

The Fundamental Human Rights in the Situations of Occupation and Economic Sanctions

Elham Aminzadeh¹

Received: 7/4/2007

Accept: 27/10/2007

Abstract

The protection of fundamental human rights at the time of war or peace is an obligation that should be observed at anytime by the states and international organizations. After the Second World War, the non-peaceful situations such as occupation and economic sanctions have occurred numerously, which in some cases lasted for more than a decade. Unfortunately, the laws governing these situations are not implemented properly, and therefore fundamental human rights of people, especially their life, integrity and security, have been violated. This article aims at considering legal rules and their effectiveness in protecting fundamental human rights at the times of occupation and economic sanctions. This study is based primarily on the conventional and customary international legal rules.

Keywords: Fundamental Human Rights, Occupation, Economic Sanctions, Security Council and the Hague.

1. Assistant Professor at Faculty of Law and Political Science, University of Tehran, E-mail: aminzadeh@majlis.ir

Introduction

Since the end of the Second World War, prolonged belligerent occupations and implementation of economic sanctions have become common features of the international system. These two violent situations occurred in different ways and with different causes. While international convention have prohibited the occupation of a state territory by using any force, the Security Council is empowered to ensure international peace and security by imposing economic sanctions on a state to change its behavior. Individual states have also implemented economic sanctions against a group or individual states as a preventive measure, in retaliation, counter measure, or to deter a country to change its policies.

Although in the length of the last half century, the rules of human rights and international humanitarian law have enjoyed a considerable growth, but in spite of states' commitment to abide these rules, during the international and non international conflicts, we witnessed in humane and harsh actions against civilians while no fault has been turning to them in flaming the fire of hostilities. In fact, international, regional and local endeavors to develop and promote respect for human rights and dignity lead societies toward creation of safe and calm conditions for growth and elevation of human beings.

Regarding the fundamental human rights, it is worth to mention that although inseparability of human rights' rules has been reasoned and argued that these rights should not be separated from other human rights rules and also must not belong to a hierarchy by giving superiority to a series of rules of human rights, but what is observed in international documents is that there exists a separation and distinction between human rights rules.

Fundamental Rights have been emphasized in international documents as "elementary rights", "supra positive rights" and "basic rights", we are encountered with the rights that do not depend on acceptance by states, and these are rights that constitute the foundation of human rights rules of international communities, which should be respected in all situations.

Although international humanitarian laws apply during the armed conflicts, the enforcement of human rights in all times and places whether in internal or international fields and whether at the time of peace or war is binding. Therefore, during the hostilities, both of these rules (human and humanitarian law) irrespective of persons who participate in the hostility or who are out of it, must be carried out carefully.

This article deals with the human rights aspects during occupation and economic sanctions. Several topics regarding consequences and effects of these situations are

analyzed and some paradoxical aspects of states' behavior in practice are referred to.

1- Fundamental Human Rights at the Time of Occupation

A- Occupation as a means of violating human rights

The occupation phenomenon must be defined as a manner that the temporary and provisional control is taken by a foreign military force, which is ethnically, religiously, culturally or nationally different from the occupant's population¹. Therefore, the occupation is not a permanent phenomenon with territorial or sovereignty claim and it must be ended one day. Unfortunately, one of the characteristics of occupations in the contemporary period is that they last for a longer time, in some cases they continue for one decade or more.

Substantially, legal rules relating to the occupation is applicable to short-term occupation. According to the Hague Conventions of 1899 and 1907² and Article 6 of the Fourth Geneva Convention of 1949 and its Protocols of 1977, the occupation is a temporary and short- term phenomenon that may last for a maximum of one year. So that, in these documents, abandoning of occupation is a

principle and occupying state cannot change it into a permanent phenomenon. Article 6 of the Fourth Geneva Convention of 1949 has specified occupation until one year. In other words, the occupation must last utmost until one year and no more.

In general, occupation is a kind of hostility the different aspects of which being governed by international legal rules. International documents have known military occupation as an unlawful act contravening sovereign equality of states and the right of self-determination of people.³ It seems that because of illegality of occupation resulting from the use of force, the framers of the Hague and Geneva Conventions provided that occupation should not last for a long term.

B- Negative impacts of the occupation on fundamental human rights of people

The reason for violation of human rights at the time of occupation is that, the benefits of the occupied people are not the same as the benefits of the occupying forces. The objective of the occupiers is that their security is guaranteed while the people under occupation are willing to resist against occupiers. The objective of the people under occupation is to expel the occupiers from their territory. In such stressful

1. Brian Walsh & Ilan Peleg, "Human rights under military occupation: The need for expansion", *The Int. J. of Human Rights*, vol.2, no. 1, (1998), p. 64.

