted by the UN General Assembly in Resolution 2200 A (XXI) of 16 December 1966 and entered into force on 03 January 1976.

¹³ United Nations Declaration of Human Rights, Preamble, at paras 7 and 8.

¹⁴ Buergenthal T. *et al* (2002) 40.

States of America (US) led West.¹⁵ Although the US objected to the adoption of one, all inclusive, covenant they did not *per se* object to social and economic rights.¹⁶

This was illustrated in 1941 when President Roosevelt had nominated “*freedom from want*” as one of the four freedoms that should characterise the future world order. He spelled out this vision in his 1944 State of the Union address as follows:¹⁷

“We have come to a realization of the fact that individual freedoms cannot exist without economic security and independence. ‘Necessitous men are not free men’. People who are out of a job are the stuff of which dictatorships are made. In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second bill of rights, under which a new basis of security and prosperity can be established for all, regardless of station, race or creed.”

Among these rights are:

*“...The right to adequate medical care and the opportunity to achieve and enjoy good health...”*¹⁸

Although the Union address was an indication that the US supported the existence of economic based rights order it did not mean that these purported economic rights must have the same status as civil and political rights. The States that were in favour of two separate covenants, in particular the US and other western States such as the United Kingdom (UK) opined that traditional principles derived from liberal theories, such as the primacy of the individual, would be infringed by placing economic and social rights on an equal footing with civil and political rights.¹⁹

The debate culminated in the adoption of two separate covenants. The assumption was that civil and political rights were legally enforceable and justiciable, in other words, they could be invoked before and applied by a court of law or a similar (*quasi*) judicial entity.²⁰ In contrast, it was assumed that economic, social and cultural rights were not immediately enforceable and therefore required State intervention for their

¹⁵ Craven M (1995) 9.

¹⁶ Steiner, H.J. and Alston, P. (2000) 243.

¹⁷ President Roosevelt State of the Union Address (11 January 1944), available at, <<http://www.infoplease.com/t/hist/state-of-the-union/155.html>> (Accessed on 27/02/07).

¹⁸ Italics my own.

¹⁹ Arambulo K. (1999) 17.

²⁰ Arambulo K..(1999) 17.

realisation and ultimately would have to be achieved progressively.²¹ This interpretation had been the forefront of the lack of enforceability, also known as justiciability, of economic, social and cultural rights. Human rights, according to Leary, are defined as justified claims to freedoms, immunities and benefits that the individual has upon his or her society and which society must respect and ensure.²²

According to Beetham, to qualify as a human right, the aspiration must satisfy a number of criteria. These criteria include: that the right must be universal and fundamental; that the right must be justiciable; that it should be clear who holds the duty to uphold or implement the right, and the agency should possess the capability to fulfil its obligations in terms of the right.²³ The argument is that the rights contained in the ICESCR do not satisfy all these requirements and thus, the rights in the ICESCR can, at most, be a statement of aspirations or goals rather than being enforceable rights.

The criteria as set out by Beetham, forms the basis of this chapter's analysis of the scope, content and implementation of economic, social and cultural rights. The analysis will entail, firstly, a general discussion of the universality and fundamentality of economic, social and cultural rights. Secondly, through an analysis of jurisprudence of international *quasi*-judicial and judicial bodies this part of the Chapter will illustrate that economic, social and cultural rights are justiciable or enforceable. Lastly, my findings will demonstrate that States Parties to the ICESCR hold the obligation to fulfil the rights therein and if a State Party is incapable the international community must take on this responsibility.

3. ECONOMIC, SOCIAL AND CULTURAL ASPIRATIONS AS HUMAN RIGHTS

3.1 The Right must be Fundamental and Universal

Concepts such as the fundamentalism and universalism of human rights are not synonymous with economic, social and cultural uniformity. The concept of universality entails the argument that human rights belong to all human beings and

²¹ Arambulo K. *Ibid.*

²² Leary A. (1993) 482-483.

²³ Beetham D. (1995) 41.

are fundamental to every type of society. In this way, everyone has the same basic human rights.

The concept of universalism, on the other hand, advocates a pattern of application to all worldwide. Some argue that the concept of universality is culturally constructed. This is the so-called “*cultural relativist argument*,”²⁴ the very rationale of which is to deny claims of universality. Human rights are viewed as representing the particular belief systems of some cultures and societies rather than those of all cultures and societies. Accordingly, human rights are considered a western construct of limited application to non-Western nations.

Fall, the Secretary-General of the World Conference on Human Rights, indicated that he and others had to grapple with the question of universality of human rights and came up, after considerable negotiation, with this definition that was adopted in the Vienna Declaration and Programme of Action paragraph 5:

*“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”*²⁵

International human rights instruments and bills of rights of nations speak of the “*all human beings*” and “*everyone*” before they spell out the particular rights in those documents. The most important comprehensive human rights instrument to be proclaimed by a global international organisation at the time, the UNDHR, declares that: “*all human beings are born free and equal in dignity and rights*” and “*everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.*”²⁶

²⁴ Cultural relativism is the principle that an individual human's beliefs and activities should be understood in terms of his or her own culture.

²⁵ Fall I. (1997) 79.

²⁶ Article 1 and article 28 respectively.

Thus, it can be argued that equal treatment of every human being is the most basic principle of the concept of human rights.²⁷ If the right to health, for example, is considered a fundamental human right, significant difference in access to healthcare, or the health status of individuals must therefore be seen as violations of the principle of equality.²⁸ Arguments such as the lack of resources as used by a State, do not justify human rights abuses in the form of discriminatory treatment because equal treatment is fundamental and universal.²⁹

International human rights experts had discussed the issue of universality and fundamentality, and confirmed that:

“...human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil and political and economic, social and cultural rights.”³⁰

“... all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.”³¹

Universality of human rights is questioned because of the differences in economic conditions in each State. Ayala-Lasso writes that the notion of universality is not static in fact it is a *“dynamic process.”³²* Full realisation of human rights may never be achieved if one takes into consideration factors of political, economic, social and cultural differences. However, through the dynamic process of universally accepted goals the full protection of human rights is approachable.³³

²⁷ Mahoney K. and Mahoney P. (1993) 483.

²⁸ Mahoney K and Mahoney P. *Ibid* 483.

²⁹ Warren D. (1997) 90.

³⁰ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Jan. 8, 1987, U.N. ESCOR, Commission on Human Rights, 43d Sess., Agenda Item 8, U.N. Doc. E/CN.4/1987/17/Annex (1987), re-published in the *Human Rights Quarterly*, Vol. 9 (1987), pp. 122–135, para 3.

³¹ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, reprinted in (1998) vol. 20 *Human Rights Quarterly* 691, see also <http://www1.umn.edu/humanrts/instreet/Maastrichtguidelines_.html> (Accessed 21/03/08), para 4.

³² Warren D. (1997) 92. Italics my own.

³³ Warren D. (1997) 91.

Human rights are inextricably linked to the preservation of human dignity. This means that respect for individual dignity is due equally to one and all, regardless of circumstance. In this way, human rights must apply universally. Individuals may exercise different rights, or exercise the same rights differently, depending on which group they belong to within society. Different groups include women, children, or those of a certain race, ethnicity or religion. Even if the form or content of human rights changes over time, the concept of their universality and fundamentality remains the same. Thus it is fair to state that economic, social and cultural rights are not only aspirations but human rights accessible to all.

3.2 Justiciability of Economic, Social and Cultural Rights

One of the main arguments against economic, social and cultural rights, as rights that are immediately enforceable, is whether these rights are justiciable. If they are not justiciable they are not capable of being invoked in a court of law and applied by the judiciary.³⁴ The argument on justiciability relates directly to the cornerstone of separation of powers in a democracy. Chirwa summarises the argument skilfully, when he states:

“the countries (western countries) argued that enforcement of these rights is programmatic and costly, and therefore dependant on the availability of state resources. Furthermore, they argued that economic, social and cultural rights lack specificity and entail intricate policy decisions regarding their implementation...that the judiciary is not institutionally competent and not democratically legitimate enough to make such difficult choices, therefore rendering judicial enforcement inappropriate.”³⁵

Christiansen states in this regard that:

“in theory, the social (economic and cultural) rights remedies imposed by a court could be overwhelming to a State, such as if a court were to require the government to provide universal employment, universal education through to the university level, free unlimited health care, etc. But this is the enforcement

³⁴ Eida A. (1995) 41.

³⁵ Chirwa D.M. “Toward Revitalizing Economic, Social and Cultural Rights in Africa: Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria” *Human Rights Brief* vol10 Issue 1 at <<http://www.wcl.edu/hrbrief/10/1africa.cfm>> (Accessed 03/09/2007).

*issue, not the justiciability issue. The nature of the rights themselves is not a legitimate basis for rejecting their justiciability. A valid rejection of social (economic and cultural) rights justiciability must rely on their inability to be properly or effectively adjudicated. Hence, the real area of concern is not the nature of the rights but what some commentators fear judges and courts will do with such rights.*³⁶

Economic, social rights and cultural rights are more frequently related to a volatile area of government policy for most nations. The question of justiciability is multi-faceted. A court also has other challenges that lie within specific areas of adjudication such as addressing the actual plaintiff's complaint or an appropriate remedy. The analysis of international law focuses on the right to enforce the economic, social and cultural rights through adjudication by a competent court rather than the specific details of the adjudication process.

With proper construction, all social, economic and cultural rights can be justiciable, provided there are common minimum obligations that are predetermined by international human rights law.³⁷ The developments in the justiciability of economic, social and cultural rights within the international human rights case law sphere are explored.

3.2.1 International Level

3.2.1.1 International Court of Justice

In the following matter, ***Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory***,³⁸ the International Court of Justice (ICJ) demonstrated the justiciability of the rights contained in the ICESCR in general. The UN General Assembly adopted a resolution asking the ICJ to urgently render an Advisory Opinion on what legal consequences arose from Israel's construction of a

³⁶ Christiansen E.C. (2007) 10. In this article the author uses the South African Constitutional Court cases for his analysis.

³⁷ An in dept discussion on the meaning of "minimum obligation" will take place under the heading 'The Right Health'.

³⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion of the ICJ of 19 July 2004 General List No. 131. Accessible at < <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> > (Accessed 06/11/07).

wall in the Occupied Palestinian Territory, considering the rules and principles of international law.

Israel is a State Party to both the ICCPR and ICESCR. However, Israel denied that the ICCPR and ICESCR applied to the Occupied Palestinian Territory and argued that the relevant law that applies to the Palestinian area is international humanitarian law.³⁹

The Court held that the rules and principles of international law that were relevant in assessing the legality of the measures taken by Israel include the ICESCR as well as the ICCPR. The ICJ held further, that the ICESCR is applicable both to territories over which a State has sovereignty and to those over which it exercises jurisdiction outside sovereign territory.⁴⁰

The ICJ held that Israel is bound by the provisions of the ICESCR. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.⁴¹ In effect the ICJ imposed a negative obligation on Israel to refrain from violating the provisions of the ICESCR. The Court held that the construction of the wall and its associated regime, *inter alia*, impeded the exercise by the persons concerned of their rights to work, health, education and to an adequate standard of living as guaranteed by the ICESCR.⁴² The Court directed Israel to cease construction and dismantle the wall, provide compensation and other forms of reparation to the Palestinian population, and to return any land and other immovable property seized for the purposes of constructing the wall.⁴³

It is evident that the ICJ was of the opinion that the rights contained within the ICESCR were applicable in times of war as well as in times of peace. Furthermore Israel as the occupying State is responsible for not violating the obligations under the ICESCR. The court did not address the positive obligations placed on States Parties

³⁹ *Supra*, para 102.

⁴⁰ *Supra*, paras 102-113.

⁴¹ *Supra*, para 115.

⁴² *Supra*, para 130.

⁴³ For a comprehensive analysis of the South African contribution to the ICJ in relation to this Advisory Opinion see: Munga A. "Legal consequences of the construction by Israel of a wall in the Occupied Palestinian Territory: South Africa's contribution to the advisory opinion of the International Court of Justice" (2005) 20 SA Public Law 86-101.

by the ICESCR. The court had the opportunity to decide on the justiciability or enforceability of the rights in the ICESCR, however, this opportunity was not taken.

3.2.1.2 Human Rights Committee

The Human Rights Committee⁴⁴ (HRC) is the UN body responsible for the adjudication of the rights in the ICCPR and for resolving claims of violation of the rights in the ICCPR. Furthermore, the HRC supervises the implementation of the ICCPR and has made it clear that the right to equality protected by article 26 applies across the spectrum of civil, political, economic, social and cultural rights.⁴⁵ Most importantly, this means that the individual complaints mechanism available under the first Optional Protocol to the ICCPR⁴⁶ can be used to make complaints about discrimination in the enjoyment of economic, social and cultural rights.⁴⁷

The *integrated approach*, as Sheinin calls it, is one of the methods that are used to protect economic, social and cultural rights.⁴⁸ The HRC and other international and quasi-judicial and judicial bodies⁴⁹ have indicated their willingness to protect economic, social and cultural rights through the non-discrimination provisions applied to civil and political rights and found in other international conventions.⁵⁰ This willingness to protect economic, social and cultural rights has been illustrated through the decisions of various international treaty monitoring bodies. These decisions demonstrate the justiciability of economic, social and cultural human rights.

The HRC had to consider whether the right to health was infringed through the discriminatory treatment of the State, in ***Ms. Yekaterina Pavlovna Lantsova v. The Russian Federation***.⁵¹

⁴⁴ The HRC was established by article 40 of the ICCPR.

⁴⁵ Human Rights Committee, General Comment No. 18, “non-discrimination” (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), para 6. Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁴⁶ Optional Protocol to the International Covenant on Civil and Political Rights, G. A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316, 999 U.N.T.S. 302, entered into force March 23, 1976.

⁴⁷ Eide A. *et al* (1995) 44.

⁴⁸ Eide A *et al* (1995) 44ff.

⁴⁹ See discussion of this issue below.

⁵⁰ Other conventions are cited below.

⁵¹ Comm. No. 763, CCPR/C/74/D/763/1997, (2002) Accessible at

Mr Lantsova was placed in a pre-trial detention centre in March 1995 and died one month later. The prison was overcrowded and conditions were inhuman due to inadequate ventilation, food and hygiene.⁵² The mother of the deceased then made a complaint to the HRC regarding the violation of articles 6, the right to life; article 7, the right not to be subjected to torture and cruel and degrading treatment; and article 10 of the ICCPR, the detained person's right to be treated with human dignity.⁵³

The HRC held that the detention of an individual obliges a State to protect the individual in terms of the right to life in terms of article 6 of the ICCPR. The right to life was violated since the State had failed to take steps to ascertain Mr Lantsova's health status and provide adequate medical assistance and adequate conditions of detention.⁵⁴

Concerning the death of Mr Lantsova, the HRC held that the State had failed to take reasonable and appropriate steps by providing Mr Lantsova with medical assistance. The HRC affirmed that it is incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection.⁵⁵ Consequently, the HRC concluded that, in this case, there had been a violation of paragraph 1 of article 6 of the Covenant.

The conditions of detention also violated the right to respect for the inherent dignity of detained individuals as provided for in article 10.⁵⁶ The HRC did not feel it necessary to deal with article 7, however, it held that the Russian Federation should provide appropriate compensation, order an inquiry into the death and ensure similar violations do not occur in future.⁵⁷

In effect the HRC had imposed a positive obligation on a State to protect the health of a prisoner through the rights to life and human dignity.⁵⁸ In addition to this positive obligation the HRC established the justiciability of the right to health through

<<http://www1.umn.edu/humanrts/undocs/763-1997.html>> (Accessed 10/10/07).

⁵² *Supra*, paras 1.1-1.5.

⁵³ *Supra*, para 3.

⁵⁴ *Supra*, para 9.2.

⁵⁵ *Supra*, para 9.2.

⁵⁶ *Supra*, para 9.1.

⁵⁷ *Supra*, para 11.

⁵⁸ For a similar example of the prisoners right to food and housing see: *Womah Mukong v. Cameroon* Comm. No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994). Accessible at <<http://www1.umn.edu/humanrts/undocs/html/458-1991.html>> (Accessed 10/10/07).

interpretation and application of the right to non-discrimination in the ICCPR. Although this case applies specifically to prisoners, where the State takes on a special relationship of protection, nothing prohibits the application of this case to the general population.

The following two decisions of the HRC demonstrate its commitment to ensure justiciability of social rights through the non-discrimination provision, article 26 of the ICCPR. These cases dealt with the infringement upon the right to unemployment and retirement benefits that the complainants were entitled to, by State differentiation.

In the first case, relating to social rights *F. H. Zwaan de Vries v. The Netherlands*⁵⁹, the HRC adjudicated upon a complaint from Mrs. Zwaan de Vries. The complainant, who was born in 1943 and married to Mr. C. Zwaan, was employed from early 1977 to 9 February 1979 as a computer operator. Since then she had been unemployed. Under the Unemployment Act she was granted unemployment benefits until 10 October 1979. She subsequently applied for continued support on the basis of the Unemployment Benefits Act. The Municipality of Amsterdam rejected her application on the ground that she did not meet the requirements because she was a married woman; the refusal was based on section 13, subsection 1 (1), of the Unemployment Benefits Act, which did not apply to married men.⁶⁰

The legal question was whether the complainant was a victim of a violation by the State Party of article 26 of the International Covenant on Civil and Political Rights, which provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. The complainant asserted that the only reasons she was denied unemployment benefits were her sex and marital status and contended that this constituted discrimination within the scope of article 26 of the Covenant.⁶¹ The States' argument was that unemployment benefits were fundamentally a social right protected in the ICESCR and that the matter is therefore inadmissible as HRC does not have jurisdiction.

⁵⁹ Comm. No. 182/1984, CCPR/C/29/D/182/1984, (1987), available at <<http://www1.umn.edu/humanrts/undocs/newscans/182-1984.html>> (Accessed 10/10/07). For a similar case concerning the non-discrimination clause and social security see: *S. W. M. Brooks v. The Netherlands*, Comm. No. 172/1984, CCPR/C/29/D/172/1984, 9 April 1987.

⁶⁰ *Supra*, para 2.1.

⁶¹ *Supra*, para 2.2.

The HRC held that the State violated article 26 of the ICCPR, which provides that all persons are entitled to equal protection of the law without any discrimination.⁶² This non-discrimination protection applies to the socio-economic domain, and is not limited to the rights explicitly enshrined in the ICCPR. Rather, all legislation should be non-discriminatory. The ICCPR does not provide for positive obligations on a State to enact legislation; however, if a State exercises its State sovereignty by enacting legislation it must comply with article 26.⁶³

In this case, the legislation required married women to meet a condition that did not apply to married men. This differential treatment was not based on objective or reasonable criteria.⁶⁴ The legislation was therefore discriminatory, although it had been repealed before the decision by the State. The HRC ordered an appropriate remedy for Mrs Zwaan de Vries.⁶⁵

In *Ibrahima Gueye et al. v. France*,⁶⁶ the second case relating to social benefits, the HRC applied the same criteria of protection in relation to article 26 of the ICCPR. The complainants claimed that French legislation provided superior pensions for soldiers of French nationality than it did for retired soldiers of Senegalese nationality, who had served in the French Army prior to the independence of Senegal in 1960 and therefore they were victims of discrimination in terms of article 26.⁶⁷ The French State claimed that the different treatment was justified due to the complainants' loss of French nationality upon independence, the difficulties in establishing the identity and family situation of retired soldiers, and the differences between the economic and social conditions prevailing in France and in its former colonies.⁶⁸

The main question before the HRC was whether the complainants were victims of discrimination within the meaning of article 26 of the ICCPR or whether the differences in pension treatment of former members of the French Army should be

⁶² *Supra*, para 12.5.

⁶³ *Supra*, para 12.4.

⁶⁴ *Supra*, para 13.

⁶⁵ *Supra*, para 14 and 16.

⁶⁶ Comm. No. 196/1985, CCPR/C/35/D/196/1985, (1989). Accessible at < <http://www1.umn.edu/humanrts/undocs/html/511-1992.html> >, (Accessed 10/10/07).

⁶⁷ *Supra*, para 1.1-1.5

⁶⁸ *Supra*, para 1.5.

granted differently depending on whether the former members were French nationals or not.⁶⁹

The HRC rejected the State's arguments. It said that the issue was not the question of nationality that determined the granting of pensions to the complainants but the services rendered by them in the past and that services were the same as those rendered by their French counterparts.⁷⁰ Mere administrative inconvenience or the possibility of some abuse of pension rights cannot be invoked to justify unequal treatment. Finally, differences in the economic, financial and social conditions between France and Senegal could not be invoked as a legitimate justification for the discrimination against all retired soldiers living in Senegal. Whether of Senegalese nationality or French nationality they would face the same economic and social conditions, yet their treatment for the purpose of pension entitlements was different. The HRC held the differentiation amounted to prohibited discrimination because it was unreasonable and very subjective and ordered the French State to remedy it.⁷¹

Where a State differentiates unreasonably one can rely on the general provision of non-discrimination in the ICCPR, whether it is an economic, social or cultural right or otherwise, the HRC does not permit a State violation of such a kind. The standard set by the HRC is therefore that of reasonableness.⁷² The cases further demonstrate that economic, social and cultural rights are justiciable through the non-discrimination provision of the ICCPR. The HRC has interpreted the right to life in article 6 of the ICCPR as including aspects of the right to health.⁷³ The HRC stated that:

*“the expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States Parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.”*⁷⁴

⁶⁹ *Supra*, para 9.3.

⁷⁰ *Supra*, para 9.5

⁷¹ *Supra*, para 11.

⁷² For a proper understanding of the reasonableness test in the domestic law sphere, in the context of the South African Constitution see Currie I. and De Waal J. (2005) 577-582.

⁷³ HRC General Comment No 6, para 5.

⁷⁴ *Ibid.*

Although the applicants relied on the right to life and the non-discrimination provisions of the ICCPR, the rights that were violated were unequal treatment or access to pension benefits as well as the right to health. This finding corresponds to the concept that human rights are interdependent, indivisible and interrelated. This means that a violation of the right to equality or the right to human dignity may often impair the enjoyment of other human rights, such as the rights to health or the right to an equitable pension, and vice versa. HRC illustrated that an applicant can demand equal treatment of economic, social and cultural rights through the non-discrimination provisions or the right to life proclaimed in the ICCPR. The jurisprudence of the HRC does encourage enforceability of the economic, social and cultural rights, however the UN body had not decided explicitly on the enforceability of justiciability of economic, social and cultural rights as yet.

3.2.1.3 Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination⁷⁵ (Committee on CERD) is responsible for the protection, enforcement and interpretation of the International Covenant on the Elimination of all Forms of Racial Discrimination⁷⁶ (CERD).

The Committee on CERD, in fulfilling its responsibility in relation to CERD, had to decide on a matter dealing with the lack of adequate housing in *L. R. et al. v. Slovakia*.⁷⁷ In particular, the Committee on CERD had to decide on the compatibility of a resolution adopted by the Dobšiná municipal council⁷⁸ with the discrimination provisions of CERD. The second resolution in question was passed in an attempt to cancel a previous resolution in which the council had approved a plan to construct low-cost social housing for Roma-inhabitants living in very poor conditions. The second resolution was passed as the result of a petition that was submitted by the anti-Roma groups. The second resolution stated that the municipality must not provide low cost housing as it would result in an influx of people of Gypsy origin.⁷⁹

⁷⁵ The Committee on CERD is established by article 9 of CERD.

⁷⁶ 660 U.N.T.S. 195, entered into force Jan. 4, 1969.

⁷⁷ Comm. No.31/2003: Slovakia CERD/C/66/D/31/2003. Accessible at <<http://www1.umn.edu/humanrts/country/decisions/31-2003.html>> (Accessed 10/10/2007).

⁷⁸ Resolution No. 251-20/III-2002-MsZ.

⁷⁹ *Supra*, para 1.1-1.2.

The complainants contended, *inter alia*, that the State Party had failed to safeguard their right to adequate housing as the only grounds for rescission of the previous resolution was related to race. This action, they contended, violated Article 5(e)(iii) of the ICERD.⁸⁰

The Committee on CERD held that, taken together, the municipal council resolutions in question, which consisted of an important practical and policy step towards realisation of the right to adequate housing, followed by its revocation and replacement with a weaker measure, amounted to an impairment of the recognition, or exercise on an equal basis, of the human right to housing.

This right is protected by Article 5(e)(iii) of CERD and Article 11 of the ICESCR. The Committee also found that the State Party was in breach of its obligation to guarantee the right of everyone to equality before the law in the enjoyment of the right to housing, contrary to Article 5(e)(iii) of CERD. The Committee ruled that Slovakia should, *inter alia*, take measures to ensure that the complainants be restored to the position that they were in upon adoption of the initial resolution by the municipal council.⁸¹

The right to housing, an economic and social right, can be protected through the specific non-discrimination provision of the CERD. Although the applicants relied on the non-discrimination provisions of the CERD, the right that was violated was the right to housing. The Committee on CERD can enforce economic, social and cultural rights through the non-discrimination provisions in CERD. A similar position to the HRC is therefore applicable to the Committee on CERD.

3.2.1.4 The Committee on Economic, Social and Cultural Rights

Probably the most important arguments in favour of the contention that social and economic rights are justiciable relates to the work done by the UN Committee on

⁸⁰ *Supra*, para 3.2-3.4. Article 5(e)(iii) provides ... States Parties undertake to prohibit and to eliminate racial discrimination in all forms and to guarantee the right of everyone, without distinction as to race, colour, national or ethnic origin,..., notably in the enjoyment of the following rights:... (e) Economic, social and cultural rights, in particular: (iii) the right to housing.

⁸¹ See a similar case dealt with by the Committee on CERD *A. Yilmaz-Dogan v. The Netherlands*, Comm. No. 1/1984, U.N. Doc. CERD/C/36/D/1/1984 (1988). Accessible at <http://www1.umn.edu/humanrts/country/decisions/1-1984.html> (Accessed 10/10/2007). In this case the Committee on CERD had to deal with the right to work, entrenched in article 5 (e) (i) of the CERD.

Economic, Social and Cultural Rights (CESCR), which was established by the Economic and Social Council (ECOSOC) under the ICESCR.⁸² The primary responsibility for the enforcement of the ICESCR lies with the CESCR. One of the mandates of the CESCR is to assist States Parties to the ICESCR in the interpretation of the various provisions of this Covenant.

The CESCR publishes general comments on the substantive articles of the ICESCR in an attempt to clarify the obligations of State Parties. In particular the general comments deal the issues such as enforceability and implementation of various rights.⁸³ One of the issues that the CESCR had to deal with is the concept of justiciability. This concept was presumably addressed by article 2 of the ICESCR. Article 2(1) of the ICESCR states that:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”⁸⁴

This provision was problematic as it was interpreted by State Parties to negate their obligations on economic grounds rather than enforcing the rights in the ICESCR. In fulfilling its mandate to interpret article 2, the CESCR published General Comment No. 3⁸⁵ *on the nature of States Parties’ obligations.*⁸⁶

⁸² ICESCR, article 19.

⁸³ General Comment No 14 (2000) The right to the highest attainable standard of health E/C.12/2000/4 Accessible at <<http://www.publichealthlaw.net/reader/docs/GenCom14.pdf>> (Accessed 11/09/2007) and General Comment No. 13 The right to education (Art 13):.08/12/99 E/C.12/1999/10. Accessible at <[http://www.unhchr.ch/tbs/dos.nsf/\(symbol\)/E.C12.999.10.En?OpenDocument](http://www.unhchr.ch/tbs/dos.nsf/(symbol)/E.C12.999.10.En?OpenDocument)> (Accessed 03/07/2007).

⁸⁴ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

⁸⁵ Each of the six UN human rights treaty-monitoring bodies, including the Committee on Economic, Social and Cultural Rights, periodically publishes documents known as General Comments or General Recommendations, which provide guidelines for States parties on the interpretation of specific aspects of the human rights treaty of concern to the particular committee. General Comments clarify the content of Covenant rights in more detail and may outline potential violations of those rights and offer advice to States parties on how best to comply with their obligations under the treaties.

⁸⁶ CESCR General Comment No. 3 (1990): *The nature of States parties obligations*, article 2(1) of the ICESCR, available here <[http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR'S+General+comment+3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR'S+General+comment+3.En?OpenDocument)> (Accessed 10/08/07).

The CESCR stated that article 2 is of particular importance to fully understand the ICESCR and must be seen as having a relationship with all of the other provisions of the ICESCR. Furthermore, it describes the nature of the general legal obligations undertaken by States Parties to the ICESCR. While the ICESCR provides for progressive realisation and acknowledges the constraints due to the limits of available resources it also imposes various obligations which are of immediate effect.⁸⁷ This interpretation was applied in other General Comments of the ICESCR, for example General Comment 13,⁸⁸ a general comment on the enforceability of the right to education.

The CESCR General Comment No. 3 set out, in general terms, the State Parties' obligations regarding substantive rights in the ICESCR. State Parties cannot attribute their failure to meet at least their minimum core obligations due to a lack of available resources without demonstrating that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations. The assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.⁸⁹

The two principles have been the cornerstone of misconception and had therefore warranted a more precise interpretation than that which is apparent from article 2 of the ICESCR. Important to this debate is the concept of a violation of ESCR and this must be distinguished from the failure to realise economic, social and cultural rights. As discussed below, it is a failure to recognise this distinction that had resulted in the misconceptions surrounding the justiciability of economic, social and cultural rights.

3.2.1.4.1 Progressive Realisation and Core Minimum Obligations

Monitoring the violation and enforceability of the rights in the ICESCR is a continuous struggle because of the concession imposed by article 2 that the right can be realised progressively. The question on behalf of the State remains how they must comply with their obligations, in terms of the ICESCR, when there are stark differences between economic, social, cultural and political conditions between

⁸⁷ General Comment No. 3, para 1.

⁸⁸ E/C.12/1999/10 of 08 December 1999, see paras 56 and 57 respectively.

⁸⁹ General Comment No. 3 para 10.

States. For this reason, the CESCR had placed a reliance on a concept of “*core minimum*” of each of the economic, social and cultural rights. The core minimum concept enables the CESCR to follow a violations approach as opposed to an aspiration approach.

The CESCR provides that:

*“...the term progressive realisation is often used to describe the intent of the phrase - ‘to take steps’. The concept of progressive realisation constitutes recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.”*⁹⁰

The CESCR further provides that:

*“...even where the available resources are demonstrably inadequate, the obligation remains for a State Party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. ...the obligations to monitor the extent of the realisation, or more especially of the non-realisation, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.”*⁹¹

The core minimum obligation or the core minimum theory of a State entails the immediate and necessary steps and action a State must take in the event of resource constraints. The CESCR had commented that:

- Article 2(1) obligates each State Party to take the necessary steps “*to the maximum of its available resources;*”
- In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations;⁹²
- The available resources include both the resources existing within a State and those available from the international community through international cooperation and assistance.⁹³

⁹⁰ General Comment No. 3, para 9.

⁹¹ General Comment No. 3, para 11.

⁹² General Comment No. 3, para 10

⁹³ General Comment No. 3, para 13.

The jurisprudence of the CESCR makes it clear that a State Party has the obligation “to move as *expeditiously and effectively as possible*” towards that goal of full realisation of the rights in the ICESCR.⁹⁴ CESCR also imposes obligations which are of “*immediate effect*.”

- Firstly, article 2(1) of the ICESCR provides State Parties must “*take steps*” towards “*the full realization of the rights*;”
- Secondly, article 2(2) of the ICESCR provides a “*undertaking to guarantee*” that the relevant rights “*will be exercised without discrimination*;”⁹⁵
- Thirdly, by implication, “*minimum core obligations to ensure the satisfaction of, at the very least, minimal essential levels of each of the rights*” is applicable immediately irrespective of the availability of resources of the State Party concerned.⁹⁶

In essence, a State can either fail to realise the rights in the ICESCR or violate the rights in the ICESCR. A State Party has the obligation to rebut the *prima facie* presumption to discharge its obligations by producing evidence to the monitoring body, in this case the CESCR, as to the steps it has taken.

It can therefore be surmised, on the one hand, that if a State Party had not taken any steps at all to realise any economic, social and cultural rights, it would amount to a violation of the ICESCR. In terms of the steps that should be taken, the CESCR stated they should be “*deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant*.”⁹⁷ In other words, the steps that must be taken by a State cannot be purposeless or futile in that State’s particular circumstances. On the other hand, if a State Party can demonstrate what steps they have taken that is to the maximum of its resources or to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances, it would have discharged its obligation in the event that the rights are not fully and immediately realised.

⁹⁴ *Ibid.*

⁹⁵ See General Comment No. 3, para 1.

⁹⁶ General Comment No. 3, para 10.

⁹⁷ General Comment No. 3, para 2.

Fidler, argues against the core minimum theory as he is of the opinion that it is contrary to article 31 (1) of the Vienna Convention that provides:

“...you must interpret a treaty in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of the object and purpose thereof.”⁹⁸

Fidler’s argument implies that the interpretation of the provisions of the ICESCR as envisaged by the CESCR is not possible because it is not in compliance with the ordinary meaning of the right as stated in the treaty. This is, however, not the interpretation of the CESCR in its General Comment No. 3 and the international human rights experts as will be discussed below.⁹⁹ The CESCR stated that the minimum core theory is essential to the purpose and object of the ICESCR, it stated:

“... a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant;”¹⁰⁰

“If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d’être (reason for being).”¹⁰¹

3.2.1.4.2 Limburg Principles and Maastricht Guidelines

The Limburg Principles¹⁰² and the Maastricht Guidelines¹⁰³ serve as important tools of interpretation in the realm of economic, social and cultural rights. International

⁹⁸ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980. Fidler D.P. (2000) 302.

⁹⁹ The Committee is the UN body responsible for monitoring the ICESCR.

¹⁰⁰ General Comment No. 3, para 10.

¹⁰¹ General Comment No. 3, para 9, words in brackets my own.

¹⁰² The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Jan. 8, 1987, U.N. ESCOR, Commission on Human Rights, 43d Sess., Agenda Item 8, U.N. Doc. E/CN.4/1987/17/Annex (1987), re published in the *Human Rights Quarterly*, Vol. 9 (1987) 122–135. The Limburg Principles are also derived from the Siracusa Principles, UN Doc. E/CN.4/1984/4, 28 September 1984 and 7 *Human Rights Quarterly* 3, 5 (1985). A group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States of America), met in Maastricht on 2-6 June 1986 to consider the nature and scope of the obligations of States parties to the International Covenant on Economic, Social and Cultural Rights, the consideration of States parties Reports by the newly constituted ECOSOC Committee on Economic, Social and Cultural Rights, and international co-operation under Part IV of the Covenant.

experts had met on various occasions to discuss and formulate their understanding of the international consensus on the obligations engendered by the rights in the ICESCR. I discuss, in brief, these two guidelines here although it does not strictly fall under the heading of CESCR. These guidelines had clarified the comments made in General Comment No. 3 and are relevant and directly linked to the enforcement of economic, social and cultural rights as was interpreted by the CESCR.

The Maastricht Guidelines read together with the Limburg Principles were “*designed to be of use by all who are concerned with understanding and determining violations of economic, social and cultural rights and in providing remedies thereto, in particular monitoring and adjudicating bodies at the national, regional and international levels.*”¹⁰⁴ They are not only an integral part of the discussion on enforceability but also provide possible remedies to problems of enforcement.