2. The Hague Conventions of 1899 and 1907 are reprinted in: L. Friedman ed., 1 *The Law of War: A Documentary History*, (1972), pp. 204, 270

3. For example see: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, 24 Oct.1970.

The Fundamental Human Rights in the Situations of ...

and hostile environment, the ground is prepared for violation of human rights.

At a time that two opposed forces are placed vis-à-vis each other, the balance of human rights observance must be made to the benefit of civilians. Whereas, in practice it is the rights of civilians under occupation that is violated repeatedly due to occupying forces being well equipped with military tools and instruments to perform effectively in an aggressive environment. In fact, international documents have paid limited attention to the law of occupation, which it mostly is in the direction of the occupiers benefits.

However, if existing international documents on occupation are well implemented, it may decrease the extent of breach of human rights in the occupied lands. But in most instances, the occupier government refrains to observe human rights of people. According to the Hague Conventions (1899-1907), the occupying state must respect the life and rights of individuals and their families, properties, beliefs and their completion of religious practices. The Fourth Geneva Convention of 1949 has prohibited any kind of mental and physical torture, collective punishments and enforcement of discriminative actions.

Unfortunately, when an occupying force seizes the power in a territory, they normally ignore the fundamental rights of the occupied people. While the occupying state has no permission to kill people under occupation or

confiscate their properties, transfer those properties to immigrants or destroy people's houses under occupation.

Common themes of Article 3 of Four Geneva Conventions and other human rights documents regarding fundamental and non-suspendible rights have provided that, the people under occupation must be safe from brutal actions and their rights must be protected by the occupying forces. The prohibited measures also include physical injury, cruel behavior, torture, execution or conviction without previous order of a competent court that has the specifications of a civilized court, prohibition of genocide, prohibition of humiliation of civilians, prohibition of rape; the necessity of existence of impartial and competent courts to investigate charges against forces of the occupying state. These are the rights that are not deniable and breakable. Even the occupying state cannot resort to torture or genocide under the pretext of security for own forces. Therefore, the occupying state even for its security is obliged to use peaceful methods.

C- Violation of fundamental human rights of people in the name of security

Article 43 of the Hague Law of 1907 has envisaged that the occupying state must adopt all necessary measures to establish the security and order in the occupied territories. Without a public order, the life and property of the

civilians will be in danger. Even for establishment of an order, if the occupying power is forced to suspend some rights, these should not include the fundamental human rights and must be returned as soon as possible. In case of opposition to the occupation or the manner of state's administration and protection of their sources, there is no justification for arbitrary arrests and with indefinite time or beating and using foul language, torture and killing of people through needless, aimless and blind attacks or demolition of their houses. Thus, in any case, the fundamental human rights of people must be protected.

In most cases, the revolt of people under occupation is due to their oppositions to harsh and arbitrary military operation, while the existence of a fair and impartial court to investigate people's complaints against the occupiers, would result in preventing tension and riot. Without such a court, these people have no way to adjudicate their violated rights.

The Geneva Protocol 1 of 1977 in Article 75, has specified that the accused is entitled to be aware of own accusations, and enjoys defense facilities, in addition to preparing the causes of own non-conviction, and he/she may enjoy having a translator. In spite of such provision, there is no guarantee for establishment of the courts in the occupied lands and states. As a rule, if the court of occupying state be active in investigating offences, the behavior of occupiers

would be adjusted effectively. In practice, however it has been proved that the accessibility of people under occupation to a fair and competent court is quite impossible because the occupiers do not permit judicial investigation for the crimes committed by military forces.

In the occupied territories, sometimes the occupier resorts to some actions to tackle security problems while those actions are deemed deviation from observing the rules of human rights. But, in practice, it has been observed that those operations are taken for other objectives than security. For example, the houses of people under occupation are being confiscated, in order to transfer them to individuals of the occupier state.

Further more, construction of wall in the occupied territories would violate human rights seriously and cannot be justified as a security necessity¹.

To protect fundamental human rights at the first place, the occupying state must create order and security in the occupied lands as determined in the international documents. Secondly, the principle of proportionality should be implemented (for example, throwing stones by youths must not result in killing them and demolishing their houses). Thirdly, the principle of distinction necessitates that civilians such as women and children be

1. For more discussions see: ICJ Rep. Legal Consequences of the Construction of a Wall in the Occupied Palestinian territory, July 2004, p 102-13.