General Comment No. 3 stipulates that a State has three general obligations. They are namely, the obligation to respect, protect and fulfil.¹⁰⁵ The three obligations form the core of the meaning of violations of economic, social and cultural rights as well as remedies. Within these obligations are other obligations that assist as to whether the three obligations had been violated. For example, the obligation to fulfil entails obligations to facilitate, provide and promote and a violation of these obligations could amount to a violation of the obligation to fulfil.¹⁰⁶ These obligations are discussed in detail under the right to health.

International bodies and tribunals have found economic, social and cultural rights justiciable on an international as well as on a regional level. The following discussion explores the interpretation and application of regional instruments in the debate about the justiciability of economic, social and cultural rights. In particular the

¹⁰³ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, reprinted in (1998) vol. 20 *Human Rights Quarterly* 691, see also <http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html> (Accessed 21/03/08). A group of more than thirty experts met in Maastricht from 22-26 January 1997 at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands). The objective of this meeting was to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies.

¹⁰⁴ Maastricht Guidelines, Introduction.

¹⁰⁵ Maastricht Guidelines, para 6

¹⁰⁶ CESCR General Comment No. 14 (2000), para 33.

discussion will entail jurisprudence from Africa by the African Commission on Human and Peoples' Rights, in Europe from the European Court of Human Rights, and in America as continent, from the Inter-American Court on Human Rights and the Inter-American Commission on Human Rights.

3.2.2 Regional Level

The justiciability of economic, social and cultural rights is developed further in the decisions and opinions of regional quasi-judicial and judicial bodies. These bodies are responsible for the monitoring and implementation of regional human rights instruments.

3.2.2.1 African Commission on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights¹⁰⁷ (African Charter) established the African Commission on Human and Peoples' Rights (African Commission) to monitor the implementation of the African Charter. The African Commission can hear State and individual petitions or communications in relation to a State's obligations under the African Charter.¹⁰⁸

In the matter of ***Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v. Nigeria***¹⁰⁹ the communication alleged an infringement of various rights in the African Charter. This case dealt with the violation of traditional civil and political as well as economic, social and cultural rights. The communication to the African Commission, alleged that the military State of Nigeria had been directly involved in oil production through the State oil company; that the Nigerian National Petroleum Company (NNPC) is the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC); and that operations by the NNPC and SPDC have caused environmental degradation and health problems that resulted from the contamination of the environment amongst the Ogoni people.¹¹⁰

¹⁰⁷ African Charter on Human and Peoples' Rights, adopted June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

¹⁰⁸ African Charter, articles 47 and 55 respectively.

¹⁰⁹ African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001). Accessible at <<http://www1.umn.edu/humanrts/africa/comcases/155-96.html>> (Accessed 10/10/07).

¹¹⁰ *Supra*, para 1.

The complainants alleged violations of amongst others, articles 4, the right to life and integrity of person, article 14, the right to property, article 16, the right to health, article 18(1) the right to family life, and article 24, the right to a satisfactory environment, of the African Charter.¹¹¹ In relation to the allegation relevant to this thesis, the alleged violation of the right to health and a safe environment as an underlying precondition of health,¹¹² the African Commission ruled that the Ogoni people had suffered these violations. The African Commission held that the State had violated their right to health as provided by article 16 of the African Charter. In addition the African commission held that the State violated the Ogoni people's the right to a clean environment as provided by article 24 of the African Charter due to the State's failure to prevent pollution and ecological degradation.¹¹³ The African Commission stated that the:

*"...government compliance with the spirit of Articles 16 and 24 of the African Charter must... include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities."*¹¹⁴

In relation to the other alleged violations, the African Commission suggested that a failure to provide material benefits or reparation for the Ogoni people also constituted a violation of the African Charter. Furthermore, it found that the implied right to housing (including protection from forced eviction), which is derived from the express rights to property, health and family read together, was violated by the destruction of housing and harassment of residents who returned to rebuild their homes.¹¹⁵ Finally, it found that the destruction and contamination of crops by State and non-state actors, violated the duty to respect and protect the implied right to food. In this regard the African Commission stated:

¹¹¹ *Supra*, para 10.

¹¹² *Supra*, para 50.

¹¹³ *Supra*, paras 52-54.

¹¹⁴ *Supra*, para 53.

¹¹⁵ *Supra*, paras 59-62.

“...that the right to food is implicit in the African Charter, in such provisions as the right to life (Article 4), the right to health (Article 16) and the right to economic, social and cultural development (Article 22). By its violation of these rights, the Nigerian Government trampled upon not only the explicitly protected rights but also upon the right to food implicitly guaranteed.”¹¹⁶

The African Commission ordered the Nigerian government to cease attacks on the Ogoni people, to investigate and prosecute those responsible for attacks, to provide compensation to victims, to prepare environmental and social impact assessment in the future and to provide information on health and environmental risks.

The case demonstrates the willingness of the African Commission to recognise the direct justiciability of the economic, social and cultural rights. Chirwa writes that the:

“SERAC case marks the first decision that directly addresses the enforcement of economic, social and cultural rights since the (African) Commission became operational..., [and] the decision shows a renewed commitment by the African Commission to the implementation of ESCR’s ...more importantly it demonstrates that ESCR’s are justiciable.”¹¹⁷

The African Commission also dealt with a specific aspect of the right to health in relation to the States ability to fulfil its obligations in ***Purohit and Moore v Gambia***.¹¹⁸ The communication alleged, *inter alia*, that the legislative regime in Gambia, in particular the Lunatics Detention Act, was outdated and violated the right to enjoy the best attainable state of physical and mental health (Article 16) and the right of the disabled to special measures of protection in keeping with their physical and moral needs (Article 18(4)), in overcrowded mental facilities and insufficient policy on mental health, guaranteed in the African Charter on Human and Peoples’ Rights.¹¹⁹

¹¹⁶ *Supra*, para 63.

¹¹⁷ Chirwa D. “Towards revitalising economic, social and cultural rights in Africa: Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria” (2002) 10 No. 1 Human Rights Brief 14 Accessible at <<http://www.wcl.american.edu/hrbrief/10/1africa.cfm>> (Accessed 03/09/07).

¹¹⁸ African Commission on Human and Peoples’ Rights, Comm. No. 241/2001 (2003). Accessible at <<http://www1.umn.edu/humanrts/africa/comcases/241-2001.html>> (Accessed 10/10/07).

¹¹⁹ *Supra*, para 3,4 and 9 respectively. Article 16 of the African Charter provides -:

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health;
2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

The African Commission held that Gambia fell short of satisfying the requirements of Articles 16 and 18(4) of the African Charter. The African Commission stated that the enjoyment of the right to health is crucial to the realisation of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind.¹²⁰ Furthermore those mental health patients should be accorded special treatment to enable them to attain and sustain their optimum level of independence and performance. This would be consistent with Article 18(4) and the standards outlined in the UN Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care.¹²¹

The African Commission stated that it was aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right.¹²² Therefore, having due regard to this depressing but real state of affairs, the African Commission read into article 16 the obligation on the part of States Parties to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.¹²³

The African Commission then ordered the State to repeal the LDA. The case therefore illustrates the justiciability of the right to health in the African regional context. The *Purochit* case makes reference to an important factor relating to the poverty in Africa but reconciles itself that the State should still take steps to fulfil its obligations and cannot just argue a lack of resources.¹²⁴

3.2.2.2 Inter-American Court of Human Rights

In the Americas, the Inter-American Court of Human Rights (IACHR) together with the Inter-American Commission on Human Rights (IAC) acts as the judicial bodies

2. Article 18(4) of the African Charter which provides -: The aged and disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

¹²⁰ *Supra*, para 80.

¹²¹ *Supra*, para 81.

¹²² *Supra*, para 84.

¹²³ *Ibid.*

¹²⁴ See *Purochit*, para 84.

interpreting the American Convention on Human Rights (American Convention).¹²⁵ The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights¹²⁶ (American Protocol), also called the Protocol of San Salvador, provides a means of protection for economic, social and cultural rights.

Article 19(6) of the American Protocol provides that any instance in which the rights established in the Protocol are violated by an action directly attributed to a State Party, individuals and non-governmental organisation can complain to the IACHR.¹²⁷ This Protocol of San Salvador extends direct access to individuals to complain to the IACHR. The right to health¹²⁸ and the underlying preconditions of the right to health for example a healthy environment¹²⁹ is also provided for in the Protocol.

One of the cases where such a procedure was applied is the “**Five Pensioners Case**.”¹³⁰ Essentially the case dealt with the State of Peru’s arbitrary reductions and suspension of payment of pensions owed to five Peruvians as well as the failure of the government to implement the decisions of the local courts.¹³¹

The IAC alleged that Peru violated Article 21, the right to property, article 25 (judicial protection) as well as Article 26 providing for the right to progressive development of economic, social and cultural rights of the American Convention by reducing by law, to the detriment of the alleged victims, the amount of the equalised¹³² pensions they had received since their retirement.

¹²⁵ American Convention on Human Rights, Nov 22, 1969, O.A.S Treaty Series No. 36, at 1, OEA/Ser.L.V/II.23 doc. Rev. 2, entered into force July 18, 1978.

¹²⁶ Adopted at the 18th Session of the General Assembly of the Organisation of American States held in San Salvador on 17th November 1988 and entered into force on the 16th of November 1999. Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.92doc.6 rev1 at 67(1992), See < <http://www.cidh.org/Basicos/basic5.htm> > (Accessed 01/03/07).

¹²⁷ Article 19(6) provide:

Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights. This provision must be read with article 44 of the American Convention providing for individual petitions.

¹²⁸ Article 10 of the Protocol.

¹²⁹ Article 11.

¹³⁰ Judgment of February 28, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 98 (2003) Accessed at < <http://www1.umn.edu/humanrts/iachr/C/98-ing.html> > (Accessed 10/10/07).

¹³¹ *Supra*, para 88(e).

¹³² The word “equalized” is used here to mean equalized with salaries of employees employed in the same position as the claimants but at 1992.

When the alleged victims ceased to work for the Superintendency of Banks and Insurance (SBS) they opted for the retirement regime established in Decree Law No. 20530, and this institution recognised their right to receive a retirement pension progressively equalized with the salary of the SBS employee who occupied the same position or a similar function to the ones they occupied at the date of their retirement. This acquired right could only be modified by the State, to the detriment of the five pensioners, as regards the parameters established in Article 21 of the Convention.

The complainants as well as the IAC argued that the State of Peru violated Article 26 of the American Convention, in that:

“when it drafted Decree Law No. 25792, which constituted an unjustified setback with regard to the level of development of the right to social security that the victims had achieved in accordance with Decree Law No. 20530. As of the entry into force of Decree Law No. 25792, the five pensioners began to receive approximately one-fifth of the retirement pension they had been receiving;”

further that:

“the obligation established in Article 26 implies that the States may not adopt regressive measures in relation to the level of development achieved unless in exceptional circumstances and in accordance to application of Article 5 of the Protocol of San Salvador¹³³ nor did it allege or prove any other circumstance to preserve the general welfare in a democratic society.”¹³⁴

The IACHR held that:

“economic, social and cultural rights have both an individual and a collective dimension. This Court considers that their progressive development, about which the United Nations Committee on Economic, Social and Cultural Rights has already ruled, should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, of the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances

¹³³ *Supra*, para 142. Article 5 of the San Salvador Protocol provides: For the scope of limitations and restriction which must be in relation to the general welfare of the democratic society.

¹³⁴ *Supra*, para 142.

*of a very limited group of pensioners, who do not necessarily represent the prevailing situation.*¹³⁵

The Court said:

*“it is evident that this is what is occurring in the instant case; therefore, the Court considers that it is in order to reject the request to rule on the progressive development of economic, social and cultural rights in Peru, in the context of this case.”*¹³⁶

The complainants were successful in that the IACHR found that the State did violate articles 21 and 25 of the American Convention. The case illustrates the justiciability of economic, social and cultural rights provided that the rights of the general population, as a whole, are in dispute. Surely this decision could also be applied in the situation of a particular group such as women, children and the elderly as well as other categories of disadvantaged groups.

3.2.2.3 Inter-American Commission of Human Rights

In the matter of ***Jorge Odir Miranda Cortez et al. v El Salvador***¹³⁷ pertaining to the immediately enforceability of the right to health at the IAC, the complainants were people living with HIV/AIDS. They alleged that the State of El Salvador’s failure to provide them with triple therapy medication¹³⁸ violated, *inter alia*, their rights to life, article 4; freedom from inhumane treatment, article 5; equal protection, article 24; judicial protection, article 25; and economic, social and cultural rights, article 26, provided in the American Convention on Human Rights¹³⁹. They also alleged that this omission by the State constituted a violation of the right to health guaranteed by article 10 of the Protocol of San Salvador.

¹³⁵ *Supra*, para 147.

¹³⁶ *Supra*, para 148.

¹³⁷ Case 12.249, Report No. 29/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 284 (2000). Accessible at <<http://www1.umn.edu/humanrts/cases/29-01.html>> (Accessed 10/10/2007).

¹³⁸ This treatment is triple dose of antiretroviral drugs. The drugs include: nucleoside reverse transcriptase inhibitors (NRTIs), protease inhibitors (PI) and non-nucleoside reverse transcriptase inhibitors (NNRTIs). The advent of these antiretroviral drugs gave rise to triple therapy, which consisted of two NRTIs and one PI 6-8 or two NRTIs and one NNRTI For a comprehensive discussion on this matter see Romanelli R. *et al* (2006) “*Effectiveness of dual and triple antiretroviral therapy in the treatment of HIV-infected children*”, available at <http://www.scielo.br/pdf/jped/v82n4/en_v82n4a06.pdf> (Accessed 21/11/07).

¹³⁹ See note 86 above.

The IAC held that the case was admissible with respect to Article 26 of the Convention, which obliges States to take steps to progressively realise the rights implicit in the economic, social and cultural standards enshrined in the American Convention.¹⁴⁰ The IAC stated:

“[I]t was not competent ratione materiae (relevant reasons) to determine independently, violations of Article 10 of the Protocol of San Salvador through the system of individual petitions. However, the Inter-American Commission can consider this Protocol in the interpretation of other applicable provisions, in light of the provisions of Articles 26¹⁴¹ and 29¹⁴² of the American Convention.”¹⁴³

Therefore the IAC, although not competent to hear matters directly, used the Protocol of San Salvador to further enforce the principle of justiciability of economic, social and cultural rights although as an interpretative mechanism to understand other rights protected in the American Convention.

3.2.2.4 European Court on Human Rights

In the decision known as the ***Belgian Linguistic Case (Nos. 1 & 2)***¹⁴⁴ the European Court on Human Rights (ECHR), the judicial body responsible for ensuring the observation of the obligations undertaken by State Parties to the European Convention,¹⁴⁵ had to deem how the right to education is protected article 2 of the First Protocol to the European Convention on Human Rights¹⁴⁶ (1st Protocol to ECHR).¹⁴⁷

The applicants were French-speaking residents of certain Flemish-speaking areas of Belgium, who wanted their children to be educated in French. While Dutch speaking children in a particular French-speaking area were allowed to be educated in Dutch-

¹⁴⁰ *Supra*, para 36.

¹⁴¹ Progressive development of measures taken by the State.

¹⁴² Prohibit interpretation contrary to the American Convention.

¹⁴³ *Supra*, para 36.

¹⁴⁴ (No.1) (1967), Series A, No.5 (1979-80) 1 EHRR 241 and (No.2) (1968), Series A, No.6 (1979-80) 1 EHRR 252.

¹⁴⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S> 222, entered into force Sept. 3, 1953, as amended by Protocols No's 3, 5, 8, and 11 which entered into force on 20 Sept. 1970, 20 Dec. 1971, 01 Jan. 1990, and 1 Nov. 1998, respectively, article 19.

¹⁴⁶ E.T.S. 9,213 U.N.T.S. 262, entered into force May 18, 1954.

¹⁴⁷ The ECHR allow individual petitions to the Court in terms of article 34 of the European Convention, as amended by Protocol 11.

speaking schools in a bilingual district outside the neighbourhood, French speaking children in an equivalent Flemish area could not attend the French-speaking schools in the same bilingual district but were compelled to attend their local Dutch language schools.

Article 2 of the First Protocol to the ECHR does not recognise a right to education to the extent that would require States to establish at their own expense, or to subsidise, education of any particular type or at any particular level.¹⁴⁸ The provision guarantees a right of access to educational institutions existing at a given time and a right to an effective education. For the right of education to be effective, there must be a right to official recognition of the studies a student has successfully completed.

The Court, however, found that there had been a violation of Article 14 of the Convention relating to non-discrimination in conjunction with Article 2 as the legislation prevented children from having access to French-language schools in certain communes of Brussels, solely on the basis of the residence of their parents. This was not the case for Dutch-language schools and thus constituted differential treatment, which was unjustifiable under Article 14.¹⁴⁹

In the light of the above analysis, international and regional human rights jurisprudence indicate the willingness by court interfere with legislative and other measures taken by a State that amount to discrimination in relation to economic, social and cultural rights. There have been limited international cases that directly deal with the justiciability of economic, social and cultural rights although there have been opportunities lent to some courts to deal with the question of justiciability.

Some regions such as the African Commission's jurisprudence has been in the forefront of the justiciability debate, indicating clearly that economic, social and cultural rights are justiciable, as was decided in the **SERAC** case. However the work of the other international and regional judicial bodies in the **Lontsova**, **Zwaan de Vries**, **Gueye**, **L.R. Purochit** and **Belgium linguistics** cases are indicators of the

¹⁴⁸ Article 2 provides: No State shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

¹⁴⁹ Article 14 provides: The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

willingness to adjudicate on economic, social and cultural rights. It must be acknowledged there is still work to be done by courts to improve the perception that economic, social and cultural rights are not justiciable.

4. ECONOMIC, SOCIAL AND CULTURAL ASPIRATIONS AS HUMAN RIGHTS: A SPECIFIC FOCUS ON THE RIGHT TO HEALTH

4.1 Introduction

On the one hand, our health and the health of those we care about are extremely important to us. Regardless of our socio-economic or cultural setting, we consider our health to be our most basic and essential quality. Ill health, on the other hand, can keep us from going to school or to work, from attending to our family responsibilities and from participating meaningfully in daily activities. Human rights are interdependent, indivisible and interrelated.¹⁵⁰ The interrelated relationship means that violating the right to health may often impair the enjoyment of other human rights, such as the rights to education or work as well as the right to life.

International human rights standards recognise that each individual has “*the right to the highest attainable standard of health.*”¹⁵¹ The right to health is not only a programmatic goal to be attained in the long term. The fact that the right to health should be a tangible programmatic goal does not mean that no immediate obligations on States arise from it. The right to health does also not mean that everyone can demand a right to be healthy from their particular State.¹⁵²

The right to health entails the obligation that States must create conditions in which everyone can be as healthy as possible. It embraces a right to healthcare services and a number of underlying preconditions of health. This part of the paper seeks to examine the right to health with a few goals in mind. Firstly, to illustrate the scope of the right to health, secondly, to examine what the common minimum obligations of the right are, and thirdly, to elaborate on the jurisprudential developments of the right

¹⁵⁰ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, held in Vienna, 14–25 June 1993. (A/CONF.157/23).

¹⁵¹ See discussion on Article 12 below.

¹⁵² Fidler D.P. (2000) 302; General Comment No. 14, UN Doc. E/C.12/2000/4 <<http://www.unhchr.ch>> (Accessed 21/11/06), para 8.

with regards to the violations approach as well as to the progressive realisation thereof.

4.2 Scope of the Right to Health in International Human Rights Law

International Human Rights standards grant each individual the right to the highest attainable standard of health. If there is a *right to health*, it means that individuals can enforce their rights against governments, both their own and internationally, with regards to protection, achievement and promotion of this right.

The World Health Organization (WHO) articulated the first specific international health and human rights provisions in the preamble to its Constitution written in 1946.¹⁵³ It declares that: “... *the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic, or social condition.*”¹⁵⁴

The phrase the “*highest attainable standard of health*” is commonly referred to by the short-hand term the “*right to health.*” Soon after the WHO Constitution was formulated, the right to health was affirmed in the Universal Declaration of Human Rights (UNDHR)¹⁵⁵ which states that:

*“everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care, necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood and old age or other lack of livelihood in circumstances beyond his control.”*¹⁵⁶

Currently the right to health can be found in a large number of international human rights instruments:

¹⁵³ The Constitution of World Health Organization, was adopted by the International Health Conference held in New York from 19 June to 22 July 1946 by the representatives of the 61 States and entered into force on 07 April 1948, available at < <http://www.searo.who.int/aboutsearo/pdf/const.pdf> > (Accessed 24/08/2006).

¹⁵⁴ WHO Constitution Preamble, para 1.

¹⁵⁵ Adopted and proclaimed by the UN General Assembly in Resolution 217 A (III) of 10 December 1948.

¹⁵⁶ UNDHR article 25 (1)2.

The International Convention on the Elimination of All Forms of Racial Discrimination¹⁵⁷ (1965), article 5 (e)(iv) provides that:

“States Parties undertake to ... eliminate racial discrimination ... and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, ... the right to public health, medical care, social security and social services....”

The Convention on the Elimination of All Forms of Discrimination against Women (1979),¹⁵⁸ articles 11 (1)(f), 12 and 14 (2)(b) states:

“States Parties shall ... ensure to (women) ... access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.... States Parties shall ... eliminate discrimination against women in ... health care ... to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning....; ensure ... appropriate services in connection with pregnancy.... States Parties shall ... ensure ... that (women in rural areas) ... have access to adequate health care facilities, including information counselling and services in family planning....”¹⁵⁹

The UN Convention on the Rights of the Child (CRC), article 24 states:

“States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health....”¹⁶⁰

Other similar provisions are found in the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990),¹⁶¹ articles. 28, 43 (e) and 45 (c) as well as the International Convention on the

¹⁵⁷ Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with article 27(1).

¹⁵⁸ Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19.

¹⁵⁹ Words in brackets my own.

¹⁶⁰ G.A. res.44/25, annex, 44 U.N. GAOR Supp. (No 49.) at 167, U.N. Doc. A 44/49 (1989), entered into force on Sept, 1990.

¹⁶¹ G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force 1 July 2003, available at, < <http://www1.umn.edu/humanrts/instreet/n8icprmw.htm> > (Accessed 09/10/2007).

Protection and Promotion of the Rights and Dignity of Persons with Disabilities (2006), article 25.¹⁶²

The right to health is also recognised in several regional instruments, such as the American Declaration of the Rights and Duties of Man (1948) article XI;¹⁶³ the African Charter on Human and Peoples' Rights (1981), article 16;¹⁶⁴ the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the Protocol of San Salvador (1988),¹⁶⁵ article 10 and the European Social Charter (1961, revised in 1996),¹⁶⁶ article 11. The American Convention on Human Rights (1969)¹⁶⁷ and the European Convention for the Promotion of Human Rights and Fundamental Freedoms (1950) contain provisions related to health, such as the right to life, the prohibition on torture and other cruel, inhuman and degrading treatment as well as the right to family and private life.¹⁶⁸

The ICESCR was the first human rights treaty to require states to “*progressively*” recognise and realise the right to health. The ICESCR provides key provisions for the protection of the right to health in international law; article 12 provides:

“(1) The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the still birth rate and of infant mortality and for the healthy development of the child;

¹⁶² G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), *entered into force* May 3, 2008, available at < <http://www1.umn.edu/humanrts/instreet/disability-convention2006.html> > (Accessed 09/10/2007).

¹⁶³ O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), available at < <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm> > (Accessed 09/10/2007).

¹⁶⁴ Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

¹⁶⁵ O.A.S. Treaty Series No. 69 (1988), *entered into force* November 16, 1999, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992), available at < <http://www1.umn.edu/humanrts/oasinstr/zoas10pe.htm> > (Accessed 09/10/2007).

¹⁶⁶ ETS No. 35, Turin, 18.X.1961, available at, < <http://www1.umn.edu/humanrts/euro/ets35.html> > (Accessed 09/10/2007).

¹⁶⁷ O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), available at < <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm> > (Accessed 09/10/2007).

¹⁶⁸ 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which *entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively, available at < <http://www1.umn.edu/humanrts/instreet/z17euroco.html> > (Accessed 09/10/2007).

- (b) The improvement of all aspects of environmental and industrial hygiene;*
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*
- (d) The creation of conditions which would assure to all medical services and medical attention in the event of sickness.”*

Even though the right is enumerated in the above mentioned instruments, the right to health has been problematic in terms of the way each State interprets their obligations under article 12.¹⁶⁹ The lack of conceptual clarity has complicated both implementation and monitoring of the right to health.¹⁷⁰ In an attempt to clarify the meaning of the right to health, the treaty bodies that monitor the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women and the CRC have adopted General Comments or general recommendations on the right to health and health related issues. These comments provide an authoritative and detailed interpretation of the provisions found in the relevant treaty.¹⁷¹

The CESCR had stated the purpose of the General Comments is to:

“to make the experience gained so far through the examination of these reports available for the benefit of all States Parties in order to assist and promote their further implementation of the Covenant; to draw the attention of the States Parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedures and to stimulate the activities of the States Parties, the international organizations and the specialized agencies concerned in achieving progressively and effectively the full realization of the rights recognized in the Covenant. Whenever necessary, the Committee may, in the light of the experience of States Parties and of the conclusions which it has drawn there from, revise and update its general comments.”¹⁷²

¹⁶⁹ Fidler D.P. (2000) 302.

¹⁷⁰ Chapman A. and Russell S. (2002) 187.

¹⁷¹ As will be discussed later in this section.

¹⁷² CESCR, Introduction, The purpose of general comments, U.N. Doc. E/1989/22, annex III at 87 (1989), article 3.

Another source of interpretation also comes from conferences and declarations, such as the International Conference on Primary Health Care resulting in the Declaration of Alma-Ata,¹⁷³ in which States pledged to progressively develop comprehensive healthcare systems to ensure effective and equitable distribution of resources for maintaining health. The Declaration of Alma-Ata also reiterates that States have the responsibility to provide for the health of their populations, “*which can be fulfilled only by the provision of adequate health and social measures.*”¹⁷⁴ Other such declarations include the UN Millennium Declaration and Millennium Development Goals,¹⁷⁵ and the Declaration of Commitment on HIV/AIDS,¹⁷⁶ also serve to clarify various aspects of public health relevant to the right to health and reaffirm commitments to the realisation of the right health.

The most important source of interpretation in terms of article 12 of the ICESCR is General Comment No. 14 on the right to health.¹⁷⁷ It was published by the CESCR to provide a detailed elaboration of the content of article 12, and emphasises how the substantial issues arising from article 12 should be implemented. It states that:

*“the right to health extends not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.”*¹⁷⁸

State parties are required to guarantee the availability, accessibility, acceptability and quality of such health services, including the underlying preconditions of health.¹⁷⁹

The obligations of the State are to some extent limited by the available resources,

¹⁷³ WHO Declaration of Alma-Ata, International Conference on Primary Health Care, Alma-Ata, USSR, September 1978.

¹⁷⁴ Declaration of Alma Ata (1978) V.

¹⁷⁵ Available here, < <http://www.un.org/millenniumgoals/>> (Accessed 20/11/2008).

¹⁷⁶ General Assembly Resolution S-26/2 of 27 July 2001.

¹⁷⁷ CESCR, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000).

¹⁷⁸ General Comment No. 14, para 11.

¹⁷⁹ General Comment No. 14, para 12.

however, as stated in the previous section, it is the view of the CESCR that a State has the obligation to work as “*expeditiously and effectively as possible*” to realise this right and that a State has a duty to take “*deliberate, concrete and targeted steps*” to ensure full realisation of the right.

In terms of the guarantees or elements that a State must satisfy to fulfil its obligations in terms of the right to health, General Comment No. 14 provides:

- The element of availability includes functioning public health and health care facilities, goods and services, as well as programmes in sufficient quantity;¹⁸⁰
- The element of accessibility includes health facilities, goods and services accessible to everyone, within the jurisdiction of the State Party. This element has four overlapping dimensions:
 - non-discrimination,
 - physical accessibility,
 - economical accessibility (affordability),
 - information accessibility;¹⁸¹
- The element of acceptability includes all health facilities, goods and services that must be respectful of medical ethics and culturally appropriate as well as sensitive to gender and life-cycle requirements,¹⁸²
- The final element of *quality* includes health facilities, goods and services that must be scientifically and medically appropriate and of good quality.¹⁸³

The right to health, like all economic, social and cultural rights, imposes on States Parties three types of obligations:

- The obligation to respect means States should not to interfere with the enjoyment of the right to health;¹⁸⁴
- The obligation to protect means States should ensure that third parties (non-state actors) do not infringe upon the enjoyment of the right to health.¹⁸⁵
- The obligation to fulfil means States should take positive steps to realise the right to health.¹⁸⁶

¹⁸⁰ General Comment No. 14, para 12 (a).

¹⁸¹ General Comment No. 14, para 12 (b).

¹⁸² General Comment No. 14, para 12 (c).

¹⁸³ General Comment No. 14, para 12 (d).

¹⁸⁴ General Comment No. 14, para 33.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

As stated earlier, the obligation to fulfil contains obligations to facilitate, provide and promote. The obligation to fulfil requires the State:

- To facilitate through positive measures that enable and assist individuals and communities to enjoy the right to health;
- To make provision for a specific right contained in the Covenant when individuals or a group are unable, for reasons beyond their control, to realise that right themselves by the means at their disposal;
- To promote public awareness as to the right and procedures for asserting and protecting the right, for example through human rights education, creating and publicising opportunities for participation and capacity building to enable meaningful participation.¹⁸⁷

The CESCR guidelines in terms of the violations of the right to health are particularly important to an analysis of the justiciability of the right. Hence the section III in General Comment No. 14 is discussed in more detail. There is a distinction between inability and unwillingness by a State Party to comply with article 12. A State that is unwilling to use the maximum of its resources to realise the right to health is in violation of article 12.¹⁸⁸ Retrogressive measures or acts in the form of a repeal or suspension that negatively affect the realisation of the right to health also constitute a violation of this right.¹⁸⁹ Thus, a failure to take steps to have a national policy or enact legislation towards realisation of the right to health is also a violation.¹⁹⁰

Violations of the obligation to respect include, for example, the denial of access to health services goods and facilities due to discrimination or the deliberate withholding or misrepresentation of information vital to health protection.¹⁹¹ Violations of the obligation to protect include, for example, failing to discourage the production, marketing and consumption of tobacco, narcotics and other harmful substances or the failing to protect consumers and workers from practices detrimental to health.¹⁹² Violations of obligation to fulfil include, for example, failure to reduce infant and maternal mortality rates or insufficient expenditure or

¹⁸⁷ General Comment No. 14, para 37.

¹⁸⁸ General Comment No. 14, para 47.

¹⁸⁹ General Comment No. 14, para 48.

¹⁹⁰ General Comment No. 14, para 49.

¹⁹¹ General Comment No. 14, para 50.

¹⁹² General Comment No. 14, para 51.

misallocation of public resources which results in a non-enjoyment of the right especially of the vulnerable and marginalised groups, such as children.¹⁹³

According to Fidler, as a result of the controversy of defining the terms of the right to health, the right has been seen largely as a right of access to health services.¹⁹⁴ Complete physical, mental, spiritual, and social well-being is apparently achievable through access to health services. In the literature, Leary distinguishes between the right to health, the right to healthcare and the right to health protection.¹⁹⁵ Each of these terms implies specific meanings and a distinctive interpretation is required for each term. According to Leary, the right to healthcare refers to health services whereas health protection refers to the underlying preconditions for health for example safe water, clean environment and adequate sanitation.¹⁹⁶ The right to health therefore entails freedoms in the form of protection from unauthorised medical experimentation and entitlements in the form of equality in the provision of healthcare services.

The term right to health and its alleged ambiguity is no different from other similar terminology in international law, for example “*the right to a fair trial*” and “*the right to association*.”¹⁹⁷ Leary says that the full meaning of these phrases is not clear from their short-hand expressions,¹⁹⁸ yet these phrases have become entrenched and acquired a generally accepted meaning through frequent use and elaboration.¹⁹⁹ This process of clarification is likely to continue with the result that the scope of the right to health will become still clearer in the future, for example through the development of regional and national case law.²⁰⁰ It is the only way the achievement of a right to health “*conducive to living a life in dignity*.”²⁰¹

4.2.1 Core Minimum Obligations; Maximum Resources and Progressive Realisation in terms of the Right to Health

¹⁹³ General Comment No. 14, para 52

¹⁹⁴ Fidler D.P. (2000) 302.

¹⁹⁵ Mahoney K. and Mahoney P. (1993) 484.

¹⁹⁶ Leary V. (1993) 12.

¹⁹⁷ Articles 14 and 22 of the ICCPR.

¹⁹⁸ This means that instead of saying *the right to the highest attainable standard of physical and mental health*, the shorter term *right to health* is used instead. In other words, the use of the shorter term should not be interpreted as ambiguous because the longer term is more specific and less ambiguous.

¹⁹⁹ Mahoney K. and Mahoney P. (1993) 485

²⁰⁰ See case discussion below.

²⁰¹ CESCR General Comment No. 14, para 1.

Tomaševski notes that it is widely acknowledged that the State has the responsibility of fulfilling the right to health of the population, but the contour of this responsibility is continuously debated depending on the different State practices.²⁰² Therefore, the assessment of a human right criterion has to be based on a shared understanding of the precise obligation of the State. This explains the need for core minimum content of the right to health.

The enforceability of the right to health took place in terms of the concept of “*core minimum*” obligations placed on States Parties that endure resource constraints and as a result of the use of the term “*progressive realisation*”. Donders *et al* spells out the meaning of the term “*core content*” (also known as the core minimum or core obligations), they state that the term:

*“is to be regarded as a useful means or instrument in helping to analyse and clarify the normative content of economic, social and cultural rights, which are deemed to be open-ended, with a view to assessing the conduct of States in this field in general and identifying violations in particular.”*²⁰³

CESCR General Comment No. 14 provides for core obligations that are of “*immediate effect*” and “*are non-derogable*.”²⁰⁴ Violations by a State Party of the core minimum obligations of the right to health cannot under any circumstances be justified.²⁰⁵

The General Comment reiterated what was said by the HRC in General Comment No. 3 that “*to the maximum resources*” includes international resources.²⁰⁶ Most of the well known international organisations have a role in the realisation of the right to health, including WHO, The International Labour Organization, the United Nations Development Programme, UNICEF, the United Nations Population Fund, the World Bank, regional development banks, the International Monetary Fund, the World Trade Organization and other relevant bodies within the United Nations system.²⁰⁷

²⁰² Eide *et al*, (1995) 128.

²⁰³ Donders Y and Volodin V (2007) 196.

²⁰⁴ General Comment No. 14, para 30 and 47 respectively.

²⁰⁵ *Ibid*.

²⁰⁶ General Comment No. 14, para 38.

²⁰⁷ General Comment No. 14, para 64.