The Fundamental Human Rights in the Situations of ...

distinguished and, in no condition, they should be targeted by the occupier forces.

The people in the occupied territories need an effective and extensive protection. They need access to impartial and competent courts so that violations of fundamental human rights are investigated and adjudicated. As a rule, such courts must be independent and free from influence in order to be able to work impartially and effectively to reestablish denied fundamental rights.

D- Detaining civilians in the occupied territories as prisoners-of-war or protected persons or other status?

The Geneva Conventions have strictly limited the detention of persons who are considered protected persons. According to Article 78 of Fourth Geneva Convention, protected persons may only be detained by an occupying force through court's proceeding or for "imperative reasons of security" of the occupying power.

Furthermore, individuals who are captured as belligerents during the occupation should be treated as prisoners-of-war unless and until a competent tribunal determines otherwise. Under the Third Geneva Convention, the occupying power must release and repatriate, without delay, all persons entitled to prisoner-of-war status soon after cessation of hostilities, except those who have been charged with a criminal offence.¹

1. Art. 118 and 119, *Third Geneva Convention*, 1949.

In practice, during the US armed conflicts and occupations of Vietnam, the 1991 Persian Gulf War, the attack on Afghanistan in 2001 and the 2003 Iraq War, most of the human rights and humanitarian rules have been ignored. The United States refused to consider individuals captured abroad as prisoners-of-war or civilians as 'protected persons'. Instead, the US Government made a blanket determination that all persons held at Guantanamo Bay or other US detention centers are "unlawful combatants" and are not entitled to the protections under the Third Geneva Convention or under the Fourth Geneva Convention.² While according to the commentary of the International Committee of the Red Cross, "[E]very person in enemy hands must have some status under international law... [T]here is no intermediate status; nobody in enemy hands is outside the law".³

The unknown numbers of detainees have no links with terrorist groups and included civilians such as farmers, taxi drivers, cobblers and other laborers.⁴ The US Government by evading its obligations under international human and humanitarian law and classifying

2. James Ross, 'Jurisdictional Aspects of International Human Rights and Humanitarian Law in the War on Terror', in Fons Coomans and Menno T. Kamminga (eds.), *"Extraterritorial Application of Human Rights Treaties"*, (Intersentia, Antwerp-Oxford, 2004), p. 17.

3. J.S. Pictet (ed.), *"Commentary on the Geneva Convention relative to the Protection of Civilian Persons in Time of War"*, (Geneva: ICRC, 1958), p. 51.

4. 'Many Held at Guantanamo Not Likely Terrorists', *"Los Angeles Times"*, (22 Dec. 2002).see Id.

detainees, including civilians, as 'unlawful combatants', has deprived them from all fundamental rights such as the right to life (some individuals lost their lives in US custody), the right to freedom, the right to have security and the right to defend themselves in an impartial and competent court which are expressly emphasized in the human rights instruments. Even these detainees were not given an opportunity to challenge their designation as an 'unlawful combatant'.

The United States is obligated to release protected persons 'as soon as the reasons which necessitated his internment no longer exist', and in any case, unless the person is serving a prison sentence determined by an impartial and competent court, internment shall 'cease as soon as possible after the close of hostilities'.¹

Since the armed conflict in Afghanistan in June 2001 and in Iraq in 2004 could no longer be characterized as an international armed conflict and the United States was no longer at war with the Taliban and Saddam governments, it was obliged to release and repatriate without delay all persons entitled to prisoner-of-war status or 'protected persons'. "Any detainee implicated in war crimes, crimes against humanity or other criminal offences should be prosecuted by courts that meet international fair trial standard."²

Otherwise, the "unlawful deportation or transfer or unlawful confinement of a protected person" is a grave breach of the Fourth Geneva Convention³. The United States authorities are responsible for all their crimes and illegal activities, and victims have the right to an effective remedy by a competent tribunal for the US acts violating their fundamental rights.⁴

E- Concluding remarks

Today, the rules and principles governing the occupiers' behavior are not observed properly due to the lack of a specific document concerning rights and protections for populations living under occupation. Existing law regarding fundamental rights of people under occupation needs to be developed into a single "Occupation Document".⁵

In addition, the fundamental human rights need proper sanctions, envisaging in the proposed document. Regional and international organizations should be able to establish independent and impartial fact finding commissions to investigate violations of human rights during the occupation. The result of investigation would determine the kind of action to be taken against the violators. These actions could be either in the form of publishing the violations of fundamental human rights of

1. Arts. 132 and 133 of the Fourth Geneva Convention.

2. James Ross, op. cit., p.20.

3. Art. 147 *Fourth of the Geneva Convention*.

4. Art. 8 of the *Universal Declaration of Human Rights*, 1948.

5. B. Walsh & I. Peleg, op. cit., pp. 62-65.

The Fundamental Human Rights in the Situations of ...

people under occupation for public opinion or taking serious steps on behalf of international community against the occupying state.