Developed States should provide economic and technical assistance to developing States to enable them to fulfil their core obligations.²⁰⁸

The core minimum obligations of State parties as set out by the Committee in the General Comment are:

*“(a) to provide equal access to health facilities, goods and services to vulnerable and marginalised groups, (b) to provide access to food which is nutritionally adequate and safe to ensure freedom from hunger. (c) to ensure basic shelter, housing and sanitation, and an adequate supply of safe and potable water (d) in providing essential drugs, (e) a comprehensive national health strategy and plan...,”*²⁰⁹

*“(a) to ensuring reproductive maternal and child health-care, (b) in providing immunisation against the major infectious diseases, (c) of taking measures against epidemic and endemic diseases, (d) in providing education and access to information concerning the main problems in the community, and (e) in providing appropriate training for health personnel, including education and human rights.”*²¹⁰

5. CONCLUSION

Economic, social and cultural rights, in general, and the right to health specifically, are universal, fundamental and justiciable. The State together with the assistance of the international community holds the duty to uphold and implement these rights.

The right to health is an inclusive right. It is normally associated with access to healthcare and the building of clinics and hospitals. This is partly the case but the right to health extends further than just that. The right to health has two basic components: a right to healthcare and a right to healthy conditions (or preconditions). It includes a wide range of factors that can help us lead a healthy life. These factors include safe drinking water, adequate sanitation; safe food; adequate nutrition and housing. The right to health should be understood as a right to the enjoyment of a

²⁰⁸ General Comment No. 14, para 45.

²⁰⁹ General Comment No. 14, para 43.

²¹⁰ General Comment No. 14, para 44.

variety of facilities and conditions which the State is responsible for providing as being necessary for the attainment and maintenance of good health.

The right to health particularly protects vulnerable groups through the provision of certain freedoms. These freedoms include the right to be free from non-consensual medical treatment, such as medical experiments and research or forced sterilisation, and to be free from torture and other cruel, inhuman or degrading treatment or punishment. In addition, the right to health provide for access to the health services, goods and facilities, all of which must be provided without any discrimination. Non-discrimination is a key principle in human rights and is crucial to the enjoyment of the right to the highest attainable standard of health. This is clearly illustrated by the International Human Rights jurisprudence.

In the event of the State really being incapable of fulfilling its obligations due to economic problems, the responsibility will normally be placed the international community to provide economic and technical assistance and cooperation. Of course the determining as to the ability of the State will lie with the CESCR and other similar bodies. However, the imposition of economic sanctions on target States severely affects and can place a tremendous strain on the health of a population.²¹¹

²¹¹ See discussion in Chapter 3 on Sanctions.

CHAPTER 3: ECONOMIC SANCTIONS

1. INTRODUCTION

This Chapter will examine the international law relating to sanctions in general and economic sanctions in particular. It examines the impact of economic sanctions on the enjoyment of the right to health and its preconditions. This will be done by analysing factors such as the impact on economy as well as the healthcare system of the target State. In addition, the analysis on the impact on the population will necessitate looking at factors such as nutrition, mortality rates and access to medicine.

The previous Chapter established the scope and content of the right to health as an international human right and a similar analysis is required for economic sanctions. The challenges in this section are to keep the discussion about economic sanctions within the limits of this thesis as there is a hefty amount of literature on the subject. This thesis therefore also focuses on the classification of sanctions, the legal and political basis of economic sanctions and the impact in general on the enjoyment of the right health of the population of a target State.

Furthermore, certain improvements to the design and monitoring of economic sanctions are necessary and some recommendations are made in this regard. It will be argued that the *modus operandi* in respect of the imposition of economic sanctions resembles strategies of war. Therefore as my argument goes economic sanctions call for the application of International Humanitarian Law (IHL) principles, especially the rules of necessity, proportionality or reasonableness and the prohibition on the use of indiscriminate attacks. Additionally, within this section the concept of targeted sanctions are analysed as well. Another element which is discussed is the possible improvement of the design and monitoring of economic sanctions.

2. OVERVIEW OF SANCTIONS

The aim of economic sanctions is to prevent the exchange of goods, services or people across national borders, thereby isolating the target State from international commerce. It is used as an effort to alter the political behaviour of the target State, through economic and political means.

The imposition of sanctions dates back centuries.²¹² Sanctions were established by practice in the Napoleonic wars and came about through rules of Blockade and Contraband. A blockade meant that all shipments that were imported by the enemy State from 3rd party States could be blocked or intercepted by the State imposing the blockade. A State could declare “*Contraband of war*,” certain goods that it deemed to have an enemy destination and susceptible to military use also called “*complete contraband*.”²¹³ Some goods were declared “*conditional contraband*,” susceptible to military and civilian use.²¹⁴

These practices were later encompassed in early legal instruments, for example the Declaration Restricting Maritime Law, Paris of 16 April 1856, and the un-ratified Declaration concerning the Laws of Naval War, London, 26 February 1909.²¹⁵ A complete Blockade was imposed on Germany on 11 March 1915 after Germany declared the water surrounding the UK a war zone. Already these rules of contraband resembled the prohibition on import of dual purpose goods as was applied to Iraq until the second US invasion. These embargoes were some of the earlier indications of sanctions as a persuasive mechanism to enforce foreign policy goals.

One of the first examples of a successful threat of sanctions, in this early period, was the threat of economic sanctions that succeeded in resolving the border dispute between the Federal Republic of Yugoslavia (Yugoslavia) and Albania, in 1921.²¹⁶ The League of Nations (later to become the United Nations) issued the threat of

²¹² Wolcott L. (1997) 353

²¹³ Hufbauer G.C *et al.* 3.

²¹⁴ Hufbauer G.C. *et al* 3-4.

²¹⁵ Hufbauer G.C *et al.* 3. Available here , < <http://www.icrc.org/ihl.nsf/WebART/255-330020?OpenDocument> > (Accessed 02/04/2008).

²¹⁶ Other examples included arms embargo on Paraguay and Bolivia over the dispute relating to a place called Chaco. Both the US, not a member of the league at the time, and the league itself, placed an arms embargo on the two States.

economic sanctions to Yugoslavia if it continued to encroach on the border of Albania.²¹⁷ Yugoslavia withdrew from the border and cited the reason for the withdrawal as being “to avoid the dangerous consequences of non-acceptance.”²¹⁸ However, it was not until the end of the First World War (WW1) that States began to explore the notion of employing economic sanctions as a substitute to a purely military response for human rights abuses.²¹⁹

Sanctions do take on various forms and although the focus of this chapter is on economic sanctions, a brief description of most of the classes of sanctions is discussed here.

3. CLASSIFICATION OF SANCTIONS

There is no single clear definition of sanctions although the international community has called for the development of such a definition.²²⁰ An accurate definition of sanctions is difficult to articulate because sanctions are complex in form and in function.²²¹ For example, sanctions can take the form of limits on exports or imports, denials of fishing rights, restrictions on international finance and lending, denials of visas or aircraft landing rights, freezing or seizing another State's assets, or cutting off or reducing foreign aid, to name but a few.²²²

Sanctions are applied in the alternative or as complementary to other measures, and can be directed at States, organisations and individuals. In the light of the various forms and functions of sanctions, the search for a narrow definition of sanctions is an academic exercise which falls outside the scope of this thesis. To fulfil the aims of

²¹⁷ Vale P. (1979) 6. See also Hufbauer G. C *et al* (1990)17.

²¹⁸ Hufbauer G. C *et al* (1990)17.

²¹⁹ League of Nations Covenant under article 16 of the Covenant provides: If any Member should resort to war in disregard of its Covenants... it shall be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not. For the full version of the Covenant of the League of Nations and amendment of 1924 see, <<http://www.historicaldocuments.com/CovenantoftheLeagueofNations.htm>> (Accessed 20/08/2008).

²²⁰ Security Council Press Release SC/6845, 28th Meeting of 17 April 2000: *Clearer Definition, Tighter Targeting of UN Sanctions*, Accessible at <<http://www.globalpolicy.org/security/sanction/sanc6845.htm>> (Accessed 10/11/07).

²²¹ Gibson S. (1999) 166.

²²² *Ibid.*

this Chapter concerned with critiquing the impact of broad-based economic sanctions on the right to health, a broad definition of sanctions will suffice.

Sanctions can be defined as any foreign policy or legislation “*that is implemented against a target State to coerce the target State through the imposition of sanctions to change its international or national policies.*”²²³ Such offending policies run the spectrum from unlawful aggression or nuclear proliferation to the gross violation of human rights.²²⁴

Military sanctions may include arms embargoes or the termination of military assistance or training. These sanctions are also inherently targeted, as only the army and/or the police of the target State feel the impact. Diplomatic sanctions directly target the ruling elite of a target State: diplomats, political leaders and their close family may have their visas revoked and may be forbidden to participate in international bodies and organisations. The UN has implemented this kind of sanctions in States such as Libya and Sudan.²²⁵ Other steps towards diplomatic isolation include the withdrawal of diplomatic personnel and international organisations from the target State.

Travel sanctions can include both sanctions against the travel of certain individuals or groups and sanctions against certain kinds of air transport. The first kind is by nature targeted, as lists of people or groups of people are compiled who are not allowed to leave their State or at least not allowed to enter the states imposing the sanction. This type of ban has been imposed on whole governments, such as was imposed against members of the military junta in Sierra Leone in 1998, and also against non-governmental groups, such as the leaders of the National Union for the Total Independence of Angola (UNITA) in 1997. Bans on certain types of air travel include the current ban on taking off or landing of any aircraft owned, leased or

²²³ Italics my own.

²²⁴ As was applied against South Africa for Apartheid, SC Resolution 418 of 1977 imposed an arms embargo, although there were already two embargoes applied in Resolutions 181 and 182 of 1963 these were not compulsory as they were not adopted under Chapter VII of the UN Charter. See *A Brief Overview of Security Council Applied Sanctions: An informal background paper prepared by the United Nations Sanctions Secretariat, Department of Political Affairs*, available at <<http://www.un.org/doc/sc/committees/sanctions/overview.pdf>> (Accessed 15/11/07).

²²⁵ See Annexure A UN Sanctions Table.

operated by or on behalf of the Taliban, established by the SC Resolution 1267 (1999).²²⁶

Cultural and Sport sanctions have less of a negative impact than other forms of sanctions; however they can still have undesired results. The athletes of the target nation may be banned from international sports competitions, folk dancers, musicians and other artists may also be banned and restrictions may be placed on educational and tourist travel. This was also applied to the Apartheid State of South Africa.

Purely economic sanctions, including *trade sanctions* and *financial sanctions*, are also categories of sanctions and will form the focus of the later parts of this chapter. The categories referred to above, as well as other types of sanctions, can be imposed to serve one or more of the following functions:

- To destabilise the management and administration of the target State, for example, the long-standing US unilateral sanctions against Cuba.²²⁷
- To obstruct or block a military action, for example, sanctions against Italy for its unlawful occupation of Ethiopia²²⁸ or to force Iraq to withdraw from Kuwait in 1990;²²⁹
- To operate as a tool for conveying a message of disapproval of some State action.²³⁰ The message can relate to State interference with elections or electoral transitions or State sponsorship of terrorism, as was imposed on Afghanistan for its failure to respond to the demand for the hand-over Osama bin Laden.²³¹

²²⁶ See Annexure A UN Sanctions Table.

²²⁷ A unilateral trade embargo was imposed on Cuba by the US in 1960 and was subsequently amended by the Cuban Democracy Act of 1992 and the Helms-Burton Act of 1996. Frost M. (1979) *Collective Sanctions in International Relations: A Historical Overview of the Theory of Practice* at 15-16.

²²⁸ For a comprehensive discussion of the sanctions placed on Italy, see Frost M. (1979) 8.

²²⁹ SC Resolution 661 of 1990.

²³⁰ Gibson S. (1999) 167.

²³¹ Contained in para 13 of SC Resolution 1267 of 1999, by which it requested that the Taliban turn over Osama bin Laden, who is accused of terrorism, to the appropriate authorities, without further delay.

- To act as a part of a trade war such as that between China and US²³² or the weakening of the military potential of the targeted State, as was imposed on the Taliban government of Afghanistan by placing an arms embargo against the Taliban.²³³
- To be deployed in a commodity-specific form, by the creation of defensive export controls to support national security considerations. These forms of sanctions are commonly used to restrict the flow of nuclear weapons technology and also in statutory arms export controls; an example of this is the sanctions imposed on Iraq. As mentioned above, in Iraq, the SC established an export/import monitoring mechanism for dual-use items, such as chlorine.²³⁴
- To be imposed on a 3rd Party with no governmental capacity, an example of this being The National Union for the Total Independence of Angola (UNITA) in Angola.²³⁵
- To be imposed to protect an animal species as was imposed on Japan by the US for whaling of protected whale species.²³⁶

4. ECONOMIC SANCTIONS

Although all sanctions do have some economic component, for example an arms embargo includes the sale and purchase of arms, strictly speaking, an arms embargo is not an economic sanction. The word *economic* is defined as “*anything relating of or relating to the production, development, and management of material wealth, of a country, household, or business enterprise.*”²³⁷ Economic sanctions therefore restrict or limit the production, development and management processes.

²³² Pape R. (1997) 90.

²³³ SC Resolution 1333 of 2000.

²³⁴ SC Resolution 1051 of 1996. The concern behind the restriction of these products, like chlorine, are that they can be used as an ingredient in the production of biological weapons, although they are most commonly used in providing safe drinking water, hence the *dual-use* principle.

²³⁵ Comprehensive sanctions had been placed on UNITA in the years 1993-2000. Sanctions started with the organisation’s dispute with the national elections of 1991 that was supervised by the UN and later evolved into other human rights abuses.

²³⁶ American Society of International Law (2001) U.S. Sanctions against Japan for Whaling *The American Journal of International Law* Vol 95 No 1, 149-152.

²³⁷ Collins English Dictionary (2004).

There are two basic kinds of economic sanctions: trade sanctions and financial sanctions. On the one hand, trade sanctions restrict imports and exports to and from the target State. These restrictions can be comprehensive or broad-based in that they restrict the imports and exports of the majority of the goods and services of the State or they can be selective, only restricting export and import of certain goods. The later economic sanction is often connected with a trade dispute.

Financial sanctions, on the other hand, address monetary issues. These can include, blocking the assets of the target State held abroad, limiting access to financial markets and restricting loans and credit, restricting international transfer payments as well as restricting the sale and trade of property abroad.²³⁸ The freezing of development aid forms another component of this type of financial sanctions and is applied the most often in current sanctions regimes.²³⁹

Financial sanctions were applied during the Iran hostage crisis when the US froze all Iranian assets within the US and was able to use the release of assets as a bargaining chip during the hostage negotiations. A similar freeze of assets of the Iraqi elite took place, as part of the broad-based sanctions against Iraq. It was believed that this kind of sanctions, denying the regime of Saddam Hussein access to world financial markets, would partially retard the regime's ability to rebuild the military.²⁴⁰

The first attempt to freeze personal assets of the ruling elites occurred in May 1994 against members of the government that applied martial law in Haiti, after a *coup d'état*²⁴¹ took place in 1991.²⁴² Gibson states that the economic sanctions policy imposed on Haiti was not as successful as it only “strongly urged” States to freeze

²³⁸ Bossuyt M. (2000) *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights* available at < <http://www.globalpolicy.org/security/sanction/unreports/bossuyt.htm>> para 12 and 13, (Accessed 14/11/2007). See also Economic and Social Council at E/CN.4/Sub.2/2000/33.

²³⁹ Gibson *ibid* 233. According to Tomaševski cutting of government-to-government aid, where South Africa is the first and best known example is applied the most; see Tomaševski K (2000) 378.

²⁴⁰ Gibson S (1999) 232.

²⁴¹ A *coup d'état* involves the seizure of an existing government by unconstitutional or undemocratic means . It is also known as an overthrow of the government. It is sometimes accompanied by limited violence, as when the head of State is killed in the *coup*. A *coup d'état* involves relatively few members of the population, and these few frequently are military officers. Participants generally control strategic elements of the armed forces and police, and have the cooperation of at least some civilian and political leaders.

²⁴² The SC by its Resolution 917 of 1994, adopted on 6 May 1994, the SC imposed additional sanctions measures, including freezing the funds and financial resources of all officers of the Haitian military and their immediate families and those employed by or acting on behalf of them.

the personal assets of the Haitian elites, rather than making the action mandatory upon States.²⁴³

There is a substantial overlap between financial and trade sanctions, especially when applied comprehensively, since with their foreign assets frozen and access to new funds blocked, sanctioned States would be unable to pay for imports, and trade would suffer. Economic sanctions are problematic in this regard, firstly, because while used as a measure to maintain international peace and security they also impact directly on the realisation of international human rights. Secondly, they strengthen the argument, commonly offered by States to explain a State's non-compliance with its human rights obligations, that it lacks the resources to fulfil their obligations.²⁴⁴ Thirdly, economic sanctions cause macroeconomic shock and economic and social disruption on a scale that cannot be mitigated by humanitarian aid, and this affects the well-being of a population and can thus affect their enjoyment of the right to health.

4.1. Legal and Political Basis for Economic Sanctions

World politics is an important component of economic sanctions and in particular the political ideology of the sender State or international organisation such as the UN. Economic globalisation has resulted in a situation where economic sanctions are almost exclusively employed by developed market economies against weaker developing economies. There are various reasons for this revelation but the most important one is an active and indiscriminate economic sanctions foreign policy applied by the US. Economic sanctions are after all a political tool expressing the foreign policy of a sender State or international organisation.

4.1.1 United Nations and Security Council Sanctions

In general, the UN Charter makes provision for a system of collective security of States. The UN Charter, unlike the League of Nations Covenant which championed similar principles but confined it to acts of war, became the first international treaty to

²⁴³ Gibson S (1999) 232. Emphasis my own.

²⁴⁴ UN Charter, articles 39 and 40. See discussion of this problem in Chapter 2 of this thesis.

create and authorise the imposition of sanctions. Furthermore, the UN Charter establishes limitations on the threat or use of force by one State or group of States against the territorial integrity of another State advancing the use of sanctions rather than military force.²⁴⁵ For a comprehensive table of UN sanctions see Annexure A attached at the end of this thesis.

The limitations, referred to above, brought an end to the indiscriminate use of force that characterised wars pre WW1 and WW2. An initial step, before war can be contemplated, is a sanctions system regulated by international law.²⁴⁶ Measures short of war that served this purpose include the suspension of trade benefits, what we would today regard as trade or economic sanctions.²⁴⁷

Article 41 of the UN Charter provides that:

“The Security Council (SC) may decide what measures not involving the use of armed force, are to be employed to give effect to its decisions, and it may call upon the Members of the UN to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

The wording of article 41 gives the impression that the SC has an unlimited discretion as to the measures that it decides to impose.²⁴⁸ However this is not the case.

Article 24 of the UN Charter states that the SC is required to act in accordance with the Purposes and Principles of the United Nations. No act of the SC is exempt from scrutiny as to whether or not that act is in conformity with the Purposes and Principles of the United Nations. It is to some extent a limitation on the indiscriminate application of economic sanctions. Additionally, article 1.1 of the UN Charter places a further limitation on its application, as it requires that sanctions or other measures undertaken to maintain international peace and security must be

²⁴⁵ UN Charter, article 2 (4), Article 51 of the UN Charter provides an exception to this limitation in the event that the State wanting to use force should use it for self-defence. A discussion of the principle of necessity and proportionality is discussed below.

²⁴⁶ UN Charter, article 4.

²⁴⁷ Vázquez C. (2003) 798.

²⁴⁸ Through the use of the word *may* in the provision imply an express permission or unfettered discretion. See Collins English Dictionary: Express (2004) 246.

“effective” and be “in conformity with the principles of justice and international law.”²⁴⁹

Furthermore, the Article 1.1-limitation also applies to economic action taken by regional bodies. Their action must also be inconformity and effective. Economic sanctions can be done on their own or in consultation with the UN. There are, however, intrinsic limitations on the scope of sanctions that may be imposed by regional bodies or groups of States, for example Organisation of Petroleum Exporting Countries (OPEC),²⁵⁰ and by a single State that acts unilaterally²⁵¹. The limitation is demanded by article 52 of the UN Charter and mandates that regional arrangements as well as individual States must ensure that their sanctions are “consistent with the purposes and principles of the United Nations.”²⁵² This means that all principles that apply to the UN must also apply to regional bodies that impose sanctions internationally.

Economic measures are referred to as sanctions instead of countermeasures as this term has a military connotation.²⁵³ The SC may also call on members of the UN to apply sanctions.²⁵⁴ The prohibition or limitation on the threat or use of force left sanctions as among the most coercive of the available means for enforcing peace and security of all citizens across the world.

Chapter VII of the UN Charter foresees the possibility of imposing collective sanctions on individual States in the case of threats to peace, breaches of peace and acts of aggression.²⁵⁵ Sanctions, adopted through Chapter VII, are also called collective sanctions, as it requires all UN member States to respect and adhere to them.²⁵⁶ In general, the principle of State sovereignty is respected by the UN Charter regarding matters which are essentially within the domestic jurisdiction of a State.²⁵⁷ The imposition of collective sanctions is, however, a limitation of this State

²⁴⁹ Human Rights Sub-Commission Holds Annual Session NGLS Roundup, no. 61, September 2000, available at, <http://www.un-ngls.org/documents/text/roundup/61hrsc.txt> (Accessed 20/10/2008).

²⁵⁰ OPEC is a group of oil rich States that imposed an oil embargo upon States that supported Israel’s occupation of Palestine.

²⁵¹ UN Charter limitations will be discussed below.

²⁵² UN Charter, article 52.

²⁵³ Tomaševski K. (2000) 377.

²⁵⁴ UN Charter, article 41.

²⁵⁵ UN Charter Chapter VII, articles 39-51.

²⁵⁶ UN Charter article 41.

²⁵⁷ UN Charter, article 2.4.

sovereignty when the UN enforces any measures taken under Chapter VII of the Charter, as it seeks to undermine that State sovereignty.

The SC, which was established by article 23 of the UN Charter, is vested with the discharging of the duties laid down in Chapter VII.²⁵⁸ The use of mandatory sanctions is intended to apply pressure on a target State to comply with the objectives set by the Security Council without resorting to the use of force. Sanctions thus offer the Security Council an important instrument to enforce its decisions.

Between 1945 and 1999 there were 17 conclusive cases of economic sanctions imposed by either unilateral or collective sanctioning States and/or organisations for the purpose of combating human rights violations by the States.²⁵⁹ These cases are deemed conclusive as they resulted in the fulfilment of the goal of the sanctions, which is normally a change in regime or government of pre-sanctions.²⁶⁰ The proliferation of economic sanctions between the years 1990 to 2000 also called the “*sanctions decade*”²⁶¹ has hit the African continent the hardest, with no-less than 35 African States sanctioned for various reasons based on human rights abuses.²⁶² One might draw the conclusion that UN economic sanctions impact Africa the most.

4.1.2 Unilateral Sanctions imposed by the US

The US’s policy of imposing economic sanctions on States that violate human rights first started to get momentum when the US Congress enacted section 32 of Foreign Assistance Act (FAA) of 1961 which states that:

²⁵⁸ See permanent members of the SC include US, UK, Russia, France and China, available at <<http://www.un.org/sc/members.asp>> UN Charter article 24 provides: 1) 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. 2) In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII. 3) The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

²⁵⁹ Tomaševski K. (2000) 378-379.

²⁶⁰ Tomaševski K. (2000) 378.

²⁶¹ Kofi Anan, Secretary-General, *Reviews Lessons Learned During the Sanctions Decade* in remarks to International Peace Academy Seminar Press Release SG/SM/7360, Accessible at <<http://www.un.org/Docs/sc/committees/sanctions/sgstatement.htm>> (Accessed 15/11/07).

²⁶² Tomaševski K. (2000) 378.

“it is the sense of the Congress that the President should deny any ...military assistance to the government of any foreign country which practices the internment or imprisonment of that country’s citizens for political purposes.”²⁶³

In December 1974 following more than a year of hearings critical of the administration, US Congress, at the instigation of Congressman Donald Fraser, passed section 502B of the FAA which states that:

“it is the sense of the Congress that, except in extraordinary circumstances, the President shall substantially reduce or terminate security assistance to any government which engages in a consistent pattern of gross violations of internationally recognised human rights.”

The FAA, in terms of section 502B, defined gross violations as including torture or cruel, inhuman or degrading treatment or punishment; prolonged detention without charges; or other flagrant denials of the right to life, liberty, and the security of the person.

In 1978 Congress amended section 502B by deleting the words “*the policy of the United States,*” in effect made the section binding on the President. In compliance with sections 116(d) and 502B(b) of the FAA country reports on human rights practices are submitted annually by the US Department of State to the US Congress. The reports cover internationally recognised individual, civil, political, and worker rights, as set forth in the UNDHR. The reports also include the impact of the State or governments policies on the right to health.

A different component of the US law on sanctions is not based on US Aid but on what the President of the US deems to be threats or acts of aggression against the US. In 1976 the US enacted the National Emergencies Act (NEA)²⁶⁴ into their federal law to stop open-ended states of emergency and formalise congressional checks and balances on presidential emergency powers. The problem, at the time, was that many US constitutional protections are suspended during a state of

²⁶³ Underline emphasis my own.

²⁶⁴ 50 U.S.C. 1601-1651.

emergency including the right to habeas corpus,²⁶⁵ the right to a jury for members of the National Guard²⁶⁶ as well as the suspension of numerous statutory laws.²⁶⁷

The International Emergency Economic Power Act (IEEPA)²⁶⁸ falls under the provisions of the NEA. It authorises the President to declare the existence of an *“unusual and extraordinary threat, which has its source in whole or substantial part outside of the US to the national security, foreign policy, or economy of the US.”*²⁶⁹

The IEEPA gives US president powers to order the investigation, regulation, or prohibition on all commerce with the sanctioned individual or State subject to the jurisdiction of the United States.²⁷⁰ The sanctions apply to all US persons and entities including companies, non-profit groups, government agencies etc., regardless of where they are located.

The Office of Foreign Assets Control (OFAC) of the US Department of the Treasury administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign States, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction. OFAC acts under Presidential wartime and national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze foreign assets under US jurisdiction. Many of the sanctions are based on United Nations and other international mandates, are multilateral in scope, and involve close cooperation with allied governments.²⁷¹ For a comprehensive table on US sanctions see Annexure B attached at the end of this thesis.

Following its military debacle in Somalia, the US has often opted for sanctions rather than military intervention when aiming to pursued target States to end its human rights abuses.²⁷² Garfield writes that between 1993 and 1996, 35 new sanctions

²⁶⁵ Article 1 (9).

²⁶⁶ 5th Amendment of the Bill of Rights.

²⁶⁷ Harold C. R (2005) *Martial Law and National Emergency*, CRS Report for Congress, see also < <http://www.Fas.org/sgp/crs/RS21024.pdf> > (Accessed 03/10/2008).

²⁶⁸ 50 U.S.C. §§ 1701-1707.

²⁶⁹ IEEPA section 1701.

²⁷⁰ Title 50 Section 1702 a (1) A-B.

²⁷¹ See < <http://www.us-treas.gov/offices/enforcement/ofac/> > (Accessed 01/10/2008).

²⁷² Lieutenant Colonel Frank G. Hoffman (January 2004), *One Decade Later -- Debacle in Somalia*,

regimes were initiated by the US. For a list of past US sanctions see Annexure C as well as a list of categories of US sanctions see Annexure D attached at the end of this thesis. By 1997, US sanctions of some sort were in force against more than 50 countries containing 68 per cent of the world's population. Most of these limit commercial relations or military cooperation.²⁷³ These statistics as well as the US's position as global economic leader meant that it played and continues to play a vital role in the politics of economic sanctions. A change to the US foreign policy towards making economic sanctions more effective might therefore have a ripple effect through the wider international community.

In this regard, Wolcott states that the

“U.S. Government, more adept than other countries in utilizing economic sanctions, is still not organized to deal adequately with sanctions or non-military policies. Several weaknesses were identified, including: 1) lack of a mechanism for contingency planning, so that sanctions might be readily applied should a country on the brink of security violations step across the threshold; 2) a bureaucratic structure that greatly hampers decision making and implementation; and 3) a glut of sanctions expertise, especially in the communications and transportation arenas.”²⁷⁴

A rethinking of the US sanctions policy is highly necessary to combat the long term impact of economic sanctions on the human rights. Furthermore, regulation of the impact of economic sanctions will need to come from other international organisations, such as the World Trade Organisation (WTO) as case in point, as a body already fulfilling a similar function in international trade law. The WTO would be suitable in this role because regulation cannot come from the UN or individual States because of their involvement in the institution of sanctions.

< http://www.military.com/NewContent/0,13190,NI_Somalia_0104,00.html > (Accessed 12/09/2008).

²⁷³ Garfield R (1999) 4.

²⁷⁴ Wolcott L.K. (1997) 7.

4.1.3 Political Basis for Economic Sanctions

Economic sanctions are foreign policy measures. A foreign policy maker needs to establish which foreign policy is necessary to each foreign event. An analysis of the success and failure of foreign policy is very important to persuade a foreign policy maker to use alternative policies. The key to an answer as to whether economic sanctions programme is a success or failure is not simple. The question entails various interrelated questions that need to be addressed before one can come to a conclusion.

In 2000 Baldwin wrote a very good analysis of this question.²⁷⁵ He states each policy maker has policy problems as there are not enough resources to cope with all problems.²⁷⁶ Thus, a policy maker needs ways to compare alternative courses of action of using scarce resources. The question of success or failure may give foreign policy makers the necessary relevant knowledge to make good foreign policy decisions.

The first element of success is the effectiveness of the foreign policy. Most foreign policies are goal-oriented. Therefore evaluating effectiveness in accomplishing goals is a necessary, but not sufficient, ingredient in estimating success.²⁷⁷ Baldwin uses the US Persian Gulf War as an example of the inefficiency of using this evaluation alone, he states that:

“that during the Persian Gulf crisis, the goal of US foreign policy makers was not solely to force Saddam Hussein to withdraw from Kuwait. Additional goals included restoring the government of Kuwait, minimizing damage to Kuwait, discouraging Israeli intervention, encouraging United Nations support, reassuring potential allies that the United States was determined but not trigger-happy, discouraging other potential aggressors from trying to emulate Iraq’s behaviour, and so on. These various goals and targets were not equally important, but neither were they trivial enough to justify ignoring them. ‘Winning the war’ is an oversimplification of the goals of any war, and

²⁷⁵ Baldwin D.A. “Success and Failure in Foreign Policy” (2000) vol 3 *Annual Review of Political Science*, 167-182.

²⁷⁶ Baldwin D.A (2000) 170.

²⁷⁷ Baldwin D.A (2000) 173.

*‘achieving the primary goal’ is an equally misleading way to define the success of economic sanctions.*²⁷⁸

Further elements that must be taken in account in assessing the success or failure of economic sanctions include: the cost incurred by the sender State as well as the cost incurred by the target State;²⁷⁹ the stakes for the sender, for example

*“detering the Soviet Union from launching nuclear missiles at the United States was probably a relatively easy task, although the stakes were very high for the United States. By comparison, getting South Africa or Rhodesia to change the way their societies were governed was relatively difficult, even though the stakes were lower for the United States. Other things being equal, the more difficult the undertaking, the more valuable is the achievement.”*²⁸⁰

The second important element that should determine success or failure of foreign policy is the *comparable or alternative* measure.²⁸¹ It is unlikely that the US economic policies will change in the near future because they are seen as the global leader and economic sanctions sends a clear message of disapproval of the destructive actions or policies of the target State. The main alternative to economic sanctions is military force. Annual defence spending by the US approaches \$300 billion while spending on non-military measures including economic sanctions, the State Department, United Nations etc, is less than \$10 billion.²⁸² The cost of military intervention far outweighs the cost of economic sanctions despite the fact that it does have an effect on the domestic businesses of the sender State; the cost of military action dwarfs that of economic sanctions. The US also has a general sanctions policy for various matters such as terrorism and trafficking. For a table of these sanctions see Annexure E attached at the end of this thesis.

In order to establish whether economic sanctions, as imposed against South Africa and Iraq, were a success or a failure, the balancing of the above elements are necessary. Various questions must be asked, including establishing the

²⁷⁸ *Ibid.*

²⁷⁹ Baldwin D.A. (2000) 173-174.

²⁸⁰ *Ibid.*

²⁸¹ Italics my own.

²⁸² Baldwin D.A. (2000) 179.

effectiveness of the policy, the goals and targets of the policy, the cost of the policy, and the alternative policies.

5. THE SHORT TERM IMPACT OF ECONOMIC SANCTIONS ON THE RIGHT TO HEALTH

Comprehensive economic sanctions undoubtedly adversely impact on the enforcement of international human rights.²⁸³ A factor that must be mentioned is that it is in most cases difficult to distinguish between the impacts of economic sanctions on the one hand, from other factors such as war, poverty and unjust government action on the other. The globalisation of economies has meant that broad-based economic sanctions do have serious repercussions for the economic development of a State and this also impacts on the welfare of the population.

The CESCR has stated, in this regard, that:

*“economic sanctions cause a significant disruption in the distribution of food, pharmaceutical and sanitation supplies, it jeopardises the quality of food and the availability of clean drinking water, it severely interferes with the functioning of basic health and education systems, and undermines the right to work.”*²⁸⁴

The Sub-Commission on the Promotion and Protection of Human Rights was the main subsidiary body of the United Nations Commission on Human Rights. With the dissolution of the Commission on Human Rights and its replacement by the Human Rights Council in 2006, responsibility for the Sub-Commission passed from the former to the latter. Its primary mandate is described as:

*“To undertake studies, particularly in the light of the Universal Declaration of Human Rights, and to make recommendations to the Commission concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities.”*²⁸⁵

²⁸³ See generally Bossuyt M. (2000) *The Adverse Consequences of Economic Sanctions on the enjoyment of Human Rights*: Working paper for the Sub-Commission on the Promotion and Protection of Human Rights, Available at <<http://www.globalpolicy.org/security/sanction/unreports/bossuyt.htm>> (Accessed 12 04/07).

²⁸⁴ CESCR General Comment No. 8 (1997) para 3.

²⁸⁵ See Sub-Commission on the Promotion and Protection of Human Rights available at,

It is composed of 26 human rights experts, each with an alternate and each elected for a term of four years, with half of the posts up for election every two years.²⁸⁶

The Sub-Commission on the Promotion and Protection of Human Rights has also recognised the adverse consequences of economic sanctions on human rights.²⁸⁷ In addition physicians, who have travelled to nations affected by broad-based economic sanctions, reported that suffering is caused by the lack of medical supplies and/or other basic health-related resources.²⁸⁸

As stated previously, the right to health is multi-faceted and thus many factors have an impact on the enjoyment of the right. This can be a complex analysis and therefore to abide by the constraints of this thesis an in-depth discussion is not the aim. The aim is to give the reader an understanding of the impacts that can occur when economic sanctions are imposed. To analyse the impact of economic sanctions on the right to health references are made to the analysis of case studies.²⁸⁹ These case studies give the ability to establish the impact on the economy as well as the health system of the target States involved.

5.1 Impact on the Economy and Health System of the Target State

A military coup ousted Haitian President Aristide in September 1991 and economic sanctions were applied by the Organisation of American States (OAS) and the US. This embargo was supported by the UN General Assembly Resolution 46/7 of 11 October 1991, supporting the OAS' call for sanctions, and stipulating that there were to be no relations with the *de facto* government.²⁹⁰ The embargo included all Haitian exports. This had a direct impact on the informal sector affecting garment, electronic, sports, and toy assembly industries and accounting for 29 780 job losses.²⁹¹ In addition, it had impacted on the formal industries as well accounting for

< <http://www.unhchr.ch/html/menu2/2/sc.htm> > (18/11/2008).