Furthermore, in international arena, the accountability structure necessitates that the occupying state should accept its responsibility of observing fundamental human rights during the occupation. In fact, incorporation of human rights principles of accountability can have positive impact on the regulation of the use of force during armed conflict.¹ Within an accountability structure on human rights rule, occupying state either would not occupy another state or in case of occupation would end this situation as soon as possible.²

2- Fundamental Human Rights at Time of Economic Sanctions

According to Article 41 of the United Nations Charter, the Security Council to maintain international peace and security may decide on measures not involving the use of armed force including complete or partial interruption of economic relations. In practice, however, it has been proved that the economic sanctions have incurred severe and irreparable damages to the civilians. The question is that whether the political organ of the United Nations, namely the Security Council or states imposing

sanctions, are bound to observe fundamental human rights during the economic sanctions?

A- The conventional limitations on the economic sanctions

Once the Security Council determined that under Article 39 of the UN Charter a particular situation should be considered a threat to or breach of the peace, would react to that situation in several ways with great liberty. The drafters of the UN Charter in Article 41 envisaged measures to be implemented by the Security Council with no limitation on the scope or duration. In fact, in the absence of such limitations, there is not any link between the law on international peace and security and human rights law.³ Even vital rules governing armed hostilities do not apply to economic sanctions. For example, the most important rule during the armed hostilities is that distinction should be made between combatants and civilians to protect civilians. However, this rule does not apply to the measures envisaged by Article 41 of the Charter, such as interruption of economic relations or of rail, sea and air communications and therefore these measures would be indiscriminated. Consequently, peacetime reactions to a threat to the peace would be aimed at civilians and necessarily have severe effects on the population, while armed reactions

1. Kenneth Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict", 98 *AJIL* (2004), pp. 3335.

2. For more discussion see: Michael Matheson, "The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons", 91 *AJIL*, (1997).

3. Matthew Craven, "Humanitarianism and the quest for smarter sanctions", 13 *EJIL* (2002), p. 48.

to a threat to the peace is taken place under international humanitarian law and it in general precludes actions aimed at civilians.¹ The absence of parameters for the measures under Article 41 has led to human disasters in Bosnia and Iraq, which will be considered in the following parts.

B- Legality of arms embargo against Bosnia

Under the Security Council's Resolution 752, Bosnia has been recognized as an independent state, which was interfered with and attacked by its neighbors including the Serbs. The attacks were directly and indirectly and encouraged by providing planes, weapons and even manpower.² Bosnia's admission to the United Nations means that it enjoys the rights as a member state, i. e. "inherent right to self-defence" under Article 51 of the Charter. Although the Security Council in the case of Kuwait had affirmed the right of self-defence³ for the victim state, this right was not recognised for Bosnia. "What the Security Council must not do is impose measures (such as the arms embargo) which seriously impair the ability of a state to defend itself from an armed attack, without also undertaking effective measures to defend the state itself."⁴

In 1993, Bosnia succeeded in having included in one of the three drafts of General Assembly resolutions, requesting for an advisory opinion on the issue of the legal status and effects of the arms embargo resolutions. However, later, Bosnia asked that the clause requesting the advisory opinion be dropped.⁵ The Bosnian Government decided that the best course of action was to secure a Court judgment that Serbia violated the Genocide Convention and not to include any arguments pertaining to the controversial and jurisdictionally uncertain issue of the arms embargo.⁶

In the second Case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia) in 1993 Judge Lauterpacht in his separate opinion stated that "[t]he duty to 'prevent' genocide is a duty that rests upon all parties The applicant obviously has here in mind ... the embargo placed by Security Council Resolution 713 (1991) [I]t is not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of *jus cogens* or requiring a violation of human rights. But the possibility that a Security Council resolution might inadvertently or in an unforeseen manner lead to such a situation cannot be excluded On this basis, the

1. Liesbeth Lijnzaad, 'Some remarks on the Human Rights aspects of sanctions' in Fons Coomans and Menno T. Kamminga (eds.), *op. cit.*, p. 267.

2. *N.Y. Times*, 6 June 1992, p. 1.

3. SC Res. 661, 6 Aug. 1990.

4. Craig Scott et al, "A Memorial for Bosnia. Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nation's Security Council's

Arms Embargo on Bosnia and Herzegovina", 16 *Mich. J. Int'l L.*, (1994), p. 70.