²⁸⁶ See Sub-Commission on the Promotion and Protection of Human Rights available at,

< <http://www.unhchr.ch/html/menu2/2/sc.htm> > (18/11/2008).

²⁸⁷ Sub-Commission on Human Rights: *The Adverse Consequences of Economic Sanctions on the enjoyment of Human Rights*, available at <<http://www.globalpolicy.org/security/sanction/unreports/bossuyt.htm>> (Accessed 08/09/07).

²⁸⁸ Morin K. and Miles S.H (2000) 158.

²⁸⁹ As done by R Garfield in 1995 in terms of a number of target State as well as Haiti in 1999.

²⁹⁰ Available here, <<http://www.un.org/documents/ga/res/46/a46r007.htm>> (Accessed 25/10/2008).

²⁹¹ Gibbons E and Garfield R (1999) 1499.

a loss of an estimate 200 000 jobs.²⁹² A quarter of a million of Haitians lost their principal source of income.

The embargo also resulted in a major rise in the price of imports. This resulted in shortages of fuel which meant that agricultural products could not reach the capital, where 30% of the Haitian population reside. Even though food imports were exempted their delivery was often delayed owing to the lack of vessels entering the Haitian ports.²⁹³ By August 1994 the embargo had prevented the export of \$15 million of coffee and cocoa, \$12 million of mangoes and \$14 million of essential oils. This resulted in a 30% decline in income per capita, while inflation rose to 138%.

The impact on the enjoyment of the right to health was severe. Limited access to clinical services and shortages of medicine and equipment frequently characterise less developed States. The shortage of transport meant the increase of all imports, including essential drugs, medical and humanitarian supplies.²⁹⁴ In 1993 basic medicine such as penicillin²⁹⁵ and intravenous fluids²⁹⁶ cost 3 times and acetaminophen²⁹⁷ and antihistamines²⁹⁸ 5 times what they in 1991.²⁹⁹ A shortage of kerosene and propane led to the collapse of the national cold chain for vaccine refrigeration; this combined with the closure of the main state hospitals resulted in a reduction of immunisation of children to 12% in 1993. This resulted in a measles epidemic from June 1991 to November 1993, 10% to 14% of these cases were fatal.³⁰⁰ The child mortality rate increased due to the lack of access to medicine and medical services.

Economic sanctions impose heavy economic shocks to trade as well as financial markets of the target State. In many target States, sanctions-related lack of capital has had more of an impact than direct restrictions on importing medicine or food. In

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ Gibbons E and Garfield R (1999) 1501.

²⁹⁵ Used to fight bacterial infections.

²⁹⁶ Used for feeding persons intravenously such as the Total Parenteral Nutrition (TPN) system or Dextran (a form of glucose).

²⁹⁷ Also known as Paracetamol.

²⁹⁸ Antihistamines are used as treatment for allergies.

²⁹⁹ Gibbons E and Garfield R (1999) 1501.

³⁰⁰ Gibbons E and Garfield R (1999) 1501.

some sanctioned States, including Cuba and Yugoslavia, direct prohibition on the purchase of medicines has existed.³⁰¹

Although affected countries routinely blame shortages of essential drugs, medical supplies, and surgical equipment almost entirely on economic sanctions. It has seldom been possible to demonstrate that prohibitions against purchase rather than a shortage of funds were responsible for the lack of these goods. To alleviate the impact of the lack of funds special attention should be given to Gross National Product per capita, the average household income as well as households below the poverty level. In addition, the focus should also be on the purchasing power of the average salary or minimum salary.

5.2 Impact on the Preconditions to health

As stated in Chapter 2, the right to health also includes the obligation on States to ensure conditions appropriate to good health. Health and healthcare services are dependent on functioning water, sanitation, available electricity as well as on functioning equipment, X-ray facilities and refrigerators to store vaccines. As the target State does not have budget for simple maintenance and procurement of equipment and spare parts the precondition to health cannot be maintained.

Economic sanctions are directly responsible a reduction of potable water and adequate sanitation. The reason for this is that economic sanctions cut off capital spending on spare parts for pump repairs and created scarcities in water purification products. Furthermore economic sanctions also retard the imports of these parts from foreign companies because the companies fear prosecution or that they will contravene the sanctions.

This was illustrated in Haiti where the percentage of potable water output declined from 30% to 50% during the first 18 months of the economic crisis and access to potable water declined from 53% in 1990 to 35% in 1994.³⁰² This meant that the

³⁰¹ Morin K. and Miles S.H (2000) 158.

³⁰² Gibbons E and Garfield R (1999) 1501.

population became reliant on *fecal* contaminated springs³⁰³ feeding the water supply system in Haiti.³⁰⁴

A weakened physical and medical infrastructure strained the capacity of a health system to respond to emergencies. Even when maternal mortality is low, reports of women delivering far from hospitals because of lack of ambulances due to a lack in engine parts is common. This is a direct consequence of the inability to import the needed parts. More women give birth without medical assistance or within a medical system lacking electricity, transportation facilities, or equipment and supplies for emergency interventions. In addition, shortages of medicines, inability to diagnose or treat common illnesses, and the functional loss of equipment due to lack of access to spare parts is also common.

5.3 Impact on Humanitarian Exemptions

The US embargo on Nicaragua exempted medical and relief supplies to be used for immediate relief of humanitarian needs.³⁰⁵ However, because of the ambiguity of the embargo law and fear of possible prosecution, many US firms refused to sell medicines or medical equipment intended for the Nicaragua population.³⁰⁶ Even if humanitarian exemptions of medicines were effective and this is normally not the case, the humanitarian efforts are not sufficient to maintain healthcare services and the health of the population.³⁰⁷

³⁰³ Failing home septic systems can allow fecal coliforms (bacteria) in the effluent to flow into the water table, aquifers, drainage ditches and nearby waters. Sewage connections that are connected to stormwater drainage pipes can also allow human sewage into surface waters. Large quantities of fecal coliform bacteria in water may indicate a higher risk of pathogens being present in the water. Some waterborne pathogenic diseases include ear infections, dysentery, typhoid fever, viral and bacterial gastroenteritis, and hepatitis A. The presence of fecal coliform tends to affect humans more than it does aquatic creatures.

³⁰⁴ Gibbons E and Garfield R (1999) 1501.

³⁰⁵ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua. v. U.S.*), Jurisdiction and Admissibility, 1984 ICJ REP. 392 June 27, 1986, was a case heard in 1986 by the International Court of Justice which ruled in favour of Nicaragua. As part of its judgment, the International Court of Justice awarded reparations to Nicaragua. The International Court of Justice found that the U.S. had violated international law by supporting Contra guerrillas in their war against the Nicaraguan government and by mining Nicaragua's harbours. The Court found in its legal verdict that the US was "in breach of its obligations under customary international law not to use force against another State," "not to intervene in its affairs," "not to violate its sovereignty," "not to interrupt peaceful maritime commerce," and "in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956."

³⁰⁶ Garfield R *et al* (1995) 458.

³⁰⁷ *Ibid.*

UN sanctions in one country excluded food and medical supplies, however, the availability of basic medications decreased by 50% because the raw materials needed to produce them could not be imported. Consequently, rates of typhus, measles, and tuberculosis were reported to have increased as well as a 30% increase in hospital mortality rate for other conditions and a 10% increase in overall mortality rate was also seen.³⁰⁸

Almost all economic sanctions legislation in recent decades has had a provision for exemptions for medicines and/or food. Nonetheless, economic sanctions commonly lead to limitations on the importation of medicines and foodstuffs due to disruption of commercial arrangements, complications in transportation, or lack of capital in the target State with which to purchase the exempted goods.³⁰⁹ Despite exemptions for medical goods, many companies producing equipment and medicines fail to fill orders from embargoed States for lack of ironclad assurances that the item indeed was exempted from the embargo.

5.4 Impact on the population of the Target State

Target States against which economic sanctions are applied report that malnutrition caused by high cost and shortage of food is often a leading cause of morbidity³¹⁰ and death among children.³¹¹ Furthermore, in four hospitals in one target State, infant malnutrition was reported to affect between 32% and 57% of hospitalised children.³¹² Infant malnutrition was compounded by the unavailability of infant formula and the malnutrition of the breastfeeding mothers. The chronically ill and the elderly are often overlooked as vulnerable groups however they are also in need of specialised medicines and treatments.³¹³ This group is particularly impacted by the increase of prices for medicine and reduction in access to medication.

³⁰⁸ Morin (2000) 158.

³⁰⁹ Garfield *op cit.*

³¹⁰ In medicine, epidemiology and actuarial science, the term morbidity can refer to: the state of poor health (from Latin *morbidus*: sick, unhealthy); the degree or severity of a health condition, the prevalence of a health condition: the total number of cases in a particular population at a particular point in time; the incidence of a disease: the number of new cases in a particular population during a particular period; disability, irrespective of cause (for instance, disability caused by accidents).

³¹¹ Morin (2000) 158.

³¹² Morin *op cit.*

³¹³ See discussion about impact on vulnerable groups in South Africa and Iraq in Chapter 4.

To compound things further, contaminated water and defective sewage resulted in waterborne diseases and this caused an increase in deaths due to cholera, typhoid, and gastroenteritis. These factors, taken together, led to a threefold increase in the child mortality rate of that target State.³¹⁴

5.5 Decrease in Infant Mortality rates

The infant mortality rate is an important measure of the well-being of infants, children, and pregnant women because it is associated with a variety of factors, such as maternal health, quality and access to medical care, socioeconomic conditions, and public health practices. There is an argument that infant mortality is not the best indicator for measuring the impact of economic sanctions on the right to health. The reason for the argument being that it is comparatively easy to concentrate scarce resources and healthcare on pregnant and lactating women and infants than on other groups of children. A State could easily have a policy to effectively apply the scarce resources to this group. Although there was a refocus of policy by Cuba and Haiti, this was not the case in Iraq where health policy and the medical profession was geared towards high-tech, hospital-based curative medicine.

Indeed, in Cuba, infant mortality actually declined under conditions of sanctions as a result of these measures.³¹⁵ Some of the factors associated with these good outcomes are a strong family doctor programme, food rationing, routine monitoring of weight and weight gain among pregnant women and a highly improved medical education system.³¹⁶ In Haiti a similar statistic was reported. The reported drop in infant mortality rate amounted to 38% during the sanctions.³¹⁷ Thus reports as to the reduction in infant mortality should not be the yardstick for assessing the impact of economic sanctions.

The short term impact of economic sanctions is inevitable and mostly cannot be avoided by the target State. However, the abovementioned short term effects should not be allowed to continue for long periods that lead to endemic devastation. The impact on health and the pre-conditions for health is tremendous if the long term

³¹⁴ Morin *op cit.*

³¹⁵ Garfield R. (1999) 13.

³¹⁶ *Ibid.*

³¹⁷ Gibbons E and Garfield R (1999) 1501.

impact is not addressed by the target State, NGO's and other international humanitarian organisations.³¹⁸ It is submitted that all parties involved in the design and monitoring of economic sanctions should respect basic principles of International Human Rights law as discussed in Chapter 2 as well as International Humanitarian Law (IHL) to achieve this minimisation.

The following section looks at some considerations that could assist in minimising the long term impact of economic sanctions on the enjoyment of the right health. In particular the section will give some suggestions on how to minimise the impact on the health system, general population as well as to prevent meaningless exemptions.

6. PRINCIPLES THAT COULD MINIMISE THE LONG TERM IMPACT OF ECONOMIC SANCTIONS ON THE ENJOYMENT OF THE RIGHT TO HEALTH

Some principles already established in international law could assist in the design and implementation of a sanctions programme. The idea being that they would lessen the impact on the population of the target State. Another means to minimise the impact on the health population is targeted sanctions which focus on the government elite perpetrating the human rights abuses rather than the general population. Furthermore, better monitoring of sanctions could also minimise the impact of sanction on the health of the population. The following section examines the viability of these possible solutions.

6.1 International Humanitarian Law

The general purpose of International Humanitarian Law (IHL) is to protect civilians and combatants during conflicts. One must remember that IHL is silent about the legitimacy of war itself.³¹⁹ It does not concern itself with the reasons for war but rather focuses on what should happen during war. This dimension of IHL, on the one hand, is also called the law of war (*jus ad bello or justice in war*) or the law of armed conflict.³²⁰ On the other hand, IHL is also concerned with the legitimacy of the resort

³¹⁸ The impact on the enjoyment of the right to health of South Africans and Iraqis is dealt with in more detail in Chapter 4.

³¹⁹ Although this is the case, the UN Charter provides in article 2(4) unjustified use of force is illegal and State must refrain from such measures. Article 51 of the UN Charter makes an exception to the rule against the use of force on the ground of self-defence.

³²⁰ Bouchet-Saulnier F. (2002) 187. See also *International Humanitarian Law in Brief*, available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/section_ihl_in_brief> (Accessed 12/11/2007).

to armed force, known as *jus ad bellum* (justice to war). Hence *jus in bello* concerns acceptable conduct in war and *jus ad bellum* concerns acceptable justifications to use armed force

The origin of IHL is found in ancient times.³²¹ Robert writes that the “*Greeks and Romans customarily observed certain humanitarian principles which have become fundamental rules of the contemporary laws of war.*”³²² IHL was established progressively through the practice of States during conflict and codified through treaties they adopted, normally after the resolution of the conflict.³²³ The works of Grotius has become known as the first systematic management of international law and in particular, IHL.³²⁴

IHL principles have an important role to fulfil with regards to the conduct of States in times of war and/or internal conflict. IHL principles can be implemented as a check and balance or limitation of economic sanctions. IHL principles, such as the prohibition on indiscriminate military action and proportionality regulate the impact of war on the parties involved. The principle of *distinction* directs those waging war to focus on military rather than civilian targets.

As stated earlier in this thesis the Inter-Agency Standing Committee³²⁵ had stressed that any sanctions regime “*must take fully into account international human rights instruments and humanitarian standards established by the Geneva Conventions.*”³²⁶

IHL principles can have an important role to fulfil with regards to the monitoring of

³²¹ Klob R (1998) 409-419, para 2, also available at <<http://www.icrc.org/web/eng/siteeng0.nsf/html/57JPg2>> (Accessed 12/11/2007).

³²² Robert A, and Guelff R. (1989) 2.

³²³ Bouchet-Sualier F. (2002) 187. In most instances these treaties are developed a particular experience after the time of the conflict. The First World War (WW1), which took place between 1914 and 1918, witnessed the use of new methods of warfare that were deployed on an unprecedented scale. These included poison gas, the first aerial bombardments and the capture of hundreds of thousands of prisoners of war. The treaties of 1925 and 1929 were a response to those developments. The Second World War (WW2), which took place between 1939 and 1945, saw civilians and military personnel killed in equal numbers, as against a ratio of 1:10 in the First World War. In 1949 the international community responded to those tragic figures, and more particularly to the terrible effects that the war had on civilians, by revising the Conventions then in force and adopting a new instrument: the Fourth Geneva Convention for the protection of civilians.

³²⁴ See also Hugo de Groot, *De Jure Belle ac Pacis, libr tres*, Paris 1625. Grotius (1583-1645) was a Dutch jurist and diplomat who strongly influenced the theory of law and the State, in general, and of international law, in particular.

³²⁵ The IAS Committee, established pursuant to General Assembly Resolution 46/182 of 19 December 1991, includes representatives of United Nations organisations and intergovernmental and non-governmental organisations active in humanitarian assistance operations.

³²⁶ The IAS Committee *Inter Agency Standing Committee Statement* (S/1998/147), dated 29 December 1997, accessible at < <http://daccessdds.un.org/doc/UNDOC/GEN/N98/040/86/PDF/N9804086.pdf?OpenElement> > (Accessed 27/03/2007).

sanctions. Accordingly, this section puts forward the argument that the imposition of economic sanctions resembles strategies of war.³²⁷ Consequently, economic sanctions call for the application of IHL principles, including the principles of necessity, proportionality and the prohibition on indiscriminate military action.³²⁸

6.1.1 Sources of International Humanitarian Law

The core sources of contemporary IHL are divided into two parts, named after its place of origin, also called Geneva law and Hague law. Geneva law is found in the four Geneva Conventions of 1949 and two Additional Protocols of 1977.³²⁹ The 1949 Conventions and Protocol I apply to international armed conflict, whereas, Common Article 3 of the 1949 Conventions, and Protocol II, apply to non-international armed conflict, known as internal or civil war. Additional Protocols I & II attempt to update and expand on the provisions relating to international conflict and civil conflict. The Hague law includes various treaties limiting production and use of certain weapons.³³⁰ The purpose of Geneva law is hence to protect those not, or no longer, taking part in hostilities, whereas, Hague law is to limit the methods and means of warfare adopted.

The International Committee of the Red Cross (ICRC) states in relation to the differences of IHL and IHRL that:

IHL aims to protect people who do not or are no longer are taking part in hostilities. The rules embodied in IHL impose duties on all parties to a conflict. Human rights, being tailored primarily for peacetime, apply to everyone. Their principal goal is to protect individuals from arbitrary

³²⁷ Kozal P. (2000) 394.

³²⁸ CESCR General Comment No. 8 (1997) para 6.

³²⁹ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 75 U.N.T.S. 31, *entered into force* Oct. 21, 1950; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949, 75 U.N.T.S. 85, *entered into force* Oct. 21, 1950; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950. Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950; See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978. For a General compilation of IHL instruments see Robert A, and Guelff R. (1989) *Documents of the Laws of War* 2ed: Clarendon Press. For a more recent list of IHL documents together with number of States parties are available at <<http://www.icrc.org/eng>> (Accessed 15/11/07).

³³⁰ See for example Declaration (IV,1), to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature. The Hague, 29 July 1899, and Declaration (IV,2) concerning Asphyxiating Gases. The Hague, 29 July 1899.

*behaviour by their own governments. Human rights law does not deal with the conduct of hostilities.*³³¹

The ICRC fulfils the function of promoter of IHL³³² and is determined to preserve its independence from the UN because of the UN's political nature.³³³ This resulted in an institutional separation between the UN as promoter of IHRL and the ICRC as promoter of IHL, in effect, further separating the development of two spheres of International Law.

With the addition of Protocol I and II the independence of IHL and IHRL became marginally blurred. Certain provisions of the Geneva Conventions of Protocols, for example article 75³³⁴ of Protocol I and Article 6³³⁵ of Protocol II, are derived directly from the International Covenant on Civil and Political Rights.³³⁶ This clearly illustrates that IHRL principles are applied to further the protection of individuals in times of war. In an analogous fashion, the same must be possible for arguing that IHL principles may be applied with regards to the interpretation of IHRL. In fact, nothing in international law prohibits such an application.

6.1.2 IHL Principles: Necessity and Proportionality and the Prohibition on Indiscriminate Action

In terms of IHL there are three traditional ways in which the legality of the use of armed force can be contested:

- Firstly, the use of force must be necessary in that the target must be linked to a specific military objective. Necessity is a component of self-defence and proscribes that any forceful action must be by means of last resort in all

³³¹ ICRC (2002) *International Humanitarian Law: Answers to your Questions*, accessible at <<http://www.icrc.org>> (Accessed 03/11/07).

³³² Statute of the ICRC article 5, available at <<http://www.icrc.org/web/eng/siteeng0.nsf/iwpList74/E1B071F72AF9BAB4C1256B66005C48D6>> (Accessed 17/11/07). Article 5(1) provides that: The ICRC shall maintain close contact with the National Societies. In agreement with them, it shall cooperate in matters of common concern, such as their preparation for action in times of armed conflict, respect for and development and ratification of the Geneva Conventions, and the dissemination of the Fundamental Principles and international humanitarian law.

³³³ Klob R. (1998) para 3.

³³⁴ Relates to the fundamental guarantees including the right to life, health, dignity and fair trial right of civilians in international armed conflicts.

³³⁵ Article 6 relates to the fair trial rights of civilians in non-international armed conflicts.

³³⁶ Roberts A and Guelff R. (1989) 388.

situations where States assert the right to use force unilaterally or collectively.³³⁷

- Secondly, the attack must not be disproportionate to the original attack or threat. Application of the principle of proportionality makes the monitoring of the use of force effective in that it ensures that the negative impact of the use of force on the State and its civilian population does not outweigh the goal; and
- Lastly, the attack must distinguish between military objectives and civilian impact and must not be aimed at spreading terror in civilian populations (indiscriminate action).³³⁸ Indiscriminate attacks are prohibited by the Protocol I of the Geneva Conventions.³³⁹

The principle of proportionality as well as the principle of necessity is well established in international law. In the ***Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V. United States of America)***³⁴⁰ the International Court of Justice (ICJ) held in relation to the principles of necessity and proportionality that the US activity in supporting rebels against the government of Nicaragua did not meet the criteria of necessity and proportionality. The Court said *“it could not find that the activities in question were undertaken in the light of necessity, and finds that some of them cannot be regarded as satisfying the criterion of proportionality....”*

The ICJ furthermore stated that:

“the general rule prohibiting force established in customary law allows for certain exceptions. The exception of the right of individual or collective self-defence is also, in the view of States, established in customary law, as is apparent for example from the terms of Article 51 of the United Nations Charter, which refers to an inherent right, and from the declaration in Resolution 2625 (XXV). The Parties, who consider the existence of this right to be established as a matter of customary international law, agree in holding

³³⁷ Gardam J. (2004) 6.

³³⁸ Bouchet-Sualier F. (2002) 241, words in brackets my own.

³³⁹ Protocol I articles 48 and 51.

³⁴⁰(Merits) Judgment. I.C.J. Reports 1986, p. 14 of 27 June 1986, available at

<<http://www.icj-cij.org/docket/index.php?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5>>

(Accessed 20/11/07).

*that whether the response to an attack is lawful depends on the observance of the criteria of necessity and the proportionality of the measures taken in self-defence.*³⁴¹

Focus of the analysis will be placed on the principle of proportionality because of value it can give to diminishing the impact of economic sanctions on the enjoyment of the right to health. However, the importance of the principle of necessity should not be neglected, I have assumed that sanctions as deterrence to gross human rights abuses can be a *necessary* action to convince a target State to change its conduct.

6.1.3 Proportional Economic Sanctions

The development of the principle of proportionality is linked to the growth over the centuries of the idea that civilians should be protected from the effects of warfare.³⁴² The underlying basis for this principle is different between *jus ad bellum* and *jus in bello*.

On the one hand, in relation to *jus ad bellum*, the principle of proportionality relates to self-defence, in that it seeks to minimise the disruption of international peace and security. This aspect of proportionality is centred on the level of destruction of the territory and infrastructure of the State; the overall collateral civilian damage and combatant casualties; and the impact of the use of force on third States.³⁴³ On the other hand, in *jus in bello* the principle of proportionality relates to the conduct of hostilities.³⁴⁴ The focus of this aspect of IHL is on the individual rather than the enemy State.³⁴⁵

In attempting to give context as to how the proportionality test should be applied, O'Connell mentions two central principles of the law of countermeasures (sanctions fall in this category): firstly, that *"they must be used only in appropriate circumstances"* (therefore they must be necessary) and must respond to a wrong,

³⁴¹ *Nicaragua v United States of America*, paras 187-201.

³⁴² Garham J. (2004) 14.

³⁴³ Gardam J. (2004) 17.

³⁴⁴ Roberts A. and Geulff R. (1989) 1.

³⁴⁵ Gardam J. (2004) 19.

and secondly, that “*they must be proportional to the injury suffered.*”³⁴⁶ Cannizzaro goes further, stating that “*proportionality requires not only employing the means appropriate to the aim chosen, but implies, above all, an assessment of the appropriateness of the aim itself.*”³⁴⁷

With this in mind the principle of proportionality is not without its problems. O’Connell says that:

*“the proportionality principle in humanitarian law also embraces a kind of exception. Proportionality requires weighing the amount of force needed between the military target and the cost to civilians. The proportionality principle permits escalating the amount of force used if the legitimate military objective cannot be obtained with less. Few would support the legality of escalating sanctions which are already considered inhumane.”*³⁴⁸

The principle of proportionality is not unique to IHL as it is also found, to a limited degree, in the field of IHRL. For example, in instances relating to states of emergency, the HRC has provided that the “*need for derogation from human rights norms must be demonstrably proportionate.*”³⁴⁹ In General Comment No. 27 the HRC applied the principle of proportionality to the interpretation of the right to freedom of movement in article 12 of the ICCPR. The HRC stated that a restrictive measure taken on the freedom of movement must be proportional to the interest that is protected.³⁵⁰

The HRC stated that the principle of proportionality will not be met “If an individual were prevented from leaving a country merely on the ground that he or she is the holder of ‘State secrets’, or if an individual were prevented from travelling internally without a specific permit. On the other hand, the conditions could be met by restrictions on access to military zones on national security grounds, or limitations on the freedom to settle in areas inhabited by indigenous or minorities’ communities.”³⁵¹

³⁴⁶ O’Connell M. (2002) 76.

³⁴⁷ Cannizzaro E. (2001) 903.

³⁴⁸ O’Connell M. (2002) 75.

³⁴⁹ HRC General Comment No. 29 *States of Emergency* CCPR/C/21/Rev.1/Add. of 2001. Accessible at <<http://www1.umn.edu/humanrts/gencomm/hrc29.html>> (Accessed 20/11/07). See article 4.

³⁵⁰ HRC General Comment No. 27, *Freedom of Movement* (Article 12 of ICCPR), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999). Accessible at, <<http://www1.umn.edu/humanrts/gencomm/hrcom27.htm>> (Accessed 20/11/07), para 11-16.

³⁵¹ HRC General Comment No. 27 para 16, available at

This is a clear indication of an acceptance of the use of the principle of proportionality in IHRL.

The proportionality test is also not unfamiliar in the domain of economic sanctions. The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts stipulates that "*countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.*"³⁵² The principle of proportionality was also alluded to by the CESCR when it stated:

*"in considering sanctions, it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of the country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country."*³⁵³

The principle of proportionality lends assistance to the evaluation of economic sanctions. The principle would serve to balance the impact on the enjoyment of the right to health and the other goals of the economic sanctions. The human rights approach would be to suspend economic sanctions if the impact on the minimum obligations of target State with regard to the right health is demonstrably disproportionate to the goal of the economic sanctions.

The application of the principle of proportionality is a step in the right direction to a proper conceptualised test which can be used to monitor the effectiveness of economic sanctions. One of the tests as to whether economic sanctions are successful is the effectiveness of the economic sanctions. The effectiveness will depend on the proportionality of the effect of the economic sanctions. If the proportionality or reasonableness test is applied correctly it can be a means to minimise the impact of economic sanctions. Apart from the IHL developments one of the other developments in the world of economic sanctions is targeted sanctions.

< <http://www1.umn.edu/humanrts/gencomm/hrcom27.htm> > (Accessed 25/11/08).

³⁵² Article 51 of the U.N. GAOR International Law Commission, 56th Session. Supp. No. 10, U.N. Doc. A/56/10 (2001).

³⁵³ CESCR General Comment No. 8, para 6.

6.2 Targeted Sanctions

Targeted sanctions are also called smart sanctions or designer sanctions.³⁵⁴ There are various forms of targeted economic sanctions. The first of these forms of targeted sanctions fall under the umbrella of financial sanctions.

Targeted economic sanctions focus on the political elite and incorporate principles of IHL and IHRL to assist the mechanism to become effective. They form another attempt to strike solely to the disadvantage of political elites, and are applied to freeze their foreign assets, but are often more difficult to enforce than economic sanctions covering all trade and financial issues. Financial sanctions require profound cooperation by the international community.³⁵⁵ Wolcott states that:

*“the greatest difficulty arises in the reluctance of countries to apply sanctions in the absence of a UN resolution. Aside from the United States, which enacted the International Emergency Economics Powers Act (IEEPA), no country has passed legislation permitting the freezing of foreign assets held within national borders.”*³⁵⁶

Another form of targeted sanctions is the idea of combining both economic sanctions and economic incentives to induce compliance with international norms. Also called the “*carrots and sticks*” approach, this kind of sanctions operates by giving incentives like financial aid that appeal to the specific target State. The aid is used as tool to incite change to the unwanted policies of the target State. Wolcott notes that incentives might “*assist when the norms of democracy and human rights are violated, but not with threats to international peace and security, which require diplomatic and military backing.*”³⁵⁷ For example, when the threat of the use of nuclear weapons arise the use of incentives will not be sufficient.

Gibson warns that this mechanism “*can only appropriately be used to encourage positive changes; using carrots for nations that have clearly violated international*

³⁵⁴ Cortright D. and Lopez G. (2000) 240.

³⁵⁵ Wolcott L. (1997) 363.

³⁵⁶ *Ibid.*

³⁵⁷ Wolcott L. (1997) 361.

*norms risks is sending the wrong message. ... incentives in this latter situation risk giving the appearance of rewarding wrongdoing.*³⁵⁸

The goal or function of targeted sanctions has changed the general application of economic sanctions from the target State as a whole to the government elite with a focus on the individual or group of individuals. This targeting is done through a form of individual lists. In this way targeted sanctions conform to the principle of IHL prohibiting indiscriminate attacks and apply the sanction to the specific individuals. Information as to the particular individual is obtained through most States, connected to the targeted State or expert panels.³⁵⁹ Cameron writes about the source of information of individuals that:

*“it is reasonable to assume that those States with economic and historical (former colonial) interests in particular target States have taken the lead in blacklisting. I have heard from various people that the main source of the names in UNITA travel and financial sanctions was the Angolan government.”*³⁶⁰

This category of targeted sanctions adopted, what I call, US unilateralism (“*you are either with us or against us!*”) in relation to the blacklisting procedure adopted after September 11th.³⁶¹ Cameron suggests that if blacklisting is to be maintained then there needs to be a national mechanism for appeal against wrongful blacklisting.³⁶²

An example of the difficulty to get delisted from so-called terrorist lists was illustrated by the delay in delisting of prominent ANC members. It was only in 2008 according to media reports that the United States government removed former President of South Africa, Nelson Mandela and other prominent ANC members such as Tokyo Sexwale and Sidney Mufamadi from its list of global terrorists.³⁶³ These individuals could until recently not enter the US without pre-authorisation as their application for visas would be rejected if they travelled to the US in their personal capacity.

³⁵⁸ Gibson S. (1999) 235.

³⁵⁹ Cameron I, *Targeted Sanctions and Legal Safeguards*, available at, <<http://resources.jur.uu.se/repository/5/PDF/staff/sanctions.pdf>> (Accessed 21/09/07), at pg 5.

³⁶⁰ Cameron I *op cit* 6.

³⁶¹ Cameron I *op cit* 14.

³⁶² Cameron I *op cit* 35.

³⁶³ Smith C. (10/08/2003) *Mandela's name comes off US terror list*, available at <http://www.iol.co.za/index.php?set_id=1&click_id=3&art_id=ct20030810102700522T600578> (07/10/2008).

To resolve the problems unfolding in the de-listing of individuals Bothe states that:

*“there must be a general normative standard for any measure affecting individual rights, the review measures must be based on reliable evidence...and the individual must have an effective remedy against such measures.”*³⁶⁴

Furthermore that:

*“the individual must be notified in an understandable way and must have an opportunity to appeal. The review body must be independent and impartial; must be able to review the measure and must play a really decisive role and must not merely be advisory in nature.”*³⁶⁵

Bothe goes further and suggests that this blacklisting procedure should be complemented by a review procedure based on the review panels of the World Bank and the dispute procedure of the WTO.³⁶⁶ How this can be complemented by a national mechanism, as suggested by Cameron, is difficult to conceptualise.

Targeted sanctions, in theory, to a large extent minimise the impact of economic sanctions. A different aspect of targeted sanctions that is procedural in nature, applies to the short-comings in relation to humanitarian exemption clauses implemented by the UN Sanctions Committees.

6.3 Appropriate Monitoring of Economic Sanctions

The SC establishes Sanctions Committees to monitor the implementation and effects of sanctions it has decided to impose on States. Sanctions Committees are named after the resolution imposing the sanction, for example Committee 661 monitors the sanctions on Iraq relating to SC Resolution 661 of 1990. The Committees are made up of a non-permanent member of the SC; the chairperson has a secretariat of seven staff members and forms part of the UN Department of Political Affairs. It

³⁶⁴ Bothe M. (2007) 5.

³⁶⁵ Bothe M. (2007) *op cit*.

³⁶⁶ Bothe M (2007) *op cit*, 6. Bothe summarises the essentials of this review procedure as including aspects like: a review of the listing decisions providing essential guarantees of fairness, namely: independence of the reviewing body; appropriate screening of review requests; effective and fair taking of evidence; speedy procedure; and publicity of the results of the procedure.

adopts its own rules of procedure and takes decisions by way of consensus of all the members.³⁶⁷

Sanctions Committees decide whether a product that is sanctioned can be exempt taking into consideration the commercial or humanitarian nature of the transaction or of the goods in question. The humanitarian goods excluded from sanctions, for example food and medical supplies intended strictly for medical purposes, are subject to a “*notification procedure*.”³⁶⁸ The notification procedure requires only a letter to be sent to the Sanctions Committee and an acknowledgement will be sent, by the President of the Sanctions Committee, to the party authorising the goods to be imported.³⁶⁹

Goods considered indispensable for the survival of the civilian population to operate, such as schools and hospitals, also known as goods that are “*humanitarian by destination*,” may also be exempt from the sanctions. These goods are subject to a “*non-objection procedure*.”³⁷⁰ Here the Sanctions Committee examines requests on a case-to-case basis. Only States, intergovernmental organisations, for example UN agencies, and the ICRC can make such requests. Non-governmental organisations (NGO’s) may only submit requests to the State where their headquarters are located. This means that the NGO has to submit a request to its appropriate ministry, which then submits the request to the ambassador to the UN, who finally submits the request to the relevant Sanctions Committee. The request is then open to objection from the members within a given period. If the period had expired and there were no objections the request may be authorised. Furthermore, if there are any objections the request will be refused without reasons.

Bouchet-Sualnier critiques this procedure of the Sanctions Committee, arguing that it leads to long delays and refusals that are not transparent because the meetings of the Sanctions Committees are held behind closed doors without minute taking and no justification is given for a refusal.³⁷¹ The CESCR also criticised the Sanctions Committees in calling for more transparent set of agreed principles and procedures

³⁶⁷ Bouchet-Sualnier F. (2002) 364.

³⁶⁸ *Ibid.*

³⁶⁹ Bouchet-Sualnier F. (2002) 365.

³⁷⁰ *Ibid.*

³⁷¹ *Ibid.*

based on human rights, wider range of exempt goods and services, authorisation of agreed agencies to determine necessary exemptions, better resources for Sanctions Committees, more precise targeting of the sanctioned regime, and a more overall flexibility.³⁷²

A possible answer to these criticisms can be found in interpreting the concept of humanitarian relief with regards to the role and structure of the Sanctions Committees in relation to sanctions. In general, the civilian population of States have the right to receive humanitarian assistance, subject to certain conditions. Firstly, the State allowing passage must be satisfied that there are no serious reasons for fearing that consignments may be diverted from their destination, that there is effective control over the operation, that no definite advantage may accrue to the military efforts or economy of the enemy and that distribution will be carried out under the supervision of the protecting power or the ICRC.³⁷³ Secondly and more particularly, the following relief must be allowed for:

*medical and hospital consignments and objects necessary for religious worship intended only for the civilian population and essential foodstuffs, clothing and tonics intended for children under 15, expectant mothers and maternity cases.*³⁷⁴

The CESCR states in relation to the normative content of Article 11 of the Covenant that:

*“States Parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political or economic pressure.”*³⁷⁵

From the above provisions one can see that goods that are subject to the notification procedure as well as goods that are considered indispensable for the survival of the civilian population by the Sanctions Committee may be regulated in terms of humanitarian law. These international norms may reduce the negative consequences of the Sanctions Committees procedures, namely, time delays in

³⁷² CESCR General Comment No 8 para 12.

³⁷³ Fourth Geneva Convention (IV), article 23 and Protocol I, article 70.

³⁷⁴ Geneva Convention (IV) article 23.

³⁷⁵ CESCR General Comment No. 12: *The right to adequate food*, E/C. 12/1999/5, 5 May 1999, para. 37.

granting notifications for humanitarian goods, as well as refusing to allow goods indispensable for the survival of the civilian population without any reasons being provided.

Geiss suggests a number of proposals to improve the Sanctions Committees procedure and efficiency with regards to the monitoring of targeted sanctions.³⁷⁶ He proposes the inclusion of automatic suspension clauses be included in the Resolution, and argues that:

“under article 27(3) of the UN Charter, the suspension or termination of a sanctions regime requires the consent of all five permanent Security Council members. In light of political realities, it is unrealistic to assume that the Security Council will always achieve the necessary consensus to adapt a sanctions regime with sufficient speed to respond effectively to a humanitarian crisis.”³⁷⁷

The clause will not only come into play automatically in the event of large scale humanitarian emergencies, but it will also give Sanctions Committees the opportunity to monitor the impact of the economic sanctions on the humanitarian situation and will give the Sanctions Committee the discretion to modify it appropriately.³⁷⁸

7. CONCLUSION

Economic sanctions can be a devious and destructive tool if used in the wrong way. When it is properly conceptualised the tool can be an alternative to war without the impact and loss of lives associated with war. A proper design of economic sanctions implemented against a target State must consider principles of IHL and IHRL.

These principles include the proportionality and necessity. The principles can be used as a mechanism to evaluate the effectiveness of economic sanctions. An example of a human rights approach is when the damage suffered as a result of sanctions can be kept to a minimum with the enforcement of the core minimum obligations as required for the enjoyment of the right to health. This would comply with the notion of respect for human rights required by the CESCR in relation to

³⁷⁶ Geiss R. (2005) 189.

³⁷⁷ Geiss R. (2005) 190.

³⁷⁸ Geiss R. (2005) 195.

economic, social and cultural rights.³⁷⁹ If the sanctioned State is not capable of fulfilling this obligation the international community must take this responsibility.³⁸⁰

It goes without saying that a reaction to gross violations of human rights may not justify economic sanctions to such an extent as to deprive the people of the necessary means of survival. The response to the violation of human rights, far from producing compliance, would in its turn worsen the situation of the people entitled to legal protection.³⁸¹

The concept of targeted sanctions considerably improves the situation but the same principles that are suggested to guide broad-based economic sanctions must be applied in the creation and implementation of targeted sanctions. This means that principles of necessity and proportionality derived from IHL and general principles of human rights must be extended to the design and implementation of targeted sanctions.

In conclusion some political considerations would need to be taken into account before the blanket implementation of economic sanctions:

- Any Resolution imposing economic sanctions should be drafted in clear language and specify in precise terms the behaviour expected of the target State so that it is clear what change in behaviour will result in lifting of the economic sanctions. This is important because prolonged economic sanctions have a significant potential for causing serious long-term damage to an economy and society of the target State. In addition the Resolution must be clear as to what products are exempted from the Resolution.

To facilitate the removal of ambiguity, the Resolution must state in clear terms categories of products excluded from the economic sanctions. Furthermore, the foreign companies must be given the assurance that they will not be prosecuted for non-compliance with the economic sanctions provided the

³⁷⁹ CESCR General Comment No. 8 paras 1 referring to articles 1, 55 and 56 of the UN Charter and 12 any sanctioning State or third party must take responsibility for a *more transparent set of agreed principles and procedures based on respect for human rights*.

³⁸⁰ CESCR General Comment No. 8 para 11.

³⁸¹ A closer examination of the Iraq situation will follow in Chapter 4.

traded products fall within these lists. Preferably these exempted lists should be communicated to all enforcing the economic sanctions. In particular, the list should be provided to military forces inspecting air, maritime and border cargoes.

- Before the implementation of economic sanctions consideration must be given to the nature of the international wrong or human rights abuses that economic sanctions are intended to remedy, in other words, what are the stakes for the targeted State as well as the sender of the sanctions. In this regard, it is important to note that the expression “threat to the peace, breach of the peace, or act of aggression” in article 39 of the UN Charter is broad enough to include serious violations of human rights where these constitute a threat to the peace. It may be that a stricter economic sanctions programme may be justifiable if the sanctions are imposed to contain or avoid an actual or threatened conflict instead of as a response to human rights violations.
- Another consideration is the likely effectiveness of the economic sanctions. The most obvious way of judging the effectiveness of economic sanctions is in terms of their capacity to alter the conduct of the target State. This is not the only measure of effectiveness; however, with consideration should also be given to the goal, targets as well as the alternatives of the sanctions regime. Consideration of other indicators of unsuccessful economic sanctions such as the cost or impact determined by mortality and morbidity rates should also be considered.
- Regard must also be had for the potentially destabilising and devastating long term effects of the economic sanctions. The stated objective or goal of economic sanctions is normally to alter the conduct of the target State. It is important to remember that a further tacit objective, or unintended consequence, of sanctions may be the change of the political infrastructure of the target State. In considering the severity of the economic sanctions, it is also necessary to take account of the fact that the sanctions may generate political instability, local tensions or violence and local hardships. Instead an alternative objective before the lifting of economic sanctions should be

considered. One such an alternative could be to bring the parties to the negotiation table.

In conclusion, certain international humanitarian law considerations must be given to the economic sanctions programme during its implementation of economic sanctions:

- The degree of suffering caused must be analysed on an ongoing basis. Indiscriminate economic sanctions must not be implemented by any State or international organisation. A well-designed economic sanctions programme would seek to affect those in power (and therefore in a position to effect change) in the target State, rather than the population at large.
- Humanitarian organisations should be mostly concerned with broad-based economic sanctions, as these have the greatest potential for inflicting suffering on the civilian population of the target State. It is self-evident that any comprehensive economic sanctions will affect the situation of the civilian population. In assessing economic sanctions, it is necessary to consider the degree of long term suffering they cause to vulnerable groups, particularly the young and the elderly. Automatic suspension clauses should come into effect if the impact on these groups is disproportionate to the objective.
- The objective or the aim of economic sanctions must not be disproportionate to the cost or impact incurred. The test for proportional economic sanctions should lie in the fulfilment of the core minimum obligations of the State. If it is found that the State had reasonably attempted to fulfil its core minimum obligations, however the economic impact still demonstrably limit the enjoyment of the basic human rights, economic sanctions should be halted or automatically suspended. The suspension should be made public in the same manner as the initial Resolution that imposed economic sanctions. This must be done even if it means that the desired result such as a change of the government is delayed.
- Economic sanctions should provide for humanitarian exceptions to limit the suffering caused among the civilian population. The system of humanitarian

exceptions provided for in the sanctions resolution must be effective. While proper implementation of economic sanctions will require the monitoring of goods shipped to the target State, it is essential to ensure that this does not undermine the humanitarian exemptions.

- An effective humanitarian exemption must not be overburdened by complex or time-consuming administrative requirements which would increase the cost of delivery of humanitarian assistance and delay its arrival. In this regard consideration of the pre-sanction GDP of the target State as well as budget for necessary departments such as health and education must be noted as an extreme shock to these budgets has ripple effects on the enforcement and enjoyment of these international human rights.
- Economic sanctions should recognise the capacity of States and humanitarian agencies to provide humanitarian assistance in times of armed conflict where permitted by IHL. If economic sanctions are likely to result in considerable hardship for the civilian population, a sanctions Resolution should require the provision of humanitarian assistance sufficient to ensure that the lives and health of the population are not endangered by the sanctions.
- The situation of the civilian population in the target State should be taken into account in the design of economic sanctions. The effects, long- as well as short-term, of the sanctions should be monitored during the implementation of economic sanctions.
- The reason for the imposition of sanctions and the likely effectiveness of a sanctions regime are two factors which must be considered in order to arrive at an intelligent and sustainable position in regard to sanctions. In particular, it is essential to bear in mind that under the UN Charter the options open to the SC when faced with a threat to the peace, breach of the peace or act of aggression are limited by the UN Charter and IHL and IHRL.

CHAPTER 4: SANCTIONS IMPOSED ON SOUTH AFRICA AND IRAQ

1. INTRODUCTION

Before analysing the effect that economic sanctions may have had on the population of South Africa³⁸² and Iraq, the difficulties of such an analysis must be acknowledged. In general, there exists no exact method for measuring precisely what damage was caused by sanctions as opposed to other factors. For example, the US led armed intervention in Northern Iraq of April 1991 (First Gulf War) had devastating economic effects on that region. There are clear difficulties with measuring exactly how much of the impact on the enjoyment of the right to health is attributable to economic sanctions alone. Nevertheless, the studies and reports cited in the previous Chapters strongly suggest that economic sanctions have had a direct impact on the enjoyment of the right to health of the population of these target States.

On the one hand the right to health includes basic elements normally associated with a healthcare system, such as the provision for: medical services in the event of sickness; the reduction of the still birth rate; the healthy development of the child as well as the prevention, reduction and control of epidemic and endemic diseases.³⁸³ On the other hand the right to health requires some preconditions conducive to good health that are not normally directly associated with the healthcare system, such as a clean environment and clean potable water. Economic sanctions can have a devastating impact on both these elements of the enjoyment of the right to health.

I will attempt to create an understanding of the economic issues relevant to each target State. In order to understand the ramifications of economic sanctions, the reader must understand the unique circumstances peculiar to each target State. A brief background of the: history, economy and political dynamics are necessary. This

³⁸² The government of Apartheid South Africa had created, through legislation and policy, artificial classifications of people into black, coloured, indian and white. It is necessary in this Chapter to refer to these classifications. However, I do not necessarily endorse the use of these terms.

³⁸³ According to article 12 (2)(a) and (c).

methodology is aimed at giving the reader a better understanding of the impact on the enjoyment of the right to health on the population of the particular target State. Furthermore, this Chapter entails an analysis of the sanctions programmes imposed on South Africa and Iraq and begins with a focus on the political conditions necessitating sanctions. In addition, it scrutinises the impact of the SC Resolutions that imposed sanctions, in general, as well as economic sanctions, in particular. It not only analyses collective action taken by the UN, but also unilateral action taken by individual States specifically the US. The Chapter concludes with a comparison of some of the salient similarities and differences between the two sanctions programmes.

2. THE REPUBLIC OF SOUTH AFRICA

The reason for including South Africa in this study is due to the lack of acknowledgement of the impact on the enjoyment of the rights of certain groups of South Africans. In addition, instead of the impact on South African the focus of the economic sanction programme on South Africa had been the success of economic sanctions based on the fact that a regime change took place.

For this reason the sanctions programme imposed on South Africa is commonly used as an example of the success of economic sanctions because it is credited with putting pressure on South Africa that supposedly led to the liberalisation of black South Africans.³⁸⁴ However, the devastating effect on South Africans due to economic sanctions was never acknowledged and never studied. This lack of acknowledgment and research stems from a lack of statistical analysis of the impact on the vulnerable groups of South Africa that ultimately bore the brunt of the economic sanctions.

Human rights abuses were perpetrated through the Apartheid policies and legislation of the government of South Africa. Apartheid marginalised all groups, even some white groups.³⁸⁵ There were, of course, a minority of white people who was against the Apartheid policies and thus economic sanctions must have also had an impact on all South Africans including whites. The impact that was suffered by the majority

³⁸⁴ See, for example, Garfield R (1999) 4.

³⁸⁵ The reference to the word “white” is explained later in this section.

of other groups falling in other races was much more devastating and hence the focus of this analysis.

The basic principle of Apartheid was that people be legally classified in racial groups based largely on appearance. The marginalisation entered all spheres of community life regardless of mode: social, cultural, economic, political and civil.

Politics, education, medical care and other public services were segregated according to race. The public services available to Black people were of the most inferior standard of all the race groups. Initially, the aim of the Apartheid was to maintain white domination while extending racial separation. The apartheid policy became so popular that in the 1960's, a plan of *Grand Apartheid* was executed, emphasising territorial separation and police repression.³⁸⁶

2.1 Political Conditions Necessitating Imposition of Sanctions

Apartheid legislation was extensive and thus not all the legislation will be discussed. References are made to some of the legislation passed by the then South African parliament. Apartheid legislation did not emerge in a vacuum. Precursors to Apartheid legislation included the Mines and Works Act, and permitted the granting of certificates of competency for a number of skilled mining occupations to whites and coloureds only.³⁸⁷

After winning the 1948 election the National Party (NP), under the leadership of Daniel Francois Malan, immediately implemented its Apartheid policy.³⁸⁸ The NP ensured the enactment of the first miscegenation legislation called the Prohibition of Mixed Marriages Act in 1949.³⁸⁹ This Act prohibited marriages between white people and members of other races. Race laws touched every aspect of social life, including education, land ownership, movement, employment, as well as health care.

³⁸⁶ The History of Apartheid in South Africa, available at < <http://www-cs-students.stanford.edu/~cale/cs201/apartheid.hist.html> > (Accessed 07/04/07). Apartheid or Political Apartheid is known as Grand Apartheid whereas segregation is known as Petty Apartheid.

³⁸⁷ Act No. 12 of 1911. Other such legislation included:-The Natives Land Act, No 27 of 1913 and the Natives (Urban Areas) Act 21 of 1923.

³⁸⁸ Segregation law that served as precursors to Apartheid legislation passed by the NP included: The Natives Land Act, No 27 of 1913 and the Natives (Urban Areas) Act 21 of 1923 and made it illegal for blacks to purchase land from white people in areas other than black reserves and the later laid the foundation for residential segregation in urban areas.

³⁸⁹ Act No 55 of 1949.

The Internal Security Act³⁹⁰ (ISA) conferred wide powers of detention without trial, banning of persons, organisations, gatherings as well as publications on the police.³⁹¹

The Public Safety Act³⁹² (PSA) enabled the declaration of a State of Emergency (SOE) granting even wider and more unbridled powers to the executive in South Africa. The Apartheid government declared partial SOE's in 1960 and 1985 and National SOE's in 1986, 1987, 1988 and 1989.³⁹³ The Public Safety Amendment Act³⁹⁴ (PSAA) enabled the declaration of unrest areas. The idea was the extension of SOE-type powers within specified areas without actually declaring a SOE. This was done to avoid the international repercussions in the form of economic sanctions for South Africa.³⁹⁵

As stated in the introduction of this Chapter all South Africans were racially classified into categories: white³⁹⁶ (of European decent), black (of African descent), coloured (of mixed descent) and indian (originating from India). In 1950 this classification was legislated by the South African parliament and named the Population Registration Act.³⁹⁷ The coloured category sometimes included major subgroups of Indians and Asians. Classification into these categories was based on appearance, social acceptance, and descent. For example, a white person was defined as in

³⁹⁰ Act No. 74 of 1982.

³⁹¹ The aftermath of the Rabie Commission of Inquiry, recommended the Act, providing for the following: banning of organisations, if the Minister had reason to believe than an organisation was using, encouraging, or threatening violence or disturbance in order to overthrow or challenge state authority or bring about change (sections 4 and 6); banning of publications; (sections 5 and 15) banning of people, including confinement to a particular district, prohibition from attending any kind of meeting and prevention from being quoted as well as providing for house arrest (sections 19(1) and 20); indefinite preventative detention and detention for interrogation (sections 28 and 29); in addition the detention could not be invalidated by a court of law (section 29(2)); detention of potential witnesses for not longer than six months or for the duration of a trial (section 31); empowerment of the Attorney-General to order that prisoners arrested be refused bail (section 30); prohibition of meetings (sections 46-53); redefinition of 'communism' to include campaigns of civil disobedience and creation of racial hostility between European and non-European races of the Republic (section 54); proscription of such activities as the promotion of 'general dislocation' or the causing of 'prejudice or interruption' to an industry or undertaking 'with the purpose of effecting social, political, constitutional, industrial or economic change' (section 54(2)); prohibition of actions causing, encouraging or fomenting feelings of hostility between different population groups (section 62).

³⁹² Act No. 3 of 1953.

³⁹³ The PSA was finally repealed by the State of Emergency Act No 86 of 1995.

³⁹⁴ Act No. 67 of 1986.

³⁹⁵ See discussion on UN Resolution 569 below.

³⁹⁶ Also included in this group was "honorary whites", which included individuals not from European decent but that received the honour from the South African government to be classified as white. The "honour" was bestowed on individuals dependent on the governments relationship with the individual's country of origin, an example of such individuals is Iranians.

³⁹⁷ Act No 30 of 1950.

appearance obviously a white person or generally accepted as a white person.³⁹⁸ A person could not be considered white if one of his or her parents were non-white. The determination that a person was white would take into account his or her habits, education, speech, deportment and demeanour. A black person would be of, or accepted as, a member of an African tribe or race, and a coloured person was one that was neither black nor white.³⁹⁹

The Group Areas Act⁴⁰⁰ forced physical segregation between races by creating different residential areas for different races. This led to removals of people living in the “wrong” areas.⁴⁰¹ The Bantu Homelands Citizenship Act⁴⁰² (later called the National States Citizenship Act) required that all South African blacks become citizens of one of the self-governing territories.⁴⁰³ The Bantu Homelands Citizenship Act was a denaturalisation law passed by the Apartheid government. It changed the status of the inhabitants of the make-shift States so that they were no longer citizens of South Africa. The introduction of the Act also ensured that the white population of South Africa would have its contact with the 'non-white' population reduced to a bare minimum. In 1970, Connie Mulder, the then South African Information and Interior Minister stated

*"no black person will eventually qualify (for South African nationality and the right to work or live in South Africa) because they will all be aliens, and as such, will only be able to occupy the houses bequeathed to them by their fathers, in the urban areas, by special permission of the Minister."*⁴⁰⁴

³⁹⁸ *Ibid.*

³⁹⁹ Other legislation included the Group Areas Act of 1950 which mandated clear separation of people according to their race and also amounted to forced removals in order to obtain separation and the Bantu Education Act No 47 of 1953.

⁴⁰⁰ Act No 30 of 1950.

⁴⁰¹ For example, the coloured community of District Six in Cape Town had to move to various places constructed by the Apartheid government for this reason.

⁴⁰² Act No 26 of 1970.

⁴⁰³ Some of the so-called Bantustans received independence. In South Africa these included Transkei, Venda, Bophuthatswana, and Ciskei (the so-called TBVC states) which were declared independent, while others (like KwaZulu, Lebowa, and QwaQwa), received partial autonomy, but were never granted independence. Transkei (Xhosa) declared independent on 26 October 1976, Bophuthatswana (Tswana) declared independent on 6 December 1977, Venda (Venda) declared independent on 13 September 1979, Ciskei (also Xhosa) declared independent on 4 December 1981, Gazankulu (Tsonga [Shangaan]), KaNgwane (Swazi), KwaNdebele (Ndebele), KwaZulu Zulu), Lebowa (Northern Sotho or Pedi) and QwaQwa (Southern Sotho). The Bantu Homelands Citizen Act was repealed by the Constitution of the Republic of South Africa Act No 200 of 1993.

⁴⁰⁴ See < <http://africanhistory.about.com/od/apartheidlaws/g/No26of70.htm> > and < <http://www.sowetofuntours.co.za/images/time10.pdf> > (Accessed 12/11/2008).

2.2 INTERNATIONAL REACTION

Through implementation of the Apartheid policy, South Africa had violated international law and the UN Charter. Apartheid had been denounced as unlawful and a criminal offence by the International Convention on the Suppression and Punishment of the Crime of Apartheid (Anti-Apartheid Convention)⁴⁰⁵ and unlawful according to the International Covenant on the Elimination of all Forms of Racial Discrimination (CERD).⁴⁰⁶ Apartheid had also been declared an “*international crime*” by the International Law Commission, the UN General Assembly and the Anti-Apartheid Convention.⁴⁰⁷

The Anti-Apartheid Convention also proclaims Apartheid to be a crime against humanity⁴⁰⁸ and expressly disposes of the principle of territoriality as an impediment to jurisdiction of the domestic courts.⁴⁰⁹ Furthermore the Anti-Apartheid Convention renders individuals criminally liable for the crime of Apartheid. Hence, members of organisations and institutions (not the organisation or institution itself), and representatives of the State (not the State itself) are culpable.⁴¹⁰

2.2.1 Security Council Resolutions and other Sanctions

The international community’s opposition to Apartheid was slow to develop, specifically because of South Africa’s strategic position in relation to trade routes around the Cape of Good Hope and because the country was a source of valuable essential minerals.⁴¹¹ The first international response came from the British Commonwealth. Ewins writes in this regard that:

⁴⁰⁵ Adopted and opened for signature and ratification by General Assembly Resolution 3068 (XXVIII) of 30 November 1973 entry into force 18 July 1976, in accordance with article XV. Available at < <http://www.unhchr.ch/html/menu3/b/11.htm> > (Accessed on 12/11/08).

⁴⁰⁶ See full citation in Chapter 2.

⁴⁰⁷ See Dugard J *Sanctions against South Africa: An international law perspective* 111, published in Orkin M (1989) *Sanctions against Apartheid*, Community Agency for Social Enquiry.

⁴⁰⁸ Article 1.

⁴⁰⁹ Article 5.

⁴¹⁰ Article 3.

⁴¹¹ Ewins R. (1995) *International Moves Against Apartheid*, available at < <http://www.speedysnail.com/textuary/apartheid.html> > (Accessed 12/11/07). See also *The Gleneagles Agreement on Sporting Contacts with South Africa*, the Commonwealth agreement that excludes South Africans from competing in international sport (1977) < <http://www.anc.org.za/ancdocs/history/commonwealth/gleneagles.html> > (Accessed 12/11/08).

“this expulsion from the Commonwealth was not entirely to the dislike of the Afrikaner-dominated National Party government, which spoke of freedom from the old colonial masters and outside domination.”⁴¹²

The first UN General Assembly Resolution that dealt with South African policy was taken in 1946 after an application by the government of India.⁴¹³ The UN was of the opinion that the treatment of Indians in the Union was not in compliance with international agreements concluded by the Indian and South African governments. The Conference of Independent African States, predecessor to the Organisation of African Unity (OAU), asked all African States to break off all diplomatic relations with South Africa and to institute a comprehensive trade, transport and communications boycott.⁴¹⁴

The request of the OAU spurred other organisations to follow suite and evolved in an international isolation and sanctions strategy against South Africa. The isolation was accomplished through the withdrawal from the Commonwealth in 1961, withdrawal from the Food and Agriculture Organisation (FAO) and the Universal Postal Union (UPU) in 1963. In addition, South Africa was forced to withdraw from the International Labour Organisation (ILO) and the WHO in 1964 and even the General Assembly of the UN in 1974.⁴¹⁵

The UN created a series of bodies specialising in dealing with the Apartheid policies of South Africa. The General Assembly established its Special Committee against Apartheid in 1962 and the UN Ad Hoc Working Group of Experts on Southern Africa was established by the HRC. The General Assembly also adopted the Anti-Apartheid Convention of 1973, as referred to above.

The Anti-Apartheid Convention illustrates the divide in the application of measures against South Africa in that no western industrialised State ever ratified it.⁴¹⁶ In the

⁴¹² Ewins R *ibid*.

⁴¹³ GA Resolution 44 (I) available here, < <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/032/95/IMG/NR003295.pdf?OpenElement> > (Accessed 12/12/2008).

⁴¹⁴ Tomaševski K. (2000) 49.

⁴¹⁵ *Ibid*.

⁴¹⁶ See Status of Ratifications, Reservations and Declarations, at < http://www.unhchr.ch/html/menu3/b/treaty8_esp.htm > (Assessed 12/11/08). Notable absentees are the United Kingdom and the US.

same year as the adoption of the Anti-Apartheid Convention, the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a Special Rapporteur on the Adverse Consequences for the Enjoyment of Human Rights of Political, Military, Economic and other Forms of Assistance Given to the Racist and Colonialist regime of South Africa.

The Pan Africanist Congress (PAC) a breakaway party of the African National Congress (ANC) organised a series of demonstrations against the pass laws.⁴¹⁷ On 21 March 1960, a large group of black people in Sharpeville demonstrated by not carrying their passes. A group of 300 police opened fire on the protesters. The shooting left 69 people dead and 187 people wounded. As a result of the unrest the government of South Africa declared a SOE. The emergency lasted for 156 days. Wielding the PSA and the Criminal Law Amendment Act, the White regime had no intention of changing the unjust laws of Apartheid.⁴¹⁸

The Sharpeville Massacre, as it became known, did elicit a response from the SC. In April 1960 the SC passed a Resolution calling for the end of Apartheid, however, the UK and France decided to abstain from this Resolution resulting in no substantial economic action from the SC.⁴¹⁹

Another important international issue was the occupation of South-West Africa (Namibia) by South Africa. The occupation was responsible for added international negative attention and the imposition of economic sanctions against South Africa. South Africa officially took possession of Namibia from Germany during WW1. After the war the Treaty of Versailles declared the territory to be a League of Nations

⁴¹⁷ The Natives Abolition of Passes and Co-ordination of Documents Act No 67 of 1952, forced black people to carry identification at all times. A pass included a photograph, details of place of origin, employment record, tax payments, and police encounters. It made it a criminal offence to be unable to produce a pass when required to do so by the police. A black person could not enter an urban area without a pass.

⁴¹⁸ The History of Apartheid in South Africa, available at < <http://www-cs-students.stanford.edu/~cale/cs201/apartheid.hist.html> > (Accessed 07/04/07).

⁴¹⁹ SC Resolution 134 (1960) available here, < <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/032/95/IMG/NR003295.pdf?OpenElement> > SC Resolution S/4300. On October 8, 1963 (the day the Rivonia trial began), Oliver Tambo addressed the UN General Assembly with these words: "I cannot believe that the United Nations can stand by calmly watching what I submit is genocide masquerading under the guise of a civilised dispensation of justice". Three days later, the General Assembly passed a Resolution, by a vote of 106 to 1 (South Africa), condemning the South African Government's apartheid policy and calling for the end of all political trials and the unconditional release of political prisoners. Britain, the US, France and Australia, however, abstained on the operative paragraph requesting the abandonment of the "arbitrary trial now in progress."

Protectorate. Subsequently, the territory was placed under the South African administration by the League.

After WW2, South Africa refused to release the territory to begin its transition to independence. At the time the territory was treated as a province of the Union of South Africa. On 21 October 1966 the UN General Assembly passed Resolution 2145 to terminate the mandate of South Africa and place Namibia under UN administration. This Resolution was upheld in the ICJ case, ***Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)***.⁴²⁰

The ultimate goal of sanctions against South Africa was an unconditional end to Apartheid policies as stated in the Resolutions imposed on South Africa. In 1962, the UN called for economic sanctions against South Africa. In particular, the General Assembly passed Resolution 1761 (XVII) and called on member States “*separately and collectively, in conformity with the UN Charter*” to break diplomatic relations with South Africa, to close ports to South African vessels, to forbid their own vessels to enter South African port, to boycott all South African goods and refrain from exporting to South Africa, and to suspend landing rights for South African aircrafts.⁴²¹ Again this Resolution was not mandatory and implementation was voluntary. As a result not all UN member States applied the Resolution.⁴²²

In 1963, as a direct result of the Sharpeville Massacre and the initial imprisonment of Nelson Mandela, the SC adopted two SC Resolutions: 181 of 1963 and 182 of 1963.⁴²³ These sanctions were, however, not adopted under Chapter VII of the UN Charter and therefore implementation by member States was also voluntary. Essentially Resolution 181 called on all States to voluntarily cease all shipments of arms to South Africa and Resolution 182 called on all States to proscribe shipments of equipment and material for arms manufacture.

⁴²⁰ Advisory Opinion, I.C.J. Reports 1971, p. 16. at 57.

⁴²¹ Article 4(a)-(e).

⁴²² Dugard J. *Sanctions against South Africa an international law perspective*, published in Orkin (1989) 118.

⁴²³ Resolution 181 S/5471 available at

< <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/200/55/IMG/NR020055.pdf?OpenElement> >

Resolution taken on 04 December 1963 as well as SC 182 S/5386 available at,

< <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/200/54/IMG/NR020054.pdf?OpenElement> >, the Resolution was taken on 07 August 1963.

The attention of the SC was again placed on South Africa due to the killings during the Soweto uprising of 1976-7 as well as the death of Steve Biko in police custody in 1977 and the consequent repressive police action in October 1977. In SC Resolution 417 the SC condemned the brutal action under South African security laws as well as other racial repression taking place in South Africa at the time.⁴²⁴ However, it was not until 4 November 1977, that the SC determined that the policies and actions of the South African government, together with the acquisition by South Africa of arms and related material, constituted a *“threat to the maintenance of international peace and security.”*⁴²⁵

Acting under Chapter VII of the UN Charter the SC adopted Resolution 418 of 1977.⁴²⁶ This Resolution imposed mandatory measures restricting arms and other military supplies to South Africa in terms of section 39 of the UN Charter. Furthermore, Resolution 418 called on all States to review all existing contractual arrangements with and licenses granted to South Africa relating to the manufacture and maintenance of arms, ammunition of all types and military equipment and vehicles, with a view to their termination.⁴²⁷ In addition the SC decided that all States should refrain from any cooperation with South Africa in the manufacture and development of nuclear weapons.⁴²⁸ With Resolution 473 of 1980 the SC called on the Sanctions Committee to redouble its efforts to secure full implementation of the arms embargo against South Africa by recommending measures to close all loopholes in the arms embargo.

The SC adopted a further Resolution against South Africa in 1984. Resolution 558 requested States to refrain from importing arms, ammunition of all types and military vehicles produced in South Africa. A further Resolution, SC Resolution 591 of 28 November 1986, adopted comprehensive measures recommended by the Sanctions Committee to close loopholes in the arms embargo, reinforcing it and making it more comprehensive.

⁴²⁴ SC Resolution 417 of 31 October 1977, available at, < <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/297/00/IMG/NR029700.pdf?OpenElement> >.

⁴²⁵ SC Resolution 418 of 1977.

⁴²⁶ Available at,

< <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/297/00/IMG/NR029700.pdf?OpenElement> >.

⁴²⁷ SC Resolution 418 of 1977, para 3.

⁴²⁸ SC Resolution 418 of 1977, para 4.

In 1985 in Resolution 569 the SC called for a lifting of the SOE and urged member States to adopt measures such as suspension of all new investments; prohibition of the sale of Kruger Rands; restriction of sports and cultural relations; suspension of guaranteed export loans; prohibition of all new contracts in the nuclear field; a prohibition of all sales of computer equipment that could be used by the South African army and police.⁴²⁹ However, as Dugard notes:

*“this Resolution was not preceded by a finding under article 39 (of the UN Charter) and was not binding on States. Subsequent attempts by some members of the SC to persuade the SC to impose mandatory economic sanctions were vetoed by Britain and the United States.”*⁴³⁰

In the same era other forms of collective sanctions were imposed on South Africa, most notably the oil embargo of 1973 imposed by the OPEC.⁴³¹ The embargo came after much negotiation between African States affiliated with OPEC and Arab States.⁴³² Iran a non-Arab State, however, refused to be part of the negotiations, and was seen by South Africa as a loophole to the embargo.⁴³³ This was followed by an oil embargo in 1985 by the European Economic Community (EEC). However this embargo was perceived as a constraint on the importation of oil rather than a barrier. European member States were still involved with the shipping of oil to South Africa claiming a loss of jobs would ensue if they refused to do so.⁴³⁴

A prominent feature of the Apartheid government of South Africa was its racial segregation of sporting activity within South Africa. In 1977, Commonwealth heads of government agreed, as part of their support for the international campaign against Apartheid, to discourage contact and competition between their sportsmen and women and sporting organisations, teams or individuals from South Africa.

The (Gleneagles) agreement was reached unanimously at Gleneagles in Scotland during the course of the biennial meeting of Commonwealth heads of government.⁴³⁵ Therefore sports and cultural boycotts by international sports organisations became

⁴²⁹ SC Resolution 418, para 6 (a)-(f).

⁴³⁰ Dugard J *Op cit* 117.

⁴³¹ The OPEC group States included, Nigeria, Gabon, Algeria, Libya, Ghana, Sierra Leone and Gambia.

⁴³² Kinghoffer A. (1989) 7. The Arab States included Saudi Arabia, Kuwait and Iraq.

⁴³³ *Ibid.*

⁴³⁴ Kinghoffer A. (1989) 8.

⁴³⁵ *The Gleneagles Agreement on Sporting Contacts with South Africa* (Commonwealth agreement on Apartheid in sport) 1977 < <http://www.anc.org.za/ancdocs/history/commonwealth/gleneagles.html> > (Accessed 12/11/08).

another form of defiance of the Apartheid policies. The sport boycotts began with the expulsion of South Africa from international table tennis in 1956. In addition, South Africa was excluded in 1964 and 1968 from Olympics by the Olympic Committee. and then expelled from the Olympic movement in 1972.⁴³⁶ South Africa was effectively banned from 90% of the international sport by the end of the 1980's.

Similar boycotts are recorded in the entertainment and artistic spheres. The UN kept lists of artists that performed in South Africa in defiance of the boycotts and published this list at regular intervals.⁴³⁷ These cultural boycotts although also demoralising, had a less devastating effect on the Apartheid government of South Africa.

The SC, acting under Chapter VII of the Charter of the United Nations, terminated the sanctions against South Africa on 25 May 1994, by its Resolution 919 of 1994, after the first democratically elected government was formed in South Africa. Although the General Assembly on numerous occasions recommended the imposition of economic sanctions on Apartheid South Africa, mandatory economic sanctions were never imposed on South Africa.

2.2.3 US Unilateral Sanctions

The US played an important role in the impact that sanctions had on South Africa. This section refers to some of the policy decisions taken by the US to derail other bodies like the UN from taking decisive economic action against South Africa. The initial US policy regarding Apartheid South Africa is summed up in the statement of the US representative to the UN, Francis T.P. Plimpton, who criticised the efficacy of economic sanctions against South Africa and stated that the US “*will continue to oppose*” specific sanctions.⁴³⁸ It signalled that western States were adopting an ambivalent approach to the abolition of Apartheid.