5. GAOR, 48th Sess., 84th plen. mtg., and, 85th plen. mtg.

6. Craig Scott et al, *op. cit.*, p. 13.

The Fundamental Human Rights in the Situations of ...

inability of Bosnia-Herzegovina sufficiently strongly to fight back against the Serbs and effectively to prevent the implementation of the Serbian policy of ethnic cleansing is at least in part directly attributable to the fact that Bosnia-Herzegovina's access to weapons and equipment has been severely limited by the embargo. Viewed in this light, the Security Council resolution can be seen as having in effect called on Members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*."¹

It should be borne in mind that the primary responsibility for maintaining international peace and security was granted by the UN members to the Security Council. The members do not expect that a UN member be left in a defenseless state against an act of aggression and the Council call on them for implementing sanctions become "unknowingly" and "unwillingly" supporters of the genocidal activities.

It is not understood why the Security Council did not change its decision² on the embargo to allow Bosnia to defend itself, while in 1992 the Council had recognized that there was interference with, violence towards and forcible

change in the ethnic composition of the population of Bosnia.³ The JNA units provided the Bosnian Serbs with an ongoing supply of arms and other supports in direct contravention of the arms embargo, an embargo which was rigorously enforced against Bosnia.⁴ The one-sided impact of the arms embargo made Serbia's flagrant violations of it all the more serious and Bosnian Serbs received an advantage from Serbia, which could not be balanced by the Bosnian forces. This was consequently a decisive factor in the success of Bosnian Serb military and its genocidal activities.⁵

C- Implementation of economic sanction in case of Iraq

One of the obvious examples of the Security Council's decision on economic sanctions is its decision against Iraq, which was implemented after the occupation of Kuwait. It was expected that by economic blockade of the United Nations, economic welfare would decrease and the people of Iraq take action for overthrowing of Saddam Hussein's regime. The result of bans caused that the income rate of Iraq reached the lowest limit in the world and the death and unemployment growth was in upswing. Not only Saddam Hussein was not overthrown, but he ruled over Iraq with utmost power for some years.

1. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia), *I.C.J. Rep.* 1993. pp. 436-41, (separate opinion of Judge Lauterpacht).

2. SC Res. 713, 25 Sep. 1991.

3. SC Res. 752, 15 May 1992.

4. Craig Scott et al, *op. cit.*, p. 47.

5. *Id.*

The international organizations, such as FAO, UNICEF and WHO, presented shocking reports from touching situation of Iraq's people. These reports warned of rising malnutrition and disease rates, especially among children.¹ The Center for Economic and Social Rights cites the 1995 FAO study as the source for its claim that sanctions killed more than 500,000 children.² Although the director of FAO's Food and Nutrition Division wrote in a 1996 letter that "the study was not designed to prove causality"³, the impact of sanctions on humanitarian crisis in Iraq, cannot be denied. According to a report by New York Times, economic ban killed Iraq's Children.⁴

Although Iraq had enjoyed a good agricultural and industrial growth, and in the length of its attack on Iran, which last for 8 years, had not suffered from basic damage to its economy and public welfare, and people of Iraq experienced an increased economic growth between years 1960 to 1990, but during the

second Persian Gulf War and subsequent economic sanction, they experienced extensive damage on their economy. Dropping 90 thousand tons destructive bombs on Iraq's infrastructure and economic regions such as petroleum refineries, communication centers, roads, railways and at least 12 bridges and destruction of 18 electric generating centers out of 20 centers, caused irretrievable damages which affected Iraq's economy seriously. These operations followed by economic sanctions authorized by the Security Council, had a direct effect on people's national and individual interests.⁵

A report by the United Nations Under-Secretary-General Martti Ahtisaari indicated that Iraq had been "relegated to pre-industrial age" where "most means of modern life support have been destroyed or rendered tenuous".⁶ It shows that the economic sanctions with its negative effects on fundamental human rights of Iraq's people had not the smallest effect on Iraq's government. Although, some of the western states announced that the responsibility of pain and death of Iraq's people rests with Saddam, but this justification was not legal nor humanitarian if Iraqi government had decided to sacrifice own people. The fact is that

1. FAO, "Evaluation of Food and Nutrition Situation in Iraq", (Rome, 1995); WHO, "The Health Conditions of the Population in Iraq since the Gulf Crisis", WHO/EHA/96. 1, New York, (March 1996); UNICEF, "Iraq Country Situation Report", (August 1995).