In 1964 the US decided to restrict Eximbank loans available to South Africa and used its influence in the International Monetary Fund (IMF) to convince the IMF to block

⁴³⁶ *Ibid.*

⁴³⁷ UN Centre against Apartheid: Notes and documents August 1988 *Register of Entertainers, Actors and Other who have performed in Apartheid South Africa.*

⁴³⁸ Case studies in Sanctions and Terrorism, available at < <http://www.iie.com/research/topics/sanctions/southafrica.cfm> > (Accessed 13/11/08)

the purchase of South African gold. This was a first step towards the imposition of economic sanctions against Apartheid South Africa by the US, although it was implemented through the IMF. At the instigation of the US the IMF refused to purchase gold at prices in excess of \$35 per ounce.⁴³⁹

Another step towards economic sanctions was taken on 22 February 1978 when the US administration under President Jimmy Carter issued regulations denying export and re-export of any item to South Africa or Namibia if the exporter “*knows or has reason to know*” the item will be “*sold to or used by or for*” the military or police in South Africa.⁴⁴⁰ In 1979 the US decided to reduce military personnel in Pretoria and South African personnel in Washington. These were positive steps but again, the action had almost no impact on the Apartheid policy exercised by the South African government. The Reagan administration continued to apply a so-called “*constructive engagement*” policy with no decisive economic action.⁴⁴¹

In the 1980’s the western States started placing economic pressure on South Africa. This action was not taken by the executive component of these States but through the legislative component over-ruling its executives.⁴⁴² The US Congress imposed comprehensive sanctions on South Africa on the 2nd of October 1986 and although President Reagan vetoed the Act his veto was overridden by Congress.⁴⁴³ The Comprehensive Anti-Apartheid Act (Anti Apartheid Act) of 1986⁴⁴⁴ was passed for the:

“purpose of a comprehensive and complete framework to guide the efforts of the United States in helping to bring an end to the Apartheid in South African and lead to an establishment of a non-racial, democratic form of government.”

McDougall’s summary of the Act states that it:

“bans imports into the US of textiles, agricultural products, iron and steel, coal, and uranium...as well as any article grown, produced, manufactured, marketed or otherwise exported by a parastatal organisation of South Africa

⁴³⁹ Hufbauer G.C (1990) 229.

⁴⁴⁰ Hufbauer G.C (1990) 228

⁴⁴¹ Bloom J (1986) 7.

⁴⁴² For example the Reagan administration believed in a *constructive engagement* with South Africa to induce gradual change, however, this achieved little.

⁴⁴³ Levy P. *Sanctions on South Africa: What did they do?*, available at <http://www.econ.yale.edu/growth_pdf/cdp796.pdf> (Accessed 08/05/07).

⁴⁴⁴ The Anti-Apartheid Act 22 U.S.C. §§ 5001-5116 (Supp. IV 1986).

*and Namibia. In addition it prohibits new investment in South Africa and new loans to the government or organisations controlled by the government and revokes US and South African landing rights and aircraft providing services to the government.*⁴⁴⁵

The Anti-Apartheid Act had a devastating effect on the South African economy because it shut down any prospect of economic growth. One of the main reasons for the decline in growth was disinvestment by US multinational companies doing business in South Africa.⁴⁴⁶ The US national and international foreign policy towards the Apartheid government of South Africa differed somewhat during this time. Even though the US enacted the Anti Apartheid Act, on 20 February 1987 the US, UK and West Germany still vetoed the SC Resolution calling for a package of mandatory sanctions.⁴⁴⁷

As stated above, one of the consequences of the Anti-Apartheid Act was the process of disinvestment. Disinvestment is a kind of economic sanction that require the withdrawal of foreign investment by international corporations.⁴⁴⁸ Various international corporations disinvested in their own corporations including Coca Cola, Exxon, Ford, IBM, etc. UNESCO estimated that of 1453 foreign companies in South Africa at the time, 520 disinvested and this meant that about R18 Billion worth of private capital was moved out of South Africa.⁴⁴⁹

The Sullivan Principles, introduced in 1977, consisted of seven requirements a corporation was to demand for its employees as a condition for doing business in South Africa.⁴⁵⁰ In general, the principles demanded the equal treatment of employees regardless of their race, both within and outside of the workplace. These demands directly conflicted with the Apartheid South African policies of racial segregation and unequal rights.

⁴⁴⁵ McDougall G. (1988) 20.

⁴⁴⁶ Ewins R *op cit* 7.

⁴⁴⁷ Hufbauer G.C. (1990) 229.

⁴⁴⁸ See Budlender D (1989) *Assessing US Corporate Disinvestment: The Case Report for the Equal Opportunity Foundation*, Community Agency for Social Enquiry.

⁴⁴⁹ Innes D *Multinational Companies and Disinvestment* 228; Published in Orkin M (1989) *Sanctions against Apartheid* Community Agency for Social Enquiry.

⁴⁵⁰ In 1977, Rev. Leon Sullivan, an African-American preacher, was a member of the board of General Motors. At the time, General Motors was one of the largest corporations in the United States. General Motors also happened to be the largest employer of blacks in South Africa, a country which was pursuing a harsh program of state-sanctioned racial segregation and discrimination targeted primarily at the country's indigenous black population. One principle was added in 1984.

The principles were:

- 1) non-segregation of the races in all eating, comfort, and work facilities;
- 2) equal and fair employment practices for all employees;
- 3) equal pay for all employees doing equal or comparable work for the same period of time;
- 4) initiation of and development of training programs that will prepare, in substantial numbers, blacks and other non-whites for supervisory, administrative, clerical, and technical jobs;
- 5) increasing the number of blacks and other non-whites in management and supervisory positions;
- 6) improving the quality of life for blacks and other non-whites outside the work environment in such areas as housing, transportation, school, recreation, and health facilities; and
- 7) working to eliminate laws and customs that impede social, economic, and political justice.⁴⁵¹

The Sullivan Principles were celebrated when introduced and gained wide use in the United States, particularly during the disinvestment campaign of the 1980s. Before the end of South Africa's Apartheid era, the principles were formally adopted by more than 125 US corporations that had operations in South Africa. Of those companies that formally adopted the principles, at least 100 completely withdrew their existing operations from South Africa.

Although international corporations withdrew from South Africa, in an attempt to comply with the Anti-Apartheid Act, they still maintained links and continued to benefit from the corporations that they sold their businesses to. An example of this was the agreement between IBM and ISM that entailed payment to the IBM Corporation to provide IBM products and services to the South African market. The agreement would be renewable after 3 years. A similar scenario took place with the disinvestment by General Motors (GM). Delta Motor Corporation was a South African car manufacturer, which was created through a management buy-out after General Motors (GM) divested from South Africa in 1986. The agreement entailed a continuation of the production of motor vehicles in South Africa under existing

⁴⁵¹ Added in 1984.

trademarks. The new Delta Corporation would then pay a licence fee to GM for use of their trade names such as Opel, Isuzu and Suzuki in South Africa. In 1997, GM acquired a 45 per cent stake in Delta, and in 2003 the company became a fully-owned subsidiary of General Motors South Africa again.⁴⁵²

2.3 IMPACT ON THE RIGHT TO HEALTH

The following section dealing with the impact on the right to health is divided into three sections, the first dealing with the economy and vulnerable groups, the second relates to the elements of the right to health and lastly the impact on the preconditions for health. All three sections related to the impact on the international right to health and the enjoyment thereof. For the purposes of this section the reference to “blacks” includes all groups not of European decent.

2.3.1 Impact of economic sanctions on vulnerable groups and the economy

The concept of human rights and vulnerable groups is not new.⁴⁵³ Any group that is open to injury or attack is vulnerable. The Apartheid government created extra vulnerable groups, which consisted of almost everyone other than the white group. Apartheid had an impact on all vulnerable groups regardless of race, such as women, children, the elderly, the disabled, people with HIV/AIDS, all these vulnerable groups deserve special attention in normal circumstances.

International human rights instruments to a large extent recognise the rights of these vulnerable groups.⁴⁵⁴ In addition, consideration before implementation of economic

⁴⁵² See the article published by the South African Department of Trade and Industry, available at < <http://www.thedti.gov.za/article/articleview.asp?current=1&artypeid=1&artid=358> > (Accessed 11/10/08).

⁴⁵³ Elisabeth Reichert (2006) *Human Rights and Vulnerable Groups*, available at, < http://www.sagepub.com/upm-data/11973_Chapter_5.pdf > (10/09/2008).

⁴⁵⁴ For example, the rights of children are protected in various international instruments including: The Declaration of the Rights of the Child, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959); The Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), entered into force February 12, 2002; The Geneva Declaration of the Rights of the Child of 1924, adopted Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924); The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49, Vol. III (2000), entered into force January 18, 2002; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182), 2133 U.N.T.S.161, entered into force Nov. 19, 2000. UNICEF, Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981; Optional Protocol to the Convention on the Elimination of All Forms of

sanctions should also be given to vulnerable groups specific to the targeted State. Treating these vulnerable groups in the same manner during the implementation of economic sanctions invariably perpetuates injustices. I attempt to focus to some extent on the vulnerable groups particular to the targeted State.

The impact of economic sanctions on the growth of the economy can be measured through an analysis of the Gross Domestic Product (GDP) of South Africa. A decline in GDP also amounts to a decrease of expenditure which then limits resources for

Discrimination against Women, G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), entered into force Dec. 22, 2000; Convention on the Political Rights of Women, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, entered into force Nov. 25, 2005; Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. res. 3318 (XXIX), 29 U.N. GAOR Supp. (No. 31) at 146, U.N. Doc. A/9631 (1974). Declaration on the Elimination of Violence Against Women, G.A. res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993); Beijing Declaration and Platform of Action, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995); Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action, G.A. Res. 23/10 (special session), U.N. Doc. A/RES/S-23/3 (Nov. 16, 2000); Follow-up to the 4th World Conference on Women and Full Implementation of the Beijing Declaration and Platform for Action and the Outcome of the 23rd special session of the General Assembly, G.A. Res. 60/140, U.N. Doc. A/RES/60/140 (Feb. 7, 2006); Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 521 U.N.T.S. 231, /entered into force/ Dec 9, 1964; Convention on the Nationality of Married Women, opened for signature and ratification by General Assembly resolution 1040 (XI) of 29 January 1957, entry into force 11 August 1958, in accordance with article 6; Convention against Transnational Organized Crime, G.A. res. 55/25, annex I, 55 U.N. GAOR Supp. (No. 49) at 44, U.N. Doc. A/45/49 (Vol. I) (2001); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, G.A. res. 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (Vol. I) (2001); Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, G.A. res. 55/25, annex III, 55 U.N. GAOR Supp. (No. 49) at 65, U.N. Doc. A/45/49 (Vol. I) (2001); Inter-American Convention on the Granting of Civil Rights to Women, 1438 U.N.T.S. 51, entered into force March 17, 1949; Inter-American Convention on the Granting of Political Rights of Women, 1438 U.N.T.S. 63, entered into force March 17, 1949; Inter-American Convention on the Nationality of Women, O.A.S. Treaty Series No. 4, 38, entered into force Aug. 29, 1934; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, 33 I.L.M. 1534 (1994), entered into force March 5, 1995 Declaration on the Rights of Mentally Retarded Persons, G.A. res. 2856 (XXVI), 26 U.N. GAOR Supp. (No. 29) at 93, U.N. Doc. A/8429 (1971). Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care, G.A. res. 46/119, 46 U.N. GAOR Supp. (No. 49) at 189, U.N. Doc. A/46/49 (1991); Declaration on the Rights of Disabled Persons, G.A. res. 3447 (XXX), 30 U.N. GAOR Supp. (No. 34) at 88, U.N. Doc. A/10034 (1975); Ad Hoc Comm. on a Comprehensive and Integral Int'l Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Draft Report, Annex II: Draft Convention on the Rights of Persons with Disabilities, U.N. Doc. A/AC.265/2006/L.6 (2006); International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008; First Optional Protocol to the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex II, U.N. GAOR, 61st Sess., Supp. No. 49, at 80, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008; Americans with Disabilities Act of 1990; International Guidelines on HIV/AIDS and Human Rights, U.N. C.H.R. res. 1997/33, U.N. Doc. E/CN.4/1997/150 (1997); A Declaration of Rights of Deaf-Blind Persons, in Conference of Hope: Proceedings of the First Historic Helen Keller World Conference on Services to Deaf-Blind Youths and Adults 91-92 (1977); Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities, AG/RES. 1608, 7 June 1999; Ad Hoc Comm. on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Draft Report, Annex II: Draft Convention on the Rights of Persons with Disabilities, U.N. Doc. A/AC.265/2006/L.6 (2006); United Nations Principles for Older Persons, G.A. res. 46/91, Annex, U.N. Doc. A/RES/46/91 (1991).

services such as the building of hospitals and procuring healthcare services. Levy explains the state of the South African economy in relation to the GDP at the time of implementation of stricter economic sanctions. He states:

*“the GDP of South Africa from 1940 to 1984 ran current account deficits in the order of 2 to 3 percent of GDP per year. This was offset by substantial capital inflows to the State, due to exports. The dependence on foreign capital left South Africa vulnerable to shifts in lending policies. One such shift occurred in the period of 1976-1980, when there was a net foreign capital outflow averaging 2.3 percent of GDP. This meant that by mid-1980’s the South Africa’s external debt was roughly \$24 Billion of which two thirds was short-term.”*⁴⁵⁵

The indebtedness was mainly caused by Apartheid and not economic sanctions.⁴⁵⁶ However, in 1985 due to economic sanctions bankers refused to loan money to the South African government.⁴⁵⁷ The downturn in the economy as well as the lack of access to loans meant that instead of having capital available for imports of medicine and medical equipment the government had to settle this short-term debt. Therefore, sanctions had a negative impact on resources available for health services in South Africa even without economic sanctions.

Although some countries broke links with South Africa, new links were forged by the South African government at an *“apartheid premium.”*⁴⁵⁸ The premium resulted in the reduction in prices of exports and the increase in prices of imports from the new trade partners. Furthermore, according to Ramphal the greatest impact on the economy of South Africa was as a result of the restriction on four commodity groups.⁴⁵⁹ South Africa’s exports were occupied in the following order: gold, coal, iron and steel and then uncut diamonds. Ramphal states that *“an export blockade of simply these four groups of commodities would cost South Africa almost two thirds of its total export earnings, a gold blockage on its own almost half of its earnings.”*⁴⁶⁰ In terms of imports he explains that *“three commodity groups would be relevant in the case of effective sanctions on South African imports: oil, capital goods and arms.”*

⁴⁵⁵ Levy P., *op cit* 5.

⁴⁵⁶ Orkin M. (1989) 28.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ Orkin M. (1989) 29.

⁴⁵⁹ Ramphal S.S. (1989) 27.

⁴⁶⁰ Ramphal S.S. *op cit.*

These commodities all fell under the unilateral economic sanctions of the US which impacted severely on the GDP.

Influx Control was the name given to the limitation of the movement of black people in cities and designated areas. It was designed to regulate the movement and residence of black people and to condemn blacks from actively participating in the formal economy to impoverished rural areas.⁴⁶¹ One of the examples used by Orkin illustrating the positive effects of the economic sanctions on the Apartheid government was the announcement by President P. W. Botha to end Influx Control in 1986. According to Orkin, economic sanctions were both efficient and effective in South Africa.⁴⁶²

The economic sanctions eventually lifted were responsible for the economic dysfunction in South Africa. Some of the results of the impact were positive, such as the decision to end the Influx control; however the impact on the economy was severe on blacks in South Africa. Furthermore, economic sanctions had a negative impact on the South African economy and the State's ability to take steps to improve the enjoyment of the rights of the vulnerable population. The decline in resources due to economic sanctions coupled with the Apartheid policies resulted in the distribution of majority of these resources to white communities limiting the access of other racial groups to these resources.

2.3.2 Impact on the enjoyment of elements of the right to health

In the analysis of the impact of economic sanctions on the right to health of South Africans, I will firstly look at the impact on access to healthcare services. Thereafter the section looks at the impact on the preconditions for health. As with previous sections the limitations of this section must be acknowledged. Throughout this section the focus is placed on available data after economic sanctions was lifted as data before sanctions is negligible. Furthermore, there was no compulsory registration of births and deaths for black South Africans. The result of this shortcoming in terms of the registration data makes infant mortality rates invariable and sometimes unreliable.

⁴⁶¹ *Ibid.*

⁴⁶² Orkin M. (1989) 1.

South Africa's official health delivery service was based on the Health Act of 1977 and proclaimed to be comprehensive and community-based.⁴⁶³ This Act was comprehensive and community based but only served the white community because of the location of medical services.⁴⁶⁴ Various factors played a role in limiting the general impact of economic sanctions on South Africa. The economic sanctions programme was implemented gradually and exemptions and non observance of sanctions among some States made direct effects on the economy less apparent. Indeed, it is believed that sanctions may have strengthened the existing white regime politically and economically for some time. Key health-related goods, such as pharmaceuticals, never became scarce, as existing US subsidiaries remained in production.⁴⁶⁵

Apartheid policies created a fragmented health system, which resulted in inequitable access to healthcare. The inequities in healthcare were reflected in the health status of the most vulnerable groups. Although consideration must be given to the fact that there is no simple way of establishing whether economic sanctions was the main cause of further deterioration in health among South Africa's oppressed population there is some evidence that substantiate that this was the case. According to Coovadia the evidence is indirect.⁴⁶⁶

Indirect evidence comes from factors such as retarded growth of the GDP and increased unemployment in South Africa. The retarded growth in South Africa was mostly attributed to unilateral economic sanctions applied by the US resulting in disinvestment.⁴⁶⁷ The average annual growth rate of the GDP in the period of 1970-1980 was 3%, compared to a declining figure of 1.3% for 1980-1990.⁴⁶⁸ In 1994 black South Africans comprised 95% of the 18 million people in South Africa living below the accepted minimum living level per month per household, with 60% of this

⁴⁶³ Act no 63 of 1977.

⁴⁶⁴ At the International Conference on Apartheid and Health held in Brazaville in 1981 Mr Alfred Nzo, Secretary General of the ANC at the time, stated that the Health Act had "absolutely nothing to do with comprehensive and adequate delivery of health care".

⁴⁶⁵ Garfield *et al* "The Health Impact of Economic Sanctions" (1995) *Bulletin of the New York Academy of Medicine*, 463.

⁴⁶⁶ Coovadia H.P (1999) 1507.

⁴⁶⁷ Coovadia H.P (1999) 1507.

⁴⁶⁸ See *A National Health Plan for South Africa* (1994) published by the African National Congress 28.

group living in total poverty.⁴⁶⁹ These levels of poverty severely restricted the populations ability to access private medical services and medication, making them heavy reliant on a public healthcare system.

Leonard describes the 1980's financial disparity and discrimination due to Apartheid in the form of a table, he states:

- that the population was 19 million blacks and 4.5 million White people;
- that 13% land was allocated to blacks and 87% to White people;
- that black people's share of national income was at 20% and White people's share was at 75%; and that the ratio of average earnings was between Black and White was 1:14;
- that the ratio per doctor for blacks was 1:44 000 compared to 1:400 for White people; and
- that the infant mortality rate for blacks was 20% in urban areas and 40% in rural areas compared to the 2.7% for White people.⁴⁷⁰

Chief Minister of the Kwa-Zulu homeland, Chief Buthelezi at the time said that *"it's no use having a stick that raps the South African regime over the knuckles but which in the process ends up lashing the very victims of Apartheid."*⁴⁷¹ From his statement it is clear that Chief Buthelezi did not approve of the impact that economic sanctions had on the marginalised groups in South Africa.

In 1988 there were 693 hospitals in South Africa and 158 567 hospital beds, public and private, of which 28% were in the private sector. An overall of 4.4 beds per 1000 was available to South Africans. However this statistic in real terms amounted to 2.7 beds per 1000 in the homelands, 4 beds per 1000 in non-metropolitan area and 7.1 per 1000 in metropolitan areas. In terms of human resources, in 1990 there were 22 260 medical doctors registered in South Africa out of whom 6087 had registered a speciality. The metropolitan areas had a ratio of 1:700 compared to 1:1900 in non-metropolitan areas.⁴⁷²

⁴⁶⁹ At the time this level was R750.00 a month. See *A National Health Plan for South Africa* (1994) published by the African National Congress 28.

⁴⁷⁰ Leonard R. (1980) 2.

⁴⁷¹ Bloom J. (1986) 83.

⁴⁷² *A National Health Plan for South Africa* (1994) 32.

In the homelands it is estimated that there was between 10 000 and 30 000 people per doctor. In 1988 there were 3 581 dentists registered, with over 93% working in the private sector; there were 1 130 clinical psychologists with 92% in the private sector and 8311 pharmacists with the majority in the private sector.⁴⁷³ In terms of financial resources within the homelands, where 44% of the total South African population lived, only 19% of the national health budget was allocated in 1990-1991.⁴⁷⁴

In 1991 the infant mortality rate (IMR) across all racial groups was 54 per 1000 live births. For black children the mortality rate was between 94 and 124 per 1000. The major cause of death was infectious diseases, especially intestinal infection and respiratory diseases.⁴⁷⁵ As stated in Chapter 3 of this thesis, the child mortality rate of a State is one of the best indicators of the negative impact of economic sanctions on the health of the population.

These figures were computed from registered deaths, but the estimated deaths were higher, especially in rural areas.⁴⁷⁶ The maternal mortality rate in 1989 was 8 per 100 000 for white women and more than 58 per 100 000 for black women.⁴⁷⁷ Tuberculosis was by far the most frequent accruing notifiable disease. The annual case rate increased by 4% between 1987 and 1988. The Western Cape Province had the highest rates in the country this is linked with the fact that the Province had the highest lack of housing in the country.⁴⁷⁸ In 1989, the measles notification rate per 100 000 was 43.1 for blacks and 3.8 for whites.⁴⁷⁹

All the indirect evidence taken together tells the story of limited access to medicine, medical facilities and services that particularly black people had in South Africa. The 1980-90 timeframe when the economic sanctions had hit the South African economy the hardest coincides with the timeframe during which economic sanctions were intensified against South Africa. Thus, economic sanctions had a direct role in limiting the growth in South Africa.

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*

⁴⁷⁵ *A National Health Plan for South Africa* (1994) 29.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid.*

Economic sanctions also had an impact on the level of unemployment, a vital indicator of the level of income of the population of South Africa. The level of income also has a direct impact on accessibility of medication and medical services. Meth analysed the impact of economic sanctions on unemployment of South Africans.⁴⁸⁰ The Federated Commerce and Industry (FCI) at the time had concluded a quantitative analysis of the impact of economic sanctions on unemployment.

Table 4.1 Impact of sanctions on production and employment in 1986⁴⁸¹

Sanctions scenario	Inter-industry effect (over 18 months—2 years)		Total net effect (over 5 years)	
	Decrease in GDP (%)	Decrease in employment number	Decrease in GDP (%)	Decrease in employment number
1	1,7	48922	---	---
2	6,7	204 803	16,9	685 343
3	10,1	312 361	29,3	1135013

The analyses in table 4.1 illustrate the link between the GDP and employment. In South Africa there was a decrease in GDP which amounted to a decrease in employment in South Africa at the time. The decrease in available income due to unemployment greatly limited the ability of the affected groups to get access to medication and medical services as well as preconditions to health such as proper housing.

This impact was mainly felt by the marginalised groups working in industrial sectors, such as mining and agriculture, in South Africa. In effect, economic sanctions assisted the Apartheid government to oppress the black people of South Africa, as the government continued to focus resources on white people excluding other marginalised groups. The available resources were distributed unequally, perpetuating racial discrimination and infringement of the right to the enjoyment of the rights to health of the majority of the population.

2.3.3 Impact on the preconditions for health

The underlying preconditions for the enjoyment of the right to health are where economic sanctions caused the most devastation. The urban housing backlog in 1990 was conservatively estimated at 3 million units. Approximately 90% was

⁴⁸⁰ Orkin M. (1989) 240-252.

⁴⁸¹ Orkin M. (1989) 250.

needed by black households.⁴⁸² In informal settlements there were no sanitation facilities. Of the 16 million rural population rough estimates indicated that 53% had safe and accessible water. These conditions were responsible for a high prevalence of respiratory diseases, such as tuberculosis. In 1989, 2.3 million people were considered in need of nutritional assistance. Of these, 92% were children below the age of twelve years, and 8% were pregnant and lactating mothers.⁴⁸³

2.3.4 Factors negating the impact of economic sanctions on the apartheid economy

Various factors that negated the impact on the economy of South Africa must be noted. These factors may have assisted to some extent to limit an even more devastating impact of economic sanctions. Oil plays an important role in the functioning of an economy. The international body regulating oil supply, OPEC, imposed oil sanctions on South Africa in 1973. However this embargo was never successfully enforced. The main reason the oil sanction were unsuccessful was the refusal of The Republic of Iran (Iran) to implement the oil embargo. In addition, the South African government used some innovative measures. One of these measures was to close petrol stations on Sundays to limit unnecessary use of supplies.

Another measure to limit the impact of the oil sanctions called “*sanctions-busting*”. It related to the illegal trade in oil. The word “busting,” in this case, referred to illegal trade of oil in a sense busting the oil sanctions. An example was the illegal oil trade by Marc Rich with the Apartheid government. An article published by Maguire *et al* in The Guardian in 2001 alleges that Marc Rich, a commodities trader was responsible for a substantial part of the illegal oil trading with the Apartheid government. The article states that he earned an estimated £100,000 a year by delivering to South Africa about 15% of its oil imports that were supposed to be destined for other countries.⁴⁸⁴

Another important factor negating oil sanctions was the oil trade with Iran. Iran and South Africa had a special relationship at the time. Shah Mohammed Reza Pahlevi’s

⁴⁸² *A National Health Plan for South Africa* (1994) 28.

⁴⁸³ *A National Health Plan for South Africa* (1994) 28-29.

⁴⁸⁴ Maguire K. and Pallister D. (2001) *Top Tory at centre of sanctions busting claim*, available at < <http://www.guardian.co.uk/uk/2001/may/04/conservatives.politicalnews1>> (17/11/08).

farther, Reza Shah, sought refuge in South Africa after his 1941 abdication and was buried in Johannesburg following his death in 1944.⁴⁸⁵ The National Iranian Oil Company owned 17.5% of the Natref refinery (a South African company), which Iran helped to construct and had a contract for supply of oil for 20 years.⁴⁸⁶ Furthermore, Iranians were granted the status of honorary whites according to South Africa's convoluted racial designations.⁴⁸⁷ Between 1973 and 1978 Iran was responsible for 90-96% of South African crude imports.⁴⁸⁸

Various factors played a role in limiting the general impact of economic sanctions on South Africa. The economic sanctions programme was implemented gradually and exemptions and non-observance of sanctions among some States made direct effects on the economy less apparent. Indeed, it is believed that sanctions may have strengthened the existing white regime politically and economically for some time. Key health-related goods, such as pharmaceuticals, never became scarce, as existing US subsidiaries remained in production.⁴⁸⁹

In conclusion, statistics show that marginalised groups in South Africa did not receive timely and appropriate healthcare under Apartheid. The healthcare facilities in South Africa were unavailable and inaccessible because they were situated primarily in metropolitan areas serving the white minority. This fact was supported by legislation such as the Group Areas Act and Bantu Homelands Act that moved the majority of the population out of the metropolitan areas. The State distributed scarce resources according to race, with black people receiving the most inferior quality of services. Economic sanctions did not improve this oppression; in fact it was responsible for further economic inequalities in South Africa.

The legacy of Apartheid and economic sanctions was not remedied immediately with the lifting of economic sanctions against South Africa. In 2002, eight years after the lifting of sanctions, South Africa's infant mortality rate was 62 per 1 000 children. Child mortality, deaths before age five, was among the highest in Africa, outside war zones. Two hundred out of every 1 000 black children die, on average, before their

⁴⁸⁵ Kinghoffer A. (1989) 36.

⁴⁸⁶ Kinghoffer A. *op cit*.

⁴⁸⁷ *Ibid*.

⁴⁸⁸ *Ibid*.

⁴⁸⁹ Garfield *et al* "The Health Impact of Economic Sanctions" (1995) *Bulletin of the New York Academy of Medicine*, 463.

fifth birthday; the sub-Saharan African average is 160 per 1 000; the white South African average is on a par with the most developed Western European nations and the United States.⁴⁹⁰ Statistics like these illustrate that impact of sanctions were clearly delegated to the vulnerable groups in South Africa.

3. REPUBLIC OF IRAQ

The broad-based economic sanctions that were applied against the Republic of Iraq (Iraq) are now commonly regarded as the most intensive foreign economic limitation for abuse of human rights and international law. Economic sanctions had a devastating impact on the enjoyment of the right to health of the majority of the population of Iraq.

The recent political history of Iraq is directly connected with the discovery of oil in the Middle Eastern region and therefore the discovery of oil is a good introduction for understanding the eco-politics of Iraq. The quest for oil in Iraq, which was known as Mesopotamia at the time, followed the discovery of oil in 1908 at Masjid-i Suleiman in Iran.⁴⁹¹ Oil pursuits in Iraq were concentrated in Mosul, one of three provinces of the Ottoman Empire⁴⁹² that ruled Iraq before its collapse during WWI.

After the war the League of Nations granted France mandates over Syria and Lebanon and granted the United Kingdom mandates over Iraq and Palestine which then consisted of two autonomous regions: Palestine and Transjordan.⁴⁹³ Parts of the Ottoman Empire on the Arabian Peninsula became part of what are today known as Saudi Arabia and Yemen.

The mandate of Protectorate over the region was given to some western nations. They used this opportunity to seek political influence and commercial benefits in the new territory. James describes the power struggle for a say in Iraqi oil and the entrance of the US in the struggle as follows:

⁴⁹⁰ This is according to Encarta Encyclopaedia (2003) © 1993-2002 Microsoft Corporation.

⁴⁹¹ Demirmen F. (2003) *Oil in Iraq: The Byzantine Beginnings*, available at < <http://www.globalpolicy.org/security/oil/2003/0425byzantine.htm> > (Accessed 12/10/07).

⁴⁹² Ottoman Turks took Baghdad from the Persians in 1535.

⁴⁹³ Treaty of Sèvres, which was ratified in the Treaty of Lausanne.

*"In July 1928, the quarrelling parties, USA, British and French, finally reached a famous accord, known as the 'Red Line Agreement,' which brought the US consortium into the picture with just under a quarter of the shares and an agreement to jointly develop fields in many other Middle Eastern countries."*⁴⁹⁴

The oil resources in Iraq have played an important role in the US-Iraqi commercial and diplomatic relationships going as far back to the presidency of J.F. Kennedy.⁴⁹⁵ The Central Intelligence Agency (CIA) was believed to have direct connections to the assassination attempts on the Iraqi leader, Abdel Karim Kassem, in 1963.⁴⁹⁶ According to a report of the United Press International, in 1959, Saddam Hussein⁴⁹⁷ was appointed to assassinate the former Prime Minister of Iraq, General Abd al-Karim Qasim on behalf of the CIA.⁴⁹⁸ The economical and political relationship between the US and Iraq is long-standing and goes hand in hand with every conflict that Iraq had instigated or suffered over the years.

3.1 Political Conditions Necessitating Imposition of Sanctions

Historically the US had strong diplomatic and economic relations with Iraq. Before 1980, following the 1967 Arab-Israeli war, Iraq severed diplomatic relations with the US and in late 1979 the US State Department put Iraq on its list of States sponsoring groups categorised by the US State Department as "terrorist".⁴⁹⁹ Despite intelligence reports that Iraq still sponsored groups on the US State Department's terrorist list, and *"apparently without consulting Congress,"* the Reagan Administration removed Iraq from the State terrorism sponsorship list in 1982.⁵⁰⁰ Diplomatic and commercial relations continued up until a day before the invasion of Kuwait by Iraq, as illustrated

⁴⁹⁴ James P. (2002) *Great Power Conflict over Iraqi Oil, The World War I Era, Global Policy Forum*, available at < <http://www.globalpolicy.org/security/oil/2002/1000history.htm> > (Accessed 16/10/2008).

⁴⁹⁵ Morris R (2003) A Tyrant Forty Years in the Making, Published in *New York Times* March 14, 2003 available at < <http://www.globalpolicy.org/security/issues/iraq/history/2003/0314history.htm> > (Accessed 12/10/2007).

⁴⁹⁶ *Ibid.* See also Coughlin C. (2002)

⁴⁹⁷ Saddam's full name is Saddam Hussein al-Majid al Tikriti and he acceded to the presidency and control of the Revolutionary Command Council (RCC), then Iraq's supreme executive body, in July 1979.

⁴⁹⁸ Sale R. (2003) Saddam Key in Early CIA Plot *United Press International*, April 10, 2003, available at < <http://www.globalpolicy.org/security/issues/iraq/history/2003/0410saddam.htm> > (Accessed 12/10/07).

⁴⁹⁹ Phythian M. (1997) 11.

⁵⁰⁰ Hurd N. (2000) *U.S. Diplomatic and Commercial Relationships with Iraq, 1980 - 2 August 1990*, updated 12 December 2001 by Hurd. N. and Rangwala G., available at < <http://www.casi.org.uk/info/usdocs/usiraq80s90s.html> > (Accessed 12/10/07).

by the US government's approval of a \$695,000 worth of advanced data transmission devices destined for Iraq.⁵⁰¹

The invasion of Kuwait resulted from a dispute between Kuwait and Iraq about production quotas which began at a meeting held by the OPEC.⁵⁰² Kuwait and other OPEC members were producing excess quotas that resulted in driving the world oil price down, a prospect Hussein could not afford at the time due to his State's financial debt.⁵⁰³ Hussein was particularly angered at the Kuwaiti's because they were supposed to support the Iraqi argument to decrease the quotas because of Iran's' history, and origins, relating to the Ottoman Empire. Kuwait decided to support the other OPEC States.⁵⁰⁴

In July 1990 Iraq issued an ultimatum to Kuwait demanding stabilisation of the international oil price; a moratorium on Iraq's wartime loans and the formation of an Arab plan similar to the Marshall Plan⁵⁰⁵ to assist with the Iraqi reconstruction Programme.⁵⁰⁶ With the collapse of the Soviet-Union the previous year⁵⁰⁷ the only world power obstructing a war on Kuwait was the US. In this regard, Hussein called a meeting with the US State Department Ambassador, April Glaspie, and according to her conversation with Hussein, the "*US had no opinion on the Iraq-Kuwait border disputes and that economic sanctions were not an option against Iraq.*"⁵⁰⁸

On 2 August 1990, in the wake of the US Ambassador's response to the possibility of an invasion of Kuwait, Hussein proceeded to order the invasion of Kuwait by Iraqi

⁵⁰¹ *Ibid.*

⁵⁰² OPEC's mission is to coordinate and unify the petroleum policies of Member Countries and ensure the stabilisation of oil markets in order to secure an efficient, economic and regular supply of petroleum to consumers, a steady income to producers and a fair return on capital to those investing in the petroleum industry, available at <<http://www.opec.org/home>> (Accessed 15/10/2007).

⁵⁰³ Coughlin C. (2002) 248. At the time Iraq owed the Gulf States about \$ 40 Billion after the war with Iran and demanded \$ 30 Billion of financial aid for relief purposes without any success.

⁵⁰⁴ *Ibid.* Kuwait, a former part of the administrative district of the Ottoman Empire, had historical disputes with Iraq about its independence given by the British after WWI. These disputes included the two State's border drawn by the British in 1920. Furthermore for Hussein the prospects of an annexation of Kuwait would mean the increase of the Iraqi Gulf Shore and opportunity to develop a much needed deep-water port.

⁵⁰⁵ Secretary of State George C. Marshall initially proposed the plan in a 1947. The Marshall Plan from its enactment, officially the European Recovery Program was the primary plan of the US for rebuilding and creating a stronger foundation for the allied countries of Europe, and repelling communism after World War II, available at <<http://www.usaid.gov/multimedia/video/marshall/>> (Accessed 12/10/07).