2. George A. Lopez & David Cortright, "Economic Sanctions and human rights: part of the problem or part of the solution?", *The Int. J. of Human Rights*, vol. 1 no.2 (1997), p.18.

3. Letter from John R. Lupien, Director of Food and Nutrition Division, FAO, to Mr. Milton Leitenberg, University of Maryland, 4 Jan. 1996, quoted in George A. Lopez & David Cortright, op.cit, p. 25.

4. Sarah Zaidi and Mary C. Smith-Fazi, "Health of Baghdad's Children", *The Lancet*, vol.346, no. 8988 (Dec. 1995), p. 1485. Barbara Crossette, "Iraq Sanctions Kill Children" UN Reports', *New York Times*, Dec. 1995.

5. Abbas Alnasrawi, "Does Iraq Have an Economic Future?" *Middle East Executive Reports*, (March 1996), pp. 8-18.

6. United Nations, "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

The Fundamental Human Rights in the Situations of ...

international society and particularly the United Nations kept silence in this regard and merely kept looking the regretful situation of Iraq's people under the economic blockade.

D- Smart and targeted sanctions

During the life of the United Nations the Security Council has imposed sanctions, most of them imposed during the post-Cold War¹. These include sanctions against Iraq², Libya³, the former Yugoslavia and Bosnia⁴, the Federal Republic of Yugoslavia⁵, Haiti⁶, Somalia⁷, Angola⁸, Rwanda⁹, Liberia¹⁰, Sudan¹¹, Sierra Leon¹², Cambodia¹³, Afghanistan¹⁴, Eritrea and Ethiopia¹⁵ and Iran¹⁶.

Regardless of legality of the above sanctions, they always have had negative effects on civilians because of their indiscriminate feature. While there is an opinion that negative consequences are

inevitable to achieve the results aimed at, another approach is to try and list types of goods that may not be targeted. This approach has been taken by the WHO and other international agencies to develop a list of goods that should be exempted from sanctions.¹⁷

Another approach is that economic sanctions would be more humane if be aimed directly at the private life of the ruler, e.g. the seizure of assets such as bank accounts and putting pressure on a targeted regime rather than on people and civilians.¹⁸ However, if authorities governing a targeted state have been elected through a democratic process, pressures resulted from economic sanctions on that government, would be considered as violation of the right of self-determination and the right to development of that people. While international instruments have prohibited any coercive action to deprive people from their right to self-determination or encourage the use of economic, political or any other type of measures to coerce another state to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.¹⁹

Administration and Management", 20 March 1991 (New York 1991).

1. From 1945 to 1990, economic sanctions imposed in two cases, against Southern Rhodesia in 1965 and South Africa in 1977 by the Council's Resolutions, 216 (1965), 232 (1966), 460 (1979), 418 (1977), 919 (1994).

2. SC. Res.661 (1990).

3. SC. Res. 748 (1992), 1192 (1998).

4. SC. Res. 713 (1991), 1021 (1995), 757 (1992).

5. SC. Res. 1160 (1988).

6. SC. Res. 841 (1993).

7. SC. Res.733 (1992).

8. SC Res. 864(1993).

9. SC. Res. 918 (1994).

10. SC. Res. 788 (1992).

11. SC. Res. 1054 (1996).

12. SC. Res. 1132 (1997).

13. SC. Res. 792 (1992).

14. SC. Res. 1267 (1999).

15. SC. Res. 1298 (2000).

16. SC. Res. 1737 (2006).

17. Liesbeth Lijnzaad, op. cit. pp. 268, 269. It is believed that such an approach raises the problem of dual-use goods.

18. See Matthew Craven op. cit., p. 48; Liesbeth Lijnzaad, op. cit. p. 269.

19. Declaration on principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations, 1970.

In fact, implementation of economic sanction as a policy tool by politicized decisions of the Security Council needs obligatory principles governing the Security Council decisions preventing harmful impacts on civilians, democratic governments and even the reputation of the Security Council.

E- The principles applicable to economic sanctions

Although maintaining international peace and security is significant for the international community, but it cannot be considered as an objective to justify the use of every means to violate fundamental human rights of people. In fact, the international peace and security is important for protecting people's life and dignity, and the provision of peace and security cannot be a reason for forcible action and ignoring people's rights.

To protect fundamental human rights of target state's people during economic sanctions, there are some principles by which the Security Council should implement its measures. These principles are as follows:

The principle of humanity, the principle of necessity, the principle of proportionality, the principle of distinction, the principle of good faith and the principle of accountability.¹

1. For more discussions see, Elias Davidsson, "Legal Boundaries to UN Sanctions", *The Int. J. of Human Rights*, vol.7, no.4, (winter 2003).