⁵⁰⁶ Coughlin C. (2002) 249.

⁵⁰⁷ Author unknown *The History Guide Lectures on the Twentieth Century*, available at <<http://www.historyguide.org/europe/lecture16.html>> (Accessed 13/10/07).

⁵⁰⁸ Coughlin C. (2002) 250. Coughlin states: this conversation took place according to transcripts of the conversation leaked by the Iraqi's.

military stationed on the border of the States. The decision to condemn the invasion and the subsequent imposition of economic sanctions was taken at a meeting of the UN by the SC after receiving letters from the permanent representatives of the government of Kuwait and the government of the US.⁵⁰⁹

3.2 INTERNATIONAL REACTION

The international reaction refers to the UN acting on behalf of the international community. The SC Resolutions against Iraq are the most comprehensive international economic action taken by an international organisation against a State to date. Comprehensive and mandatory economic sanctions implemented against Iraq were devastating. The population of Iraq was severely inhibited from realising their international right to health. This was acknowledged by the CESCR as well as other UN human rights treaty bodies by publishing comments on the impact of economic sanctions on the enjoyment of human rights in Iraq.

In particular the CESCR noted that:

“the living standard of a large section of the Iraqi population has been reduced to subsistence level since the imposition of the embargo. Furthermore notwithstanding the effect of sanctions and blockades, the State Party remains responsible for implementing its obligations to the maximum of its available resources in accordance with article 2 (1) of the ICESCR. While aware that the embargo imposed on Iraq created extremely difficult conditions with respect to the availability of food, medicines and medical articles, recommended that the Government take all necessary measures to address the needs of the population, in particular the most vulnerable groups such as children, the elderly and nursing mothers.”⁵¹⁰

The HRC noted that:

“the effect of sanctions and blockades has been the cause of suffering and death in Iraq, especially to children and reminded the government of Iraq that

⁵⁰⁹ SC Resolution 660 and 661 of 1990. A comprehensive list of the SC Resolutions in relation to Iraq is available here < <http://www.un.org/Docs/scres/1990/scres90.htm> > (Accessed 02/07/2007).

⁵¹⁰ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Iraq, E/C.12/1/Add.17, (1997), available at, < [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1.Add.17.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.17.En?Opendocument) > (Accessed 28/10/2008).

*whatever the difficulties, the State Party remains responsible for implementing its obligations under the Covenant.*⁵¹¹

The Committee on the Rights of the Child, responsible for the implementation of the CRC, recognised that the:

*“economic embargo on Iraq has adversely affected the economy and many aspects of daily life, thereby impeding the full enjoyment by the States Party’s population, particularly children, of their rights to survival, health and education.*⁵¹²

Another similar comment came from The Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Sub-Commission appealed to the international community and to the SC in particular, *“for the embargo provisions affecting the humanitarian situation of the population of Iraq to be lifted.*⁵¹³

3.2.1 The invasion of Kuwait

On the same day as the Iraqi invasion of Kuwait, the SC adopted Resolution 660 which was based on articles 39⁵¹⁴ and 40⁵¹⁵ of the UN Charter.⁵¹⁶ The Resolution condemned the war, demanded a withdrawal of the Iraqi forces from Kuwait and an

⁵¹¹ Concluding Observations of the Human Rights Committee: Iraq, UN Doc. CCPR/C/79/Add.84 (1997), available at < <http://www1.umn.edu/humanrts/hrcommittee/iraq1997.html> > (Accessed 15/11/07)

⁵¹² Concluding Observations of the Committee on the Rights of the Child: Iraq, UN Doc. CRC/C/15/Add.94 (1998) available at < <http://www1.umn.edu/humanrts/crc/iraq1998.html> > (Accessed 15/11/07)

⁵¹³ United Nations High Commissioner for Human Rights: Humanitarian situation in Iraq, Sub-Commission decision 1999/110 (Unedited Version), <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/18e324b5ce7b5d3b802567ee0031fba4?Opendocument_1> (Accessed 12/10/2008).

⁵¹⁴ Article 39 provides:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

⁵¹⁵ Article 40 provides:

In order to prevent an aggression of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in the Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

⁵¹⁶ Between 1990 and 2004 there are a total of 74 SC Resolutions relevant to Iraq proscribing the various aspects of the Iraqi situation therefore a comprehensive discussion of the content of these Resolutions is not allowed by the restrictions on this thesis, I have however, alluded to the most important aspects of the Resolutions for this thesis since 1990. for a list of the SC Resolutions relating to Iraq, see < <http://www.un.org/Docs/scres/1990/scres90.htm> > (12/10/2007).

immediate resort to intensive negotiations between the States.⁵¹⁷ The SC, on 6 August, adopted Resolution 661 of 1990, as a result of the refusal of Iraq to comply with the demands of SC Resolution 660, imposed under Chapter VII of the UN Charter. Resolution 660 imposed comprehensive and mandatory sanctions on Iraq and did not recognise any regime set up in Kuwait by the occupying power.⁵¹⁸

The SC also established a committee, known as The 661 Sanctions Committee (Sanctions Committee),⁵¹⁹ tasked with monitoring the implementation of the sanctions imposed, which prohibited the export of all commodities and products from Iraq, and the sale and supply of all products and commodities, including weapons and other military equipment, as well as the transfer of funds, to Iraq.⁵²⁰ Exceptions to the sanctions programme included the provision that the Sanctions Committee had to allow items relating to humanitarian circumstances, which included supplies intended strictly for *“medical purposes and for provision of certain basic foodstuffs.”*⁵²¹

Coughlin calls the invasion of Kuwait *“one of the great military miscalculations of the modern history.”*⁵²² It is suggested that the reason for the international outcry against the invasion was because the world was not ready for another Soviet-Union style annexation of States almost immediately after the collapse of the Soviet-Union.⁵²³ George Bush (I) immediately ordered the aircraft carrier Independence from the Indian Ocean to the Persian Gulf and imposed unilateral sanctions on both States to the conflict.⁵²⁴ He ordered the freezing of all Kuwaiti and Iraqi assets and property in US. The order applied to all banks and companies and included the restriction of movement of goods and people to and from Iraq.⁵²⁵

On 25 August 1990, in Resolution 665, the SC called upon Member States co-operating with the Government of Kuwait to deploy maritime forces to the area to use such measures as might be necessary

⁵¹⁷ SC Resolution 660, paras 1, 2 and 3 respectively.

⁵¹⁸ SC Resolution 661, para 3 (a), (b) and (c), prohibiting imports by UN member States and para 4, prohibiting imports by UN member States.

⁵¹⁹ Discussed in the previous Chapter.

⁵²⁰ SC Resolution 661, para 6.

⁵²¹ SC Resolution 661 para 3 (c) and 4.

⁵²² Coughlin C. (2002) 255.

⁵²³ *Ibid.*

⁵²⁴ George Bush senior was empowered by the International Emergency Economic Powers Act 50 USC 1701.

⁵²⁵ *Ibid.*

*“to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in Resolution 661 of 1990.”*⁵²⁶

The SC also requested Member States to use, as appropriate, the SC’s Military Staff Committee to coordinate their actions.

The SC focused for the first time on the humanitarian situation in Iraq and Kuwait in its Resolution 666, adopted on 13 September 1990, in which it instructed the Sanctions Committee to:

*“...keep the situation regarding foodstuffs in Iraq and Kuwait under constant review, paying particular attention to children under 15 years of age, expectant mothers, nursing mothers, the sick and the elderly.”*⁵²⁷

On 25 September 1990, in its Resolution 670,⁵²⁸ the SC explicitly confirmed that the sanctions against Iraq applied to *all means of transport, including aircraft*⁵²⁹ and elaborated further measures affecting shipping and air transport. The SC decided that States must deny permission to any aircraft to take off from their territory if the aircraft would carry any cargo to or from Iraq or Kuwait other than food in humanitarian circumstances. In addition States were to deny over-flight permission to any aircraft destined to land in Iraq or Kuwait.⁵³⁰ The SC also called upon States to detain any ships of Iraqi registry which entered their ports and were in violation of the sanctions Resolution.

3.2.2 The Sanctions Programme after the Liberation of Kuwait

Subsequent to the successful liberation of Kuwait, the SC adopted, on 3 April 1991, Resolution 687⁵³¹ representing one of the most intricate and extensive sets of decisions ever taken by the SC.⁵³² The 34 operative paragraphs of the Resolution were divided into nine parts and set out in great detail the terms for a formal cease-fire to end the conflict and restore security and stability to the area. The Resolution

⁵²⁶ SC Resolution 665, para 1-2.

⁵²⁷ SC Resolution 666 of 1990, para 1 and 4 respectively.

⁵²⁸ Adopted at the 2943rd meeting.

⁵²⁹ SC Resolution 670, para 2.

⁵³⁰ SC Resolution 670, paras 4, 5 and 6.

⁵³¹ SC Resolution 687, U.N. SCOR, 46th Sess., 2981st mtg. at 11, U.N. Doc. S/INF/47 of 1991.

⁵³² Fishman A. (1999) 700.

sought to involve Iraq co-operatively in post-war measures to build lasting peace and stability in the region.⁵³³ At the same time, enforcement measures remained in place, including the sanctions programme and the SC's authorisation for Member States to use "*all necessary measures*" to uphold Iraqi compliance.⁵³⁴ The economic sanctions programme imposed on Iraq became the strongest and most salient UN sanctions ever imposed against a State.⁵³⁵

The major requirements provided in Resolution 687 included a boundary settlement and peacekeeping aspects,⁵³⁶ the elimination of weapons of mass destruction and the non-acquiring by Iraq of nuclear weapons capability,⁵³⁷ the return of Kuwaiti property,⁵³⁸ the creation of the Compensation Fund⁵³⁹ and repatriation issues.⁵⁴⁰

As far as economic sanctions are concerned, the SC decided, under section F of the Resolution, that the prohibition on the importation of goods to Iraq first imposed under Resolution 661 of 1990 would not apply to foodstuffs, materials and supplies for essential civilian needs. Furthermore, this part of the sanctions programme would be reviewed every 60 days, taking into account the policies and practices of the government of Iraq, including the implementation of all relevant Resolutions of the SC for the purpose of determining whether to reduce or lift the sanctions.⁵⁴¹ The SC also stated that the ban on Iraqi oil exports would be lifted once the SC approved the program for the Compensation Fund called for in section E of Resolution 687, and once it agreed that Iraq had completed all the actions pertaining to the weapons provisions of the Resolution.⁵⁴²

In the intervening time, exceptions to the oil embargo would be approved by the Sanctions Committee when needed to assure adequate financial resources to provide for essential civilian needs in Iraq.⁵⁴³ Also in section F, the SC specified the

⁵³³ SC Resolution 687 of 1991, preamble and para 34.

⁵³⁴ SC Resolution 687 of 1991, para 29.

⁵³⁵ Joyner C. (2003) 334.

⁵³⁶ SC Resolution 687 of 1991, paras 2-5.

⁵³⁷ SC Resolution 687 of 1991, para 14.

⁵³⁸ SC Resolution 687 of 1991, para 15.

⁵³⁹ SC Resolution 687 of 1991, paras 18 and 19.

⁵⁴⁰ SC Resolution 687 of 1991, paras 30 and 31.

⁵⁴¹ SC Resolution 687 of 1991, paras 22-25.

⁵⁴² SC Resolution 687 of 1991, para 22.

⁵⁴³ SC Resolution 687 of 1991, para 20.

categories of weapons to which the arms embargo mandated by Resolution 661 of 1990 should continue to apply.⁵⁴⁴

By SC Resolution 700 of 1991, the SC approved the guidelines, which itemised the types of arms, material and activities prohibited by the SC and defined the responsibilities of the Sanctions Committee in this regard. The provisions relating to both the oil and the arms embargoes would be reviewed by the SC every 120 days, taking into account Iraq's compliance with the Resolution and general progress towards the control of armaments in the region.

The period between 1990 and 1997 was the phase that economic sanctions were the most devastating to the Iraqi population.⁵⁴⁵ By 1998 the SC reaffirmed its intention to act in accordance with the relevant provisions of Resolution 687 of 1991, and noted that Iraq's failure to comply with relevant international obligations had delayed the lifting of the Resolution by the SC.⁵⁴⁶ The SC conducted 40 reviews of the sanctions programme established in paragraph 20 of Resolution 687.⁵⁴⁷ No modification of the sanctions programme resulted from these reviews. The economic sanctions programme against Iraq, as imposed by SC Resolution 687 of 1991, was finally lifted by SC Resolution 1483, adopted on 22 May 2003.

3.2.3 US Unilateral Sanctions

The US did not stop to provide Iraq with weapons of mass destruction capability even though they had knowledge of the use of chemical and biological attacks on Iraqi Kurds by the Hussein regime. This was an indication of the earlier misconceived policy applied by the US towards Iraq. An investigation held by the Senate Committee on Banking, Housing, and Urban Affairs in 1993, confirmed the export of dual use products which gave Iraq nuclear capability.⁵⁴⁸ These products

⁵⁴⁴ SC Resolution 687 of 1991, para 24, the Resolution also established the UN Special Commission on Weapons (UNSCOM).

⁵⁴⁵ Joyner C. (2003) 335.

⁵⁴⁶ SC Resolutions 1154, 1194 and 1205 of 1998.

⁵⁴⁷ Pursuant to para 21 of Resolution 687.

⁵⁴⁸ The Senate Committee on Banking, Housing, and Urban Affairs is responsible for U.S. government legislation and oversight as it effects "dual use" exports -- those materials and technologies that can be converted to military uses. U.S. Chemical and Biological Exports to Iraq and Their Possible Impact on the Health Consequences of the Persian Gulf War, available at < <http://www.globalpolicy.org/security/issues/iraq/history/husseinindex.htm> > (Accessed 12/10/07).

included chemical, biological, nuclear, and missile-system equipment that could be used for military purposes.⁵⁴⁹

In 1990 the US passed specific legislation imposing unilateral economic sanctions on Iraq. The US government pledged support for the enforcement of the SC Resolutions and Congress enacted the Iraq Sanctions Act which condemns the invasion of Kuwait on 02 August 1990.⁵⁵⁰ Section C(a) makes provision for comprehensive and broad-based economic sanctions on Iraq. It states that:

“notwithstanding any other provision of law, no funds, credits, guarantees, or insurance appropriation or otherwise...shall be used to support or administer any financial or commercial operation of any United States government department, agency, other entity, or any person subject to the jurisdiction of the United States, for the benefit of the Government of Iraq, its agencies or instrumentalities, or any other person contrary to the trade embargo or any other economic sanctions imposed...”

Humanitarian assistance is excluded by Section 586 C(b) from the embargo and Section 586 D(a) makes provision for the denial of assistance in terms of the Foreign Assistance Act of 1961. It also places a hold on imports if the president so directs.⁵⁵¹ The Iraq Sanctions Act extends the multinational economic sanctions imposed by the UN.

3.3 IMPACT ON THE RIGHT TO HEALTH

In general, individual and business income plays an important role in the strength or weakness of the government. The government's capacity to have sufficient resources is therefore dependent on this income. The lack of resources creates hardship for the population in that the State is not able to fulfil obligation to provide services to the population. Economic sanctions advance this hardship in that it limits the ability of the society to develop economically. No State is able to fulfil its international human rights obligations in the light of broad-based economic sanctions. Below are some of the important impacts on the health of the population of Iraq.

⁵⁴⁹ *Ibid.*

⁵⁵⁰ Public Law 101-513 of 5 November 1990 Section 586 through 586J. Section A (5).

⁵⁵¹ Section 586D(b)

One must not forget that the right to health is interrelated with other rights, for example, the right to education, fulfilment of this right also a precondition for the right to health. Thus various other factors impact on the enjoyment of the right to health, not all the impacts are discussed here.

3.3.1 Impact of economic sanctions on vulnerable groups and economy

The economy of Iraq is dominated by the oil sector, which traditionally provided about 95% of foreign exchange earnings. In 1990, prior to economic sanctions and The US Gulf War, Iraq produced about 3 million barrels of oil a day, of which it exported 2.5 million barrels.⁵⁵² This generated export earnings of US\$19bn a year providing 95% of the funds for the national budget and 64% of the GDP. After the implementation of economic sanctions foreign trade was cut by 90% drastically reducing the GDP.⁵⁵³

Prior to economic sanctions, in the 1980s, Iraq incurred devastating financial problems. The problems were mainly caused by factors such as the government's massive expenditures on warfare in the eight-year Persian Gulf War with Iran as well as the damage to oil export facilities. To combat the financial deficit the government of Iraq implemented austerity measures⁵⁵⁴ by borrowing heavily followed by rescheduling of foreign debt payments. Iraq suffered economic losses from the Persian Gulf War of at least US\$100bn. After hostilities ended in 1988, oil exports gradually increased with the construction of new pipelines and restoration of damaged facilities. A combination of low oil prices, repayment of war debts and the costs of reconstruction resulted in another serious financial crisis. This crisis was one of the main motivations for the invasion of Kuwait by Iraq.⁵⁵⁵

One of the most vulnerable groups in Iraq is a group called Kurds. Since the creation of the modern State of Iraq, the history of Iraqi Kurdistan⁵⁵⁶ has been one of underdevelopment, political and cultural repression, destruction, ethnic cleaning and genocide.⁵⁵⁷ They were part of the Ottoman Empire and were promised their own

⁵⁵² Garfield R. (1999) 12.

⁵⁵³ *Ibid.*

⁵⁵⁴ Austerity is usually required when a government's fiscal deficit spending is felt to be unsustainable.

⁵⁵⁵ See discussion of invasion of Kuwait above.

⁵⁵⁶ The area where the majority of Kurds live is also called Kurdistan.

⁵⁵⁷ See O'Leary C.A. (2002) 2.

State under the terms of the 1920 Treaty of Sevres only to find the offer rescinded under the 1923 Treaty of Lausanne.⁵⁵⁸ The Kurds of Iraq received the brunt of economic sanctions imposed on Iraq. This was similar treatment to the marginalised groups in Apartheid South Africa.

Al-Anfal (The Spoils) was the codename given to aggressive and planned military operations against Iraqi Kurds.⁵⁵⁹ When Hussein's regime initiated war against Iran in 1980 Iraqi forces attacked Iranian soldiers and civilians with chemical weapons.⁵⁶⁰ Saddam Hussein's cousin, Ali Hasan al-Majid, who became known as "*Chemical Ali*" because of his use of chemical and biological weapons on Kurdish towns and villages, was the main co-perpetrator of these atrocities.⁵⁶¹ The 1980's is also the period when the most of Hussein's human rights abuses were perpetrated.

In March 1988, the Iraqi forces attacked the town of Halabja with conventional artillery bombs, artillery fire and chemicals including mustard gas and nerve gas agents.⁵⁶² The attack hit the Kurds the hardest, when chemical weapons killed 5 000 Kurds in the town of Halabja.⁵⁶³ O'Leary state that this was part of a systematic ethnic cleansing of Kurds.⁵⁶⁴ According to O'Leary, "*the oppression was part of an ongoing campaign by the Iraq government against Kurds because of their struggle to gain autonomy within Iraq.*"

In 1991, following the March uprising of Kurds in the north and Shia Arabs in the south against the central government of Iraq, Kurdistan was divided into two parts. Relying on SC Resolution 688, military forces from eleven States, including the US and Turkey, implemented Operation Provide Comfort⁵⁶⁵ to give security and humanitarian assistance to refugees, mostly Kurdish, in camps along the Iraq-Turkey border. The so-called safe haven and no-fly zone were established in this context.⁵⁶⁶

⁵⁵⁸ O'Leary C. A. (2002) 1.

⁵⁵⁹ *Ibid.*

⁵⁶⁰ Gunter M. (1992) 37.

⁵⁶¹ *Ibid.*

⁵⁶² Gasses included Sarin, Tabun and VX.

⁵⁶³ Gunter M. (1992) 44, see also Coughlin C. (2002) 248.

⁵⁶⁴ O'Leary C.A (2002) 2. More than 4000 villages in rural Kurdistan were destroyed and perhaps 300 000 people perished.

⁵⁶⁵ See Global Security at < http://www.globalsecurity.org/military/ops/provide_comfort.htm > (Accessed 14/11/08).

⁵⁶⁶ Global Security *op cit*, paras 1-2.

The Kurdish was the most vulnerable group in Iraq before the imposition of sanctions. Nothing specific was done to alleviate the impact of economic sanctions on this group.

3.3.2 Impact on the enjoyment of the right health of population

Health services in normal circumstances stretch a government's budget in developing States. The normal limitations that characterise access and availability of health services including medication and equipment are compounded by economic sanctions. Furthermore, the impacts on the health of the population in Iraq are multi-faceted. On the one hand it entails the impact of economic sanctions on the healthcare system. On the other hand it entails impact on preconditions for health which were neglected due to the lack of resources.

Iraq had invested heavily in healthcare services in the 15 years prior to the economic sanctions and in 1990 it had an advanced curative medical care system.⁵⁶⁷ To maintain this advanced system, the continued availability of ambulances, hospitals, doctors, technology and more was essential to Iraq. Broad-based economic sanctions on Iraq limited all these elements of the healthcare system. The limitation was compounded by inequitable distribution of medical goods by officials as well as population displacements through the war.⁵⁶⁸ The health of the population as well as the ability of the health officials to measure changes in healthcare services were placed in jeopardy.⁵⁶⁹

Almost all sanctions legislation in recent decades contains provisions for exemptions for medicines (and/or food) including the economic sanctions legislation imposed on Iraq. Nonetheless, economic sanctions commonly lead to limitations on the importation of medicines and foodstuffs due to disruption of commercial arrangements, complications in transportation and/or a lack of capital with which to purchase the exempted goods in the embargoed State. Garfield states that despite exemptions for medical goods, many companies producing equipment and

⁵⁶⁷ Garfield R (1999) 14.

⁵⁶⁸ Garfield R. (2002) 98.

⁵⁶⁹ *Ibid.*

medicines failed to fill orders from embargoed countries for lack of ironclad assurances that the item indeed was exempted from the embargo.⁵⁷⁰

Hospitals and health centres in Iraq largely remained without repair and maintenance. The functional capacity of the healthcare system degraded substantially due to shortages of water and power supply, lack of transportation and the collapse of the telecommunications system. Furthermore, communicable diseases, such as water borne diseases and malaria became part of the endemic pattern of the precarious health situation.⁵⁷¹

As stated previously, other than the child mortality rate, an analysis of the infant mortality is not the best indicator of the impact of economic sanctions. However in Iraq both the mortality rate of young children as well as the infant mortality rate increased dramatically. While the infant mortality rate rose from 64/1 000 births in 1990 to 129/1 000 in 1995.⁵⁷² A study conducted by British Broadcasting Corporation (BBC), suggested that the:

*“surge in mortality also reflects the low access to health services, and clean drinking water and sanitation, which affects everyone. The researchers looked at 23,000 women aged between 15 and 49 years, asking about the health of their children. They found that in south and central Iraq, infant mortality had risen to 108 per 1,000 between 1994 and 1999, while child mortality covering those between one and five years rocketed from 56 to 131 per 1,000.”*⁵⁷³

According to initial data provided by Iraq to United Nations Children’s Fund (UNICEF) an estimated 500 000 children died as a result of economic sanctions.⁵⁷⁴ UNICEF’s Chief Statistician based this calculation on the rate of decrease (morbidity rate) and the rate of infant mortality in the 1980’s and states that *“had this rate continued through the 1990’s, there would have been half a million fewer deaths of*

⁵⁷⁰ *Ibid.*

⁵⁷¹ S/1999/356, Annex II. See also ICRC, *Iraq: A decade of sanctions*, 14 December 1999.

⁵⁷² *Iraq Child and Maternal Mortality Surveys*, UNICEF 1999, available at < <http://www.unicef.org/newsline/99pr29.htm> > and < <http://www.unicef.org/reseval/iraq.htm> > released August 12, 1999.

⁵⁷³ BBC News: Health, *Child death rate doubles in Iraq*, available at < <http://news.bbc.co.uk/2/hi/health/763824.stm> > (Accessed 15/09/07).

⁵⁷⁴ See Joyner C (2003) 339 around the debate of the likely amount of children that died as a result of economic sanctions.

children under-five in the country as a whole....⁵⁷⁵ Garfield states that this initial data was incorrect.⁵⁷⁶ According to him, correct data was established in 1999, indicated that the mortality rate of children had at least doubled, which is still a devastating amount of 300 000 children presumed dead as a direct result of economic sanctions.⁵⁷⁷ Another reason why this was the most devastating episode of economic sanctions applied by the international community is the maternal mortality rate. In 1997, the maternal mortality rate increased from 50/100 000 in 1989 to 117/100 000.⁵⁷⁸

The impact was not only on elements directly linked to the enjoyment of the right to health, such as access to hospitals and medication, but also preconditions to good health.

3.3.3 Impact on the preconditions for health

Vulnerable groups such as children and the elderly are the most susceptible to severe malnutrition and other diseases.⁵⁷⁹ Prior to economic sanctions the Iraqi government had created its own food ration programme. This programme was regarded by the United Nations as the largest and most efficient food-distribution system of its kind in the world. It had become what was perhaps Hussein's most strategic tool to maintain popular support at the time.⁵⁸⁰

The United States and other western nations had hoped the sanctions, which devastated Iraq's once-prosperous economy, would lead Iraqis to rebel against their leader or, at the least, to compel him to fully cooperate with UN inspectors looking for weapons of mass destruction. But Hussein held firm in a large part by using food to stem discontent with the pain of sanctions, employing a massive network of trucks,

⁵⁷⁵ For a comparison between UNICEF's Report "*Results of the 1999 Iraq Child and Maternal Mortality Survey*" August 1999 and The U.S. State Department's Report "*Saddam Hussein's Iraq*" September 1999 See, < <http://www.scn.org/ccpi/UNandUSreports.html> > (Accessed 15/11/07).

⁵⁷⁶ Garfield R (1999) 15. Despite the subsequent retraction by the publishers the study is still referred to.

⁵⁷⁷ *Ibid.*

⁵⁷⁸ *Report of the Second Panel established pursuant to the note by the President of the Security Council of 30 January 1999, S/1999/100, concerning the current humanitarian situation in Iraq, S/1999/356, Annex II.*

⁵⁷⁹ Joyner C. (2003) 338.

⁵⁸⁰ Richman S. (2004) 1. *Iraqi Sanctions: Were They Worth It?* available at, < <http://www.globalpolicy.org/security/sanction/iraq1/2004/01sanctionsworth.htm> > (Accessed 14/11/2008).

computers, warehouses and neighbourhood distributors to provide basic sustenance for most Iraqis.⁵⁸¹

Almost the entire population of young children was affected by sudden shift in the nutritional status towards malnutrition.⁵⁸² Despite food and medicine exemptions, the import thereof had been considerably slowed down due to the needed approval of the Sanctions Committee.⁵⁸³ Measures that initially were intended as a means to apply non-violent economic pressure on the Iraqi government deteriorated into an aggravated humanitarian crisis for nearly all of Iraqi society.⁵⁸⁴ The use of potable water is particularly vital for a health system. The lack of safe water in Iraq contributed substantially to the devastating health statistics, in particular cholera and other water born deceases.⁵⁸⁵

Those children unprotected by breast feeding were at far greater risk. In addition, malnutrition among women giving birth led to a high rate of low-weight births and high perinatal mortality. Economic sanctions led to inadequate sanitation, food sources and medical care. Many of the children with acute malnutrition after weaning became chronically malnourished as toddlers. As a result they were at highest risk of serious disease and death, especially from measles, diarrhoea, and respiratory infections.⁵⁸⁶

In a report to the SC on the state of situation in Iraq, Former UN Secretary-General Kofi Annan stressed, *inter alia*, that

*“the nutritional and health status of the Iraqi people continues to be a major concern and that increased revenues available for the implementation of the humanitarian Programme should be used by the Government of Iraq to reduce current malnutrition levels and to improve the health status of the Iraqi people.”*⁵⁸⁷ Furthermore, he pointed out that *“there were still major concerns about the deterioration of infrastructure. He stated that unless infrastructure*

⁵⁸¹ *Ibid.*

⁵⁸² *Nutritional Status Survey of Infants in Iraq*, UNICEF 1998.

⁵⁸³ Tomaševski K. (2000) *Responding to Human Rights Violations 1946-1999*, .315.

⁵⁸⁴ Joyner C. (2003) 338.

⁵⁸⁵ One of the best explanations including destruction of the infrastructure of Iraq is the embargo on imports of chlorine as it is seen as a dual purpose product.

⁵⁸⁶ Garfield (1999) 14.

⁵⁸⁷ S/2000/520, available at < <http://daccess-ods.un.org/TMP/4093939.htm> > (Accessed 15/11/07).

*for electricity, water and sanitation is sufficiently rehabilitated, the Iraqi people will continue to be vulnerable to disease and hardship.*⁵⁸⁸

The initial UN missions that went to Iraq to assess and confirm the state of humanitarian needs led to an offer to Iraq to sell oil under UN supervision.⁵⁸⁹ The oil sales would then be used to purchase goods for humanitarian purposes. The programme was to assist in a reduction of the adverse effects of economic sanctions on the population of Iraq.

3.4 Oil- For- Food Programme

In August 1990 the Security Council adopted resolution 661, imposing comprehensive sanctions on Iraq following that country's invasion of Kuwait. In the immediate aftermath of the Gulf War in 1991, the Secretary-General dispatched an inter-agency mission to assess the humanitarian needs arising in Iraq and Kuwait. The mission visited Iraq from 10 to 17 March 1991 and reported that *"the Iraqi people may soon face a further imminent catastrophe, which could include epidemic and famine, if massive life-supporting needs are not rapidly met."*⁵⁹⁰

In an effort to relieve the suffering of civilians in Iraq and in the Iraq/Turkey and Iraq/Iran border areas, the SC devised a scheme called the Oil-for-Food Programme (OFF Programme). The OFF Programme allowed for the export of Iraqi oil and the proceeds of the sales to be used to pay for foodstuffs and medicines. Furthermore, the proceeds were also used by the Compensation Commission to fund compensation claims from Kuwaitis; for the United Nations Special Commission on Iraq (UNSCOM); for weapons inspection; and other of the UN's activities mandated by Resolution 687. However, the most important goal of the OFF Programme was to alleviate the humanitarian situation in Iraq.

On 15 August 1991, the SC adopted Resolution 706, setting out the terms for the limited sale of Iraqi oil and oil products during a period of six months. Primarily the

⁵⁸⁸ *Ibid.*

⁵⁸⁹ Tomaševski K. (2000) *op cit* 315.

⁵⁹⁰ *Report to the Secretary-General on humanitarian needs in Kuwait and Iraq in the immediate post-crisis environment by a mission to the area led by Mr Martti Ahtisaari, Under-Secretary-General for Administration and Management, dated 20 March 1991, S/22366, para 37 available at;*
< <http://www.un.org/Depts/oip/background/reports/s22366.pdf> > (Accessed 21/11/2008).

adoption of this Resolution was to increase the level of funds available for humanitarian programmes and for several of the operations mandated by Resolution 687. On 19 September 1991, the SC, in Resolution 712, approved a basic structure for the implementation of Resolution 706.

The SC also confirmed that funds from other sources could be deposited in the escrow account.⁵⁹¹ The escrow account was a sub-account of the OFF Programme and would become immediately available to meet Iraq's humanitarian needs without the deductions specified in the Resolutions. By Resolution 778, adopted on 2 October 1992, the SC decided, *inter alia*, that all States should transfer to the escrow account provided for in Resolutions 706 (1991) and 712 (1991) those funds of Iraq representing the proceeds of sale of Iraqi petroleum or petroleum products.

On 14 April 1995, acting under Chapter VII of the Charter, the SC adopted Resolution 986 (1995), by which it provided Iraq with another opportunity to sell oil to finance the purchase of humanitarian goods and various mandated United Nations activities concerning Iraq. The new proposal permitted the sale of \$2 billion of Iraqi oil (\$1 billion in each of two 90-day periods) subject to certain conditions additional to those contained in Resolutions 706 and 712, and reaffirmed the commitment of all Member States to the sovereignty and territorial integrity of Iraq and describing the new exercise as temporary.

Iraq had export earnings of \$19bn before economic sanctions.⁵⁹² The Office of the Iraq Programme reported that the OFF Programme transferred a total of \$9.978Bn to the Development Fund for Iraq. This amount included:

*“transfers of \$1 billion each were made on 28 May, 31 October and 18 November 2003 from the United Nations Iraq escrow account, at the request of the Security Council contained in paragraph 17 of resolution 1483 (2003) of 22 May 2003. Another \$2.6 billion was transferred on 31 December 2003, a further \$2 billion on 31 March and \$0.5 billion on 19 April 2004. Three more transfers, totalling \$1.128 billion, were made in 2004 and three transfers totalling \$0.75 billion have been made in 2005.”*⁵⁹³

⁵⁹¹ The Escrow Account included all money made from the sale of Iraqi oil and was administered by the UN.

⁵⁹² Garfield R. (1999) 12.

⁵⁹³ Office of the Iraq Programme, available at < <http://www.un.org/Depts/oip/>> (Accessed 02/12/2008).

Although the framework for the OFF Programme existed in 1991 it only became operative in 1996, partly because of the refusal of the Iraqi government to agree to the Programme and the practical implications for the Sanctions Committee.⁵⁹⁴ On 20 May 1996, a Memorandum of Understanding between the Secretariat of the UN and the Government of Iraq on the implementation of SC Resolution 986 (1995) was concluded.⁵⁹⁵ On 8 August 1996, the Sanctions Committee adopted procedures for the discharge of its responsibilities as required by paragraph 12 of SC Resolution 986.⁵⁹⁶ On 9 December 1996 the Secretary-General's reported to the President of the SC, pursuant to paragraph 13 of that Resolution and authorised States to permit the import of petroleum and petroleum products originating in Iraq.⁵⁹⁷ On 10 December 1996 after 6 years of facing economic sanctions prohibiting the export of oil, SC Resolution 986 became operative.

Under Resolution 986 Iraq was given the discretion to sell oil to who they wanted. This discretion was used to the advantage of Iraq government in two ways. The first advantage was that they only gave oil contracts to companies owned by States that had influence in foreign policy and international public opinion in favour of lifting economic sanctions.⁵⁹⁸ The second advantage was in giving contracts to companies from which they could elicit illegal funds, such as surcharges. The 2005 report from the Independent Inquiry Committee on the OFF Programme confirmed that the Iraqi government made \$228.8 million through illegal surcharges.⁵⁹⁹

The period of implementation for the OFF Programme, as well as the value of oil that could be sold at any given time to fulfil its objectives was increased on numerous occasions.⁶⁰⁰ Fishman writes,

⁵⁹⁴ Joyner C. (2003) 341.

⁵⁹⁵ S/1996/356, available at, < www.casi.org.uk/info/undocs/s1996-356.pdf > ((Accessed 28/10/2008).

⁵⁹⁶ S/1996/636, available at, < www.casi.org.uk/info/undocs/sanctcommittee960808.pdf > (Accessed 28/10/2008).

⁵⁹⁷ S/1996/1015, available at, < www.pogar.org/publications/other/un/secgen/iraq/s1015-96e.pdf > (Accessed 28/10/2008).

⁵⁹⁸ Volcker P A. *et al* (2005) Report on Programme Manipulation; Independent Inquiry Committee the UN Oil-For-Food Programme, available at < www.iic-offp.org > (Accessed 02/09/2008), at 16.

⁵⁹⁹ *Ibid.*

⁶⁰⁰ Starting with SC Resolution 1111 of 1997 adopting the decision that the provisions of Resolution 986 (1995), except those contained in paragraphs 4, 11 and 12, should remain in force for another period of 180 days beginning at 00.01 hours, Eastern Daylight Time. Continuing with SC Resolution 1129 of 1997, the SC decided that the provisions of Resolution 1111 should remain in force, except that States were authorised to permit the import of petroleum and petroleum products originating in Iraq, including financial and other essential transactions directly relating thereto, sufficient to produce a sum not exceeding a total of one billion United

*if the humanitarian fund is managed properly, there is no reason why the Iraqis should not be permitted to sell as much oil as they wish, as long as the proceeds of the sales go toward the purchase and distribution of humanitarian supplies for the civilian population.*⁶⁰¹

Fishman's concern in relation to the OFF Programme is addressed by the SC Resolution 1284 of 1999, which introduced several changes in the sanctions programme for Iraq with a view to improving the humanitarian situation of the population. These included the removal of ceilings to the value of imports of petroleum and petroleum products originating in Iraq.⁶⁰² The Resolution also provided for the removal of the waiver of approval requirement by the Sanctions Committee for supplies of foodstuffs, pharmaceutical and medical supplies, as well as basic or standard medical and agricultural equipment and basic or standard educational items.⁶⁰³

The UN Secretary-General at the time of the Resolution, Kofi Anan, was asked to make arrangements, subject to SC approval, to allow funds deposited in the escrow account to be used for the purchase of locally produced goods and to meet the local cost for essential civilian needs. In March 2003 the coalition forces led by the US invaded Iraq. The OFF Programme officially ended on 31 May 2004.

On the one hand, because of the extent of the devastation and humanitarian impact of economic sanctions in Iraq, the OFF Programme was seen to be inefficient in providing for the civilian needs and clearly needed improvements.⁶⁰⁴ On the other hand, Langenkamp states that:

"in the period from 1997 until the invasion in 2003 by the coalition forces, Iraq sold oil worth \$64.2bn pursuant to the Programme. In that period the combined total of Saddam's schemes, including kickbacks, illegal surcharges,

States dollars within a period of 120 days from 00.01. Eastern Daylight Time, on 8 June 1997 and, thereafter, a sum not exceeding a total of one billion United States dollars within a period of 60 days from 00.01 Eastern Daylight Time, on 4 October 1997.

⁶⁰¹ Fishman K (1999) 725.

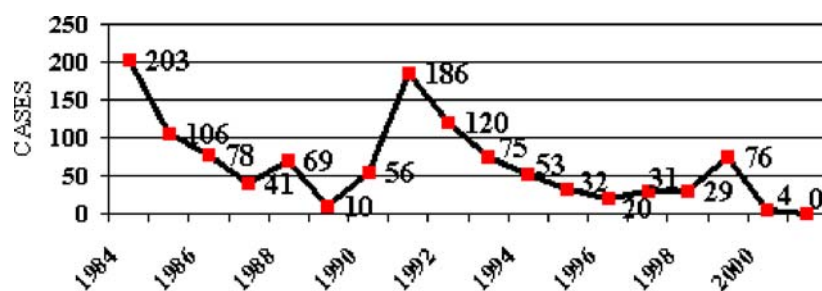
⁶⁰² SC Resolution 1284 of 1999, para 15.

⁶⁰³ S/2000/520.

⁶⁰⁴ Kozal P. (2000) 399.

overcharges for supplies, and undercharges for oil, was 2.8% of the oil sales. Thus 97.2% of the money collected went for its intended purpose.⁶⁰⁵

The OFF Programme was never meant as a comprehensive resolution of the humanitarian crisis, it was an interim or temporary measure.⁶⁰⁶ The OFF Programme was reported to have been successful in certain regions like the immunisation of 95% of children against polio.⁶⁰⁷ As can be seen in the table below the cases of Polio increased drastically after the implementation of sanctions. However, with assistance of the OFF Programme the Polio cases reported decreased to zero cases.



Graph of Polio Cases from 1984 to 2000⁶⁰⁸

The OFF Programme is credited with:

- improvement in healthcare delivery services and in diagnosis and treatment of diseases including the national immunisation for a polio free country;
- a 40% increase in major medical surgeries and a 25% increase in laboratory investigations;⁶⁰⁹
- a reduction in the transmission of communicable diseases, such as cholera, malaria, measles, mumps, meningitis and tuberculosis;⁶¹⁰
- improvement of healthcare delivery in several new or rehabilitated centres in the centre/south, including: the Saddam Centre for Neurological Sciences; the AIDS Research and Study Centre; the Acupuncture Therapy Centre; the

⁶⁰⁵ Langenkamp R. (2005) *Putting the Oil-For-Food in Perspective*, available at < <http://jurist.law.pitt.edu/forumy/2005/11/putting-oil-for-food-in-perspective.php> > (Accessed 10/07/07).

⁶⁰⁶ Office of the Iraq Programme Oil for Food: Health available at, < <http://www.un.org/DEpts/oip/sector-health.html> > (05/05/06)

⁶⁰⁷ *Ibid.*

⁶⁰⁸ Graph from Office of the Iraq Programme, available at < <http://www.un.org/Depts/oip/>> (Accessed 02/12/2008).

⁶⁰⁹ Oil-for-Food Programme: Background Brief – Health, available at, < <http://www.un.org/Depts/oip/sector-health.html> > (Accessed 02/12/2008).

⁶¹⁰ *Ibid.*

Tuberculosis Control Institute and; the National Centre for Haematology Research;⁶¹¹ and

- a decline in the incidence of measles; and a doubling of deliveries of medicines and medical supplies.⁶¹²

During the thirteen years of the economic sanctions the Programme generated \$64,2bn for humanitarian relief purposes. In comparison to the GDP in 1980 alone, Iraq earned \$59 billion, a clear indication that the Oil-for-Food Programme was never going to be enough to fulfil all of Iraq's needs.⁶¹³ Between 1997 and May 2005 purchases in all industries amounted to \$34.5bn in total. The Ministry of Health spent \$2,7bn, 9.7% of the total value.⁶¹⁴

In the evaluation of the OFF Programme of Iraq, certain improvements are recommended:

- a humanitarian assessment of Iraq should focus on well-being of the general population and of vulnerable groups;
- it should collect information on changes in poverty levels, income levels and sources, and the proportion of income spent on food;
- the particular effects of economic and social welfare changes on women should be investigated, as well as the effects on fertility, marriage, and choices of internal and international migration;
- this will assist in the identification of more and less effective coping mechanisms in various population sectors, and modifications needed to make the programme more effective;
- the extended period of neglect to infrastructure for water, sanitation, roads, agriculture, and electricity should be specified.⁶¹⁵

4. CONCLUSION

The consequences of economic sanctions for both target States is in direct conflict with the article 12 of the ICESCR. Firstly, a drastic increase of infant and child

⁶¹¹ *Ibid.*

⁶¹² *Ibid.*

⁶¹³ *Guide to Sanctions: What has caused the humanitarian problems in Iraq?*, available at < <http://www.casi.org.uk/guide/blame.html> > (Accessed 15/03/07).

⁶¹⁴ Office of the Iraq Programme Oil for Food Report *op cit*, 265.

⁶¹⁵ Garfield R (1999) 10.

mortality rates contravenes article 12 (2)(a) of the ICESCR. Secondly, the lack of prevention, treatment and control of the morbidity rate contravened article 12 (2)(c) of the ICESCR. Lastly, economic sanctions created conditions which ensured the lack of access to medical services and medical attention in the event of sickness thus economic sanctions are in direct conflict of article 12 (2)(d) of the ICESCR.

The governments of South Africa and Iraq committed widespread and systematic violations of human rights. These violations necessitated international reaction of some kind. The SC imposed comprehensive economic sanctions on Iraq but never applied broad-based economic sanctions against South Africa. The reason for the lack of comprehensive action was due to the influence of the US and the UK within the SC and internationally. The US, in particular, applied a strategy of “*constructive engagement*” until the 1980’s when they past the Anti-Apartheid Act. In both South Africa and Iraq, the SC sanctions impacted on the government regime of the day but more seriously it’s impacted on the realisation of the rights of the civilian population.

The intended goal of economic sanctions to ensure a regime change was never achieved in Iraq; this was in fact achieved by the coalition forces invasion in 2003. Even in South Africa I am convinced that sanctions were not the reason for the political change. The reason for this conviction is the nature of the sanctions imposed on the Apartheid government. Other factors like the strong political defiance and resistance from the ANC and the PAC played a considerable role in the change of government.

However, if one is to question the success of the economic sanctions programme against Iraq, there is no doubt that economic sanctions certainly were not a success in Iraq. The economic sanctions programme was imposed for a valid and necessary reason. One cannot dispute that the international law violations by the Hussein government were intentional and necessitated a form of response by the international community. However, the success and effectiveness of the economic sanctions remains unproven.

It is evident that the economic sanctions were more devastating on the human rights of the population of Iraq than that of South Africa. One of the main reasons for this difference in impact was that economic sanctions imposed on South Africa by the

UN, were not supported by key trade partners including the US and the UK, two permanent members of the SC. The ability to maintain trade with these partners and others, such as Iran, meant that trade in South Africa decreased but at a less drastic tempo. Another reason was the lack of interest by the western powers to impose economic sanctions and a focus mainly on military, cultural and sport sanctions instead. These reasons made the long term impact and effectiveness of the sanctions on South Africa more benign than those imposed on Iraq.

In addition, South Africa was reliant upon a diverse economy, depending on more than one commodity for its growth and income and in fact, these commodities were only sanctioned in the mid 1980's. This resulted in a gradual decrease in the GDP of South Africa. The negative impact of sanctions was spread more evenly. Moreover the implementation of predominantly unilateral sanctions allowed the South African government to adapt and direct its export and imports, from and to, other States.

In Iraq the economy was mainly driven by its oil exports making the control and regulation of economic sanctions focused and concise to this one commodity. This meant that economic sanctions, which prohibited export of oil, had devastating effects on the economy of Iraq. It became so overwhelming that the Iraqi peoples' enjoyment of human rights suffered tremendously. In addition, the western powers were in the forefront of imposing the sanctions programme on Iraq mainly due to its history and interests in the Iraqi oil. Hussein's government had a tradition of dictatorship and no real resistance from opposition parties internally, unlike South Africa where political activism played an important role in bringing about a change in power, the chances of the population voting Hussein out of power was slim to none.

The sanctions programmes implemented in both target States had a negative effect on the populations enjoyment of their right to health as well as the preconditions to the enjoyment to health. The right to health is vital to the human being and jurisprudence had illustrated that this right is enforceable. The analytical question would thus be whether a court of law can suspend economic sanctions if there exists a causal link between economic sanctions and extreme limitations to the enjoyment of the right to health.

In Iraq, the OFF Programme was vital to stabilising the impact of economic sanctions on the population. The OFF Programme was the first of its kind and hence not perfect. Hussein was able to abuse the OFF Programme to the benefit of the government. This kind of programme will certainly be an asset to any similar scenario now that lessons had been learned.

The impact of longstanding, comprehensive and mandatory economic sanctions as was imposed on the Iraqi population resulted in further hardship for the population of Iraq. The impact was particularly felt by the vulnerable groups within these societies, namely women, children and surely the elderly. In South Africa, because of the Apartheid policies and legislation, the most vulnerable groups included those classified as black, coloured and indian. These vulnerable groups in South African received the most inferior healthcare services, limited access to health services as well as the least favourable preconditions to health. In Iraq, the Kurdish was the most vulnerable group. It is likely that they suffered the most during the implementation of economic sanctions because of the traditional relations between the Kurds and the Iraqi government.

Economic sanctions against Iraq and South Africa were not effective in achieving the set out goal and were more destructive than even armed conflict would have been on the civilian population. Hopefully, the international community will not tolerate this again. However, in both sanctions programmes the creators of the sanctions would have been more successful if the imposition of the sanctions programme had human rights protection as the basis of its creation.

CHAPTER 5: CONCLUSION

1. PREFACE TO THE CONCLUSION

Both Iraq and South Africa committed gross violations of human rights which necessitated the imposition of sanctions. In both States the SC sanctions impacted on the government regime of the day but this impact was mostly suffered by the civilian population. This impact was particularly felt by the vulnerable groups within the society, women, children and the elderly. In South Africa those vulnerable are extended by a classification of race. The same can be argued for the impact on Kurdish-Iraqis in northern of Iraq compared to other Iraqi's but certainly not as acute as non-whites in South Africa. Together due to segregation, there is a stark economic difference between races. The South African government systematically divided the population into different races in South Africa. The difference had a class connotation ranging from the upper class for whites people to lower class for black people. Today as a result of Apartheid South Africa still struggles to think outside of colour or pigment of one skin when confronted with different races.

If one wants to establish the success or failure of economic sanctions there must be a balancing of the relevant elements. Various questions must be asked. These questions include: What was the goal of the economic sanctions? What were the costs or impact of the economic sanctions? As well as whether the economic sanctions were effective or not?

2. SOUTH AFRICA

Sanctions against South Africa played an important psychological role in bringing about political change. The question accordingly arises why the sanctions campaign against South Africa had starkly different consequences than that of Iraq. It is suggested that perhaps an answer may be found in the following factors: firstly, the goal was simple but precise. Throughout the economic sanctions programme by the UN and the US it was stated as being an end to the Apartheid policies of the South African government.

Secondly, the type of sanctions that were imposed on South African was not broad based and not applied universally. A lack of interest by the western powers to impose economic sanctions and a focus on, mainly, military, cultural and sport sanctions instead, made the impact and effectiveness of the sanctions on South Africa more benign than those imposed on Iraq. Initially the US refused to apply any sanctions. The UN acted alone and never was able to apply comprehensive economic sanctions against South Africa because of vetoes from the US and UK. It was only in the late 1980's that unilateral economic sanctions against South Africa were implemented by the US. In addition, the effectiveness of the economic sanctions was minimal. The economic sanctions did not result in the stated goal which was to change the policy of the Apartheid government.

Thirdly, to weigh the success of economic sanctions against South Africa an analysis of the impact on the enjoyment of the right to health was done. The findings of the analysis indicate that economic sanctions did have a negative impact on the GDP and clearly the State was experiencing economic difficulties.

Fourthly, the population did suffer a heavy cost due the economic sanctions. Statistics indicated an increase in morbidity and mortality rates, limited access to healthcare services as well as conditions unsuitable for health after the implementation of economic sanctions. Although one must acknowledge the impact of Apartheid policies on the economy as well as on the discrimination against the black majority in South Africa, economic sanctions did not assist the hardship of black South Africans

Fifthly, the benefit of a new democratically elected government cannot be attributed to economic sanctions. It must be noted that economic sanctions were not the only factor acting against the Apartheid policies of the South African government. An effective political movement, locally and internationally, against the Apartheid government was able to create substantial disruption and awareness amongst the international community.⁶¹⁶ A further key ingredient in the political change in South Africa was the fall of the communism. This fall meant that one of the main arguments used by the Apartheid government, that the ANC was a communist party, could no longer stand.

⁶¹⁶ Levy P. *op cit* 11.

Lastly, South Africa was more reliant upon a diverse economy and hence the negative impact of sanctions was spread more evenly. South Africa was also fortunate to secure valuable oil resources as the oil embargo of 1973 offered South Africa a loophole in that Iran refused to be part of the embargo. All these factors resulted in the negation the effectiveness of economic sanctions. Moreover the implementation of predominantly unilateral sanctions allowed the South African government to adapt and direct its export and imports, from and to, other States.

If one is the answer the question as to whether the economic sanctions that were applied to South Africa was successful, the answer will have to be no. The goal was achieved through other factors and the impact outweighed the purported benefits of economic sanctions.

3. IRAQ

Firstly, the goal of the economic sanctions against Iraq changed more than once, in fact it included restoring the government of Kuwait, minimising damage to Kuwait, discouraging Israeli intervention, encouraging United Nations support, reassuring potential allies of the policies of the United States and discouraging other potential aggressors from trying to emulate Iraq's behaviour. How does a State comply with all these demands? The intended goal of economic sanctions to ensure a regime change in Iraq was never achieved. The obvious reason for this was the fact that the goal kept on changing. Unlike South Africa where political activism played an important role in bringing about a change in power, the chances of the population voting Hussein out of power was slim to none.

Secondly, the impact of comprehensive and mandatory sanctions on Iraq had a devastating effect on its population. The economy of Iraq was devastated. The OFF programme was successful in diverting the worst catastrophe. The OFF Programme was responsible for the improvement to some extent in the enjoyment of basic levels of healthcare services and a reduction of morbidity rates. However, the measures were implemented too late for many victims of economic sanctions. Measures that initially were intended as a means to apply non-violent economic pressure on the Iraqi government deteriorated into an aggravated humanitarian crisis for nearly all of the Iraqi society. Instead of achieving non-violent aims the sanctions achieved the

contrary. The impact of longstanding, comprehensive and mandatory economic sanctions imposed on Iraqi population resulted in grave violations of human rights.

In addition, the Iraqi economy was mainly driven by its oil exports making the control and regulation of economic sanctions focused and concise. This meant that economic sanctions, which prohibited export of oil and import of goods without consent by the UN had devastating effects on the economy of Iraq. It became so overwhelming that the Iraqi peoples' enjoyment of human rights suffered tremendously. In effect even the senders started to question the proportionality of economic sanctions. In addition, the western powers, in particular the US were at the forefront of imposing the economic sanctions on Iraq mainly due to its history and interests in the Iraqi oil.

Thirdly, the health conditions in Iraq deteriorated faster than what the State were able to import the necessary resources. The Iraqi healthcare system was severely impaired, access to health services was minimal and extremely limited, and preconditions for health also deteriorated fast. Economic sanctions violated the right to the health of the population of Iraq.

Lastly, if the benefit was a change in government, the cost of economic sanctions would have outweighed the benefits by far. One of the alternatives was war and this even took place in the case of Iraq. There is now no doubt that the foreign policy makers of the time would reconsider everything today if they could see the result on the Iraq and the result on the US economy today. In this case as well, the economic sanctions programme against Iraq was certainly a failure.

The popularity of the imposition of economic sanctions as a tool of foreign policy will not change soon. Recent economic sanctions programmes were imposed on States such as the Democratic Republic of the Congo as well as North Korea. Due to this popularity and a lack of appropriate alternatives, certain recommendations as to the possible improvement of economic sanctions programmes are provided.

4. RECOMMENDATIONS

4.1 A Human Rights Approach

Economic, social and cultural rights, in general, and the right to health specifically, are universal, fundamental and justiciable. The right to health is an inclusive right. Arguments of scarce resources and a debilitated economy cannot be ignored, especially since the assistance from the international community is prohibited due to economic sanctions. Economic sanctions in their current form restrict the attainment of *the highest standard of health* to an unacceptable level.

It is submitted that the inability to fulfil the minimum core obligation under international human rights law should become a suspensive condition of Resolutions imposing economic sanctions. Recognition, by the UN and other member States, of the justiciability of economic, social and cultural rights should take place in all forms of international human rights law, even law regulating economic sanctions. In this regard special attention must be given to all vulnerable groups in a society including vulnerable groups' particular to a target State. A human rights approach is the key to alleviating the devastating effects of economic sanctions.

4.2 IHL: Necessity and Proportionality

The principle of proportionality is not unique to IHL it is also found, in a limited degree, in the field of IHRL. In the following instances relating to States of Emergency, the Human Rights Committee has provided that the *need for derogation from human rights norms must be demonstrably proportionate*. The proportionality test is also not unfamiliar in the domain of economic sanctions.

The International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts stipulates that *countermeasures must be commensurate with the injury suffered*. Thus while the principle of IHL in the form of necessity and proportionality lends assistance to the evaluation of a sanctions programme it is not without its difficulties.

Caution should thus be placed on the implementation of these principles to a sanctions programme. It is however a step in the right direction to a proper conceptualised test which can be used to monitor the effectiveness of sanctions in relation to its objectives.

In addition to the above call for IHL and IHRL principles to apply to the implementation and monitoring of sanctions, developments within the area of economic sanction itself, and in particular the creation of targeted sanctions, is the international community's attempt to address the traditional shortcomings of economic sanctions.

From the above it is clear that any sanctions programme must be regulated in accordance with IHL principles in that it must be necessary in relation to the objective or aim and it must be proportionate in relation the objective or aim itself and the injury or damage suffered. Given the character of economic sanctions as complex measures commonly employed over a significant period of time, the main problem in assessing their necessity and proportionality lies in the fact that circumstances change over time.

It goes without saying that a reaction to gross violations of human rights may not justify economic sanctions to such an extent as to deprive the people of the necessary means of survival. The response to the violation of human rights, far from producing compliance, would in its turn worsen the situation of the people entitled to legal protection as is evident in the Iraqi situation.

This is a clear indication that the objective or the aim is disproportionate to the loss incurred or is derogating from the core minimum obligations of the State. In such a case the sanctions programme must be halted or suspended automatically.

4.2 Sanction Committees

Sanctions Committees will be scrutinized. In this regard it suggestions will be put forward as to the improvement of these monitoring bodies, with reference to humanitarian relief. It is argued that goods that are subject to the notification procedure as well as goods that are considered indispensable for the survival of the

civilian population by the Sanctions Committee may be regulated in terms of humanitarian law.

Sanctions Committees monitoring the impact of economic sanctions should focus on all vulnerable groups in a target State. It is recommended that the design of economic sanctions should consider the effect on vulnerable groups particular to the target State. They should be given the discretion to call for the suspension of economic sanctions if the effects on the population are disproportionate to the benefits. An example would be the Kurds of the Iraq, a focus on humanitarian aid in strategic position in Iraq would have alleviated the impact on this vulnerable group.

A further safeguard against possible harm resulting from economic sanctions is to found in the limitations imposed by the UN Charter itself. The UN Charter requires that sanction or other measures undertaken to maintain international peace and security must be effective, meaning that the measure must produce a desired or intended result. Furthermore it must be monitored to be in conformity with the principles of justice and international law.

Other limitations include that no act of the Security Council is exempt from scrutiny as to whether or not that act is in conformity with the Purposes and Principles of the UN and that these purposes include promoting higher standards of living and economic and social progress; solutions to international economic, social, health and other problems and universal respect for and observance of human rights.

It is clear that these international norms may reduce the discussed negative consequences of the Sanctions Committees procedures, namely, time delays in granting notifications for humanitarian goods, as well as refusing to allow goods indispensable for the survival of the civilian population without any reasons being provided. It is clear from the above discussion that IHL principles have an important role to fulfil with regards to the monitoring of sanctions.

4.3 Targeted Sanctions

The concept of targeted sanctions had considerably improved the situation but the same principles that are suggested in relation to comprehensive economic sanctions

must be applied in the creation and implementation of targeted sanctions. This means that principles of necessity and proportionality derived from IHL and general principles of human rights must be maintained and developed further.

4.4 IHRL: Duty on International Community

In the event of the State really being incapable, as will be determined by the CESCR and other similar bodies, the responsibility will be placed the international community in the States position. This responsibility must be regulated by international humanitarian law but must clarify that the obligations on the international community remains the minimum core obligations of the State concerned. Thus, any humanitarian relief must have as its goal fulfilment of the core minimum obligations of the rights in the ICESCR.

Compliance with international human rights should be the burden of a State, in the absence of State support, for whatsoever reason, the international community should carry this responsibility. Where States are unable to govern progressively due to economic sanctions this duty should fall with the international community in the form of humanitarian aid regulated by international humanitarian law. The ability of governance is severely compromised when economic sanctions are applied hence the obligations in relation to ICESCR should fall on the international community who apply collective sanctions and/or States who apply unilateral sanctions.

The State responsibility to fulfil international human rights law obligations are extended to the right to health but the ambit of this responsibility is continuously debated upon, depending on the States financial capability. There is a clear shared interpretation of the meaning of the right to health, initiated by the CESCR General Comment No. 14. This explains the need for a core minimum content of the right to health. This interpretation must be taken further by implementation of these principles even when the failure of the State to fulfil its obligations occurs, as a result of economic sanctions.

The core minimum obligation in relation to the right to health, means that any financial restrictive measure imposed on a government will have a ripple effect on the financial ability of the State to fulfil its core minimum obligations. For example an

indication of a disproportionate sanctions programme will be a regime that impacts on the minimum essential food which is nutritionally adequate and safe or results in a substantially inadequate supply of essential drugs.

Accordingly sanctions programmes must consist of an additional compulsory programme indicating the manner in which the negative impacts of a disproportionate sanctions programme will be addressed. This will have result that sanctions, specifically economic sanctions, are successful because it is created based on international human rights perspective.

Economic sanctions are supposed to be a positive foreign policy tool. They are not seen as positive tool by the international community because of the negative the impact on the population of a target State. The Iraq economic sanctions programme was too comparable to suffering in military conflicts. Further development of this foreign policy tool is necessary because of the lack of effective alternatives. In my opinion, the consideration of the above recommendations should result in positive steps towards alleviating the negative impacts of economic sanctions on the economic, social and cultural rights of a population. The alleviation of the negative impacts are especially vital in terms of the enjoyment of the right to health, a prerequisite to a dignified life.

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Annexure A: Sanctions Instituted by the UN

No	State	Res./date passed	Component of sanction	Date in effect
1	Southern Rhodesia	217 (20-11-65) 232 (16-12-66) 253 (29-05-68) 460 (21-12-79)	Arms and oil embargo Calls for member states to suspend economic relations Sanctions Committee formed Sanctions lifted	1965—1979
2	South Africa	418 (04-11-77) 421 (09-12-77) 919 (25-05-94)	Arms embargo Sanctions Committee formed Sanctions lifted	1977—1994
3	Iraq/Kuwait	661 (06-08-90) 670 (25-09-90) 687 (03-04-91)	Comprehensive trade sanctions; Sanctions Committee formed Air embargo Cease-fire resolution; full trade embargo remains pending Iraqi fulfillment of established conditions Initial authorisation of oil for food arrangements and Subsequent authorisations for oil for food programme Assets freeze Transfer List of individuals established pursuant to resolution List of entities established pursuant to resolution	1990—present until April (Kuwait 1991)
4	Iraq (only)	712 (19-09-91) 986 (14-04-95) 1111 (06-04-97) 1143 (12-04-97) 1175 (06-19-98) 1210 (11-24-98) 1242 (6-04-99) 1483 (24-11-03)	Comprehensive trade sanctions; Sanctions Committee formed Air embargo Cease-fire resolution; full trade embargo remains pending Iraqi fulfillment of established conditions Initial authorisation of oil for food arrangements and Subsequent authorisations for oil for food programme Assets freeze Transfer List of individuals established pursuant to resolution List of entities established pursuant to resolution	1990—present

5	Former Yugoslavia	713 (25-09-91) 724 (15-12-91) 757 (30-05-92) 820 (17-04-93) 942 (23-09-94) 943 (23-09-94) 1022 (22-11-95) 1074 (01-10-96)	Arms embargo Sanctions committee formed Comprehensive trade sanctions, flight ban, cultural/sport boycott on Serbia & Montenegro Sanctions strengthened Sanctions imposed against Bosnian Serbs Some sanctions against Serbia & Montenegro eased Indefinite suspension of sanctions following Dayton peace accord Termination of sanctions against Serbia & Montenegro and Bosnian Serbs	1991—1996
6	Somalia	733 (23-01-92) 751 (24-04-92)	Arms embargo Sanctions Committee formed	1992—present
7	Libya	733 (23-01-92) 883 (11-11-93)	Arms and air embargoes; diplomatic sanctions; Sanctions Committee formed Libyan government funds frozen; ban on oil equipment	1992—1999
8	Liberia	788 (19-11-92) 1792 (19-12-07)	Travel ban and Travel Ban List Arms embargo Assets freeze and assets freeze list	1992—Due to end on 19-12-2008
9	Haiti	841 (16-06-93) 861 (27-08-93) 873 (13-10-93) 917 (6-05-94) 944 (29-09-94)	Oil and arms embargo; foreign assets frozen; •Sanctions Committee formed Suspension of oil and arms embargo following signing of Government Island agreement Oil and arms embargo reinstated Sanctions expanded to trade and financial assets Sanctions lifted effective 16-10-94	1993—1994 (Preceded by OAS Embargo 1991—1993)
10	Angola	864 (15-09-93)	Arms and oil embargo against UNITA; Sanctions Committee formed	1993-present
11	Rwanda	918 (17-05-94) 1011(16-08-95)	Arms embargo; Sanctions Committee formed Sanctions lifted 1-9-96 for Rwandan government; still in effect for non—government forces	1994—present

12	Sierra Leone	1132 (08-30-97) 1171 (08-01-1998)	Arms, economic, and diplomatic embargo Travel Ban on certain leading members of the former Military Junta in Sierra Leone (Armed Forces Revolutionary Council - AFRC and Revolutionary United Front (RUF)	1997—present
13	Sudan	1054 (26-04-96) 1070 (16-08-96) 1591 (29-03-05) 1556 (30-06-04)	Diplomatic sanctions Conditional imposition of air embargo effective in 90 days; deferred pending further examination of sanctions effects arms embargo on all non-governmental entities and individuals, including the Janjaweed, operating the states of North Darfur, South Darfur, and West Darfur on Travel ban Assets freeze	1996—present
14	Taliban	resolution 1267 (1999) 1333 (2000) 1390 (2002) 1455 (2003) 1526 (2004) 1617 (2005) 1735 (2006) 1822 (2008)	Individual or entity associated with Al-Qaida, Osama bin Laden and/or the Taliban Assets freeze Travel ban Arms embargo	1999-current
15	Democratic Republic of the Congo	1807 (31-03-08) 1552 (2004) 1596 (2005) 1616 (2005) 1654 (2006) 1698 (2006) 1771 (2007) 1807 (2008)	Sanctions Committee arms embargo, previously imposed by paragraph 20 of resolution 1493 and paragraph 1 of resolution 1596 (2005) Travel ban, Consolidated Travel Ban and Assets Freeze list	2004-current
16	Côte d'Ivoire	1572 (2004) 1584 (2005) 1643 (2005) 1782 (29-10-07)	Arms Embargo Travel ban Assets freeze Diamond sanctions Due to end on 31 October 2008	2004-current

17	Lebanon	1636 (31-10-05)	Travel ban Assets freeze The resolution individuals designated by the international independent investigation Commission or the Government of Lebanon as suspected of involvement in the 14 February 2005 terrorist bombing in Beirut, Lebanon that killed former Lebanese Prime Minister Rafiq Hariri and 22 others. As of 26 January 2007, no individuals have been registered by the Committee.	2005-current
18	Democratic People's Republic of Korea (DPRK)	1718 (14-10-06)	The Security Council decided, inter alia, that the DPRK shall suspend all activities related to its ballistic missile programme; that it shall abandon all nuclear weapons and existing nuclear programmes; and that it shall abandon all other existing weapons of mass destruction and ballistic missile programmes in a complete, verifiable and irreversible manner Arms Embargo Assets freeze Travel ban	2006-current
19	The Islamic Republic of Iran	1737 (23-12-06) 1747 (2007) 1803 (2008)	A proliferation-sensitive nuclear and ballistic missile programmes-related embargo An export ban on arms and related materiel from Iran; and Individual targeted sanctions – namely, a travel ban, a travel notification requirement, and an assets freeze – on designated persons and entities.	2006-current

Table last update 03 October 2008

Annexure B United States Sanctions (last updated on 03/ 10/2008)

No.	OFAC Country Sanctions Programs	Reason	Last Updated	IIEP A
1	Balkans Sanctions (since 2001)	Extremists in the Republic of Macedonia and the Western Balkans	03/04/2008	Y
2	Belarus Sanctions (since 2006)	For undermining democratic institutions human right abuse and certain members of government of Belarus.	09/04/2008	Y
3	Burma Sanctions	Burmese government's large scale repression of, and violence against, the democratic opposition.	07/29/2008	N
4	Cote d'Ivoire (Ivory Coast) Sanctions (since 2006)	Blocking property of certain persons contributing to the conflict in Côte d'Ivoire.	09/19/2006	Y
5	Cuba Sanctions	Trading With The Enemy Act in response to certain hostile actions by the Cuban government.	09/12/2008	N
6	Democratic Republic of the Congo Sanctions	Blocking property of certain persons contributing to the conflict.	03/30/2007	N
7	Iran Sanctions (since 1979)	For the Iran hostage crisis and subsequent sponsorship of terrorism and its aggressive actions against non-belligerent shipping in the Persian Gulf.	11/20/2007	Y
8	Iraq Sanctions (since 2003) (since 2007)	Targeted sanctions on former officials of the Ba'ath government of Iraq. Persons who threaten stabilization efforts in Iraq with violence.	09/16/2008	Y

9	Former Liberian Regime of Charles Taylor Sanctions	To deal with that threat, the order blocked all property and interests in property of senior members of the former Charles Taylor regime. Does not include current government.	05/23/2007	N
10	North Korea Sanctions (since 2008)	Trading With the Enemy Act with respect to North Korea, effective June 27, 2008. For risk of the proliferation weapon-Usable fissile material.	06/26/2008	Y
11	Sudan Sanctions (since 1997)	For policies and actions of the Government of Sudan, including continued support for international terrorism, ongoing efforts to destabilize neighbouring governments, and the prevalence of human rights violations, including slavery and the denial of religious freedom.	07/31/2008	Y
12	Syria Sanctions (since 2004)	The actions of the Government of Syria in supporting terrorism, continuing its occupation of Lebanon, pursuing weapons of mass destruction and missile programs, and undermining United States and international efforts with respect to the stabilization and reconstruction of Iraq.	07/10/2008	Y
13	Zimbabwe Sanctions (since 2003)	To members of the government of Zimbabwe, and its supporters to undermine democratic institutions and processes in Zimbabwe, President Bush issued Executive Order 13288 imposing sanctions against	07/25/2008	Y

		specifically identified individuals and entities in Zimbabwe.		

Annexure C Past United State Sanctions

No	Archive of Inactive Sanctions Programs Past subjects of IEEPA emergencies	Inactive Since:
1	The first Iraq Sanctions Program (for invading Kuwait)	Components still active in the Iraq II program
2	Kuwait (while occupied by Iraq)	1990-1991
3	Libya Sanctions Program (for sponsoring terrorism)	09/20/2004
4	Taliban Program	07/02/2002
5	Yugoslavia Program	05/28/2003
6	Haiti	1994
7	Liberia (for human rights violations)	2004
8	Nicaragua (for aggressive activities in Central America)	1990
9	Panama (for military coup by Manuel Noriega)	1990
10	Serbia and Montenegro (for sponsoring Serb nationalist groups)	2003
11	Sierra Leone (for human rights violations)	07/29/2003
12	South Africa (for maintaining apartheid)	1991
13	UNITA (for interfering with UN peacekeeping efforts)	05/06/2003

Annexure D United States Sanctions

	OFAC List-Based Sanctions Programs	Last Updated:
1	Anti-Terrorism Sanctions	08/28/2008
2	Diamond Trading Sanctions	05/21/2008
3	Counter Narcotics Trafficking Sanctions	09/12/2008
4	Non-proliferation Sanctions	09/17/2008
5	Persons Undermining the Sovereignty of Lebanon or its Democratic Processes and Institutions	11/05/2007