The principle of humanity provides that the integrity and health of every person in any conditions be respected, the principle to which the United Nations' Charter in its preamble has implicitly referred to. In addition to the UN Charter, the constitution of states, the multilateral treaties and the resolutions of international organizations have stressed on the principle of humanity. What the principle of humanity has determined, is the prohibition of acts which jeopardize the existence of human kind, whether her/his mental or physical health or dignity, and the affirming rules for preparing the minimum possibilities of life which is necessary for ordinary life of human.

The second and third principles are the principles of necessity and proportionality. These two natural law principles are linked to each other and are indispensable. The principle of proportionality can only be invoked with regard to lawful and necessary measures. For example, unlawful actions like torture which violates fundamental human rights rules would not be permissible.²

In fact, the principle of proportionality under international law provides that even if there is a necessary sanction programme, it cannot exceed the somewhat broadly construed bounds of proportionality. Article 57 of Additional Protocol 1 of 1977 to Four Geneva Conventions of 1949, prohibits any "attack which may be

2. Elias Davidsson, op.cit., p. 12-13.

The Fundamental Human Rights in the Situations of ...

expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects...which would be excessive in relation to the concrete and direct military advantage anticipated"...“a remote advantage to be gained at some unknown time in the future would not be a proper consideration to weight against civilian losses”.¹ Therefore, the principle of proportionality should apply to sanction regimes to protect fundamental human rights of people.

The fourth principle is the principle of distinction, which determines that belligerents are required to distinguish between civilians and combatants to direct their attacks only against military targets. This rule has been expressly emphasized in Article 47 of Additional Protocol 1 of 1977 to Geneva Conventions. Collective forcible sanctions including economic and military ones therefore cannot be aimed at the entire population. In fact, economic sanctions as destructive means could destroy a community more than the use of military instruments, since economic sanctions do not discriminate between combatant and non-combatant. During a military attack, many bombs may miss targets, but economic sanctions are missing none, including those who are most remote from the aims and less capable to bring a change in a policy such as those who are the poor, the aged, the children, the infirm, and people who, in war are regarded most

1. W.A.Solf in M. Bothe/K.J. Partsch/W.A.Solf, *New Rules for Victims of Armed Conflict*, (1982), p.365.

clearly as non-combatants. In the case of Iraq, the population, during the economic sanctions was punished more than the government.²

The fifth principle is the principle of good faith. In most sanctions imposed by the Security Council the neutral and fair methods and standards have been ignored. Its actions have been based on biased or unevenly applied standards. For example, in the case of Iraq, sanctions were imposed to induce it to withdraw from Kuwait, while skeptics pointed out that many invasions and occupations by states had not resulted in the imposition of sanctions.³ All existing sanctions regimes except on the former Yugoslavia are targeted at countries of the south.⁴

It is expected that the Security Council should act its mandate with good faith and for the common aims and on behalf of all Member States, in some cases however it does not act with good faith and neutrality. For instance, despite the Israeli acknowledgment of having nuclear weapons, threatening regional and international peace and security, the Security Council had no reaction to condemn or impose sanction against it. At the same time the Council

2. See generally, Ahmed Shehabaldin and William M.Laghlin JR, "Economic Sanctions against Iraq; Human and Economic Costs", *The Int. J. of Human Rights*, vol.3 .no.4. (Winter 1999).

3. For instance invasions and occupations by Israel of Palestinian territories and Iraq against Iran.

4. Boris Kondoch, " The Limits of Economic Sanctions under International Law: The Case of Iraq", *International peace-keeping, The Yearbook of International Peace Operations*, Michael Bothe and Boris Kondoch, ed. vol.7, (2001), p.272.

passed Resolution 1737¹ imposing sanctions against Iran in spite of its vast cooperation with the International Atomic Energy Agency (IAEA) and no report was issued by the inspectors of the Agency regarding Iran's diversion to not peaceful purposes.²

While the Preamble of the UN Charter, has emphasized on the fundamental human rights, and again Articles 55 and 56 have authenticated fundamental human rights and freedoms of people. Generally, it has been emphasized on two groups of non-suspendible human rights rules, one is the non-suspendible individual rights and the others the non-suspendible collective rights such as the rights to self-determination and the right to development. Non-suspendible civil and political rights in the time of peace and war cannot be violated by the United Nations through its actions, nor this organ can force the states to violate these fundamental human rights through its resolutions.

The right to self-determination and the right to development as collective rights have provided that the rights of people in determining own political destiny and the right

of free enjoyment of benefits of natural resources of their country must be observed. The importance of the right of self-determination as a fundamental human rights is in the extent that the two Covenants of 1966 have emphasized on it explicitly.³ This right must not be violated by any state or regional or international organization. While Security Council Resolutions 1737 and 1747 imposing sanctions against Iran have provided that all Iranian nuclear research and development activities should be ceased which is not in compliance with human rights rules.

The sixth principle is the principle of accountability. According to this principle, the legal bases and effects of the sanctions imposed against a state should be assessed in a transparent way. The United Nations General Assembly has demanded that the transparency of the Sanctions Committee of the Security Council which operates secretly and is not publicly accountable should be increased.⁴

International lawyers believe that the imperative obligation to respect the non-derogable rights of International Covenant on Civil and Political Rights of 1966 (ICCPR) is

1. SC Res.1737, 23 Dec. 2006.

2. The IAEA Board of Governor Res. GOV/2005/77, 18 Nov. 2005. The Security Council in its Resolution 1737 has declared that it imposes economic sanction against Iran because its nuclear programme has been a matter of international concern, which such finding is not compatible with Article 39 of the UN Charter which has provided a State would be under enforceable measures of the Security Council if committed act of aggression, breach of the peace or threat to the peace. Comparison should be made to the Israeli announcement of possessing nuclear arms which by any international standard deems a threat to the peace.

3. Common Article 1 of two International Covenants on Human Rights of 1966 has provided: "1- All peoples have the right of self-determination. By virtue of that right they freely determine their political status and pursue their economic, social and cultural development. 2- All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

4. GA Res.242, Annex II (1997), UN Doc.A/52/242.

The Fundamental Human Rights in the Situations of ...

described as a rule of *Jus Cogens*.¹ According to Judge Schewebel “where the Court speaks of ‘conformity with the international obligations assumed ... under the Charter’, of a ‘violation of the purposes and principles of the Charter’, of the pledge to observe and respect human rights and fundamental freedom for all, when it finds that certain actions ‘constitute a denial of fundamental human rights’ and classifies them as a ‘flagrant violation of the purposes and principles of the Charter’, it leaves no doubt that, in its view, the Charter does impose on Members of the United Nation legal obligations in the human rights field”².

It seems when Member States of the United Nations are bound to observe the fundamental human rights, the United Nations as an international organization and its organs are bound to observe human rights rules in their actions seriously. The General Assembly has provided that the observance of fundamental human rights is part of international customary law that not only in the armed conflicts but in the non-armed conflicts and during the economic sanctions is also applicable. Although it is believed that civil and political rights are

considered as non-derogable rights, but there is a close relation between socio-economic and civil and political rights. Lowering the life standard (such as nutrition, health, potable water and medical care) because of imposing economic sanctions, which lead to a willfully murder and denial of the right to life, comprise severe violation of fundamental human rights.³

The suspension of some human rights rules in the internal system of states should be followed by informing of suspender state to the international community, which it means that there is an obligation of accountability for internal authorities regarding human rights rules.⁴ However, such an accountability system does not exist for international organizations. The Security Council’s decisions and actions cannot be reviewed by the International Court of Justice, the General Assembly or any other international organ.

The victims of economic sanctions including civilians, groups and states have no forum to complain their suffering as a result of violation of fundamental human rights at the time of economic sanctions. Therefore, it is the obligation of the Security Council as a decision making organ of the United Nations that before adopting any decision on enforceable action

1. See: Marten Zwaneburg, "Compromise or commitment: Human Rights and International Humanitarian Law Obligation For UN Peace Forces", *Leiden J. of Int. Law*, vol.11(1998), T.D.Gill, "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers Under Chapter VII of the Charter", vol.26, *Netherlands Yearbook of Int. Law* (1995).

2. Egon Schewebel, "The International Court of Justice and the human rights clauses of the Charter" , *AJIL*, vol.66 (1972) , pr.337,348

3. UN Doc.A/AC.182/L100,part II, 30 Jan.1998.

4. Article 4 (3) of the International Covenant on Civil and Political Rights has provided that, “[A]ny State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant....”.

against a state, must consider all human rights rules and general principles of international law, including distinction, necessity, proportionality, humanity, good faith and accountability.

F- Concluding remarks

Under Article 24(1) of the Charter, the Security Council has been delegated the authority to react to situations endangering international peace and security, and under Article 25, the member states of the UN have agreed to carry out the decisions of the Security Council. However, the Security Council has been obliged under Article 24(2) to act in accordance with the principles and purposes of the Charter, which clearly includes human rights obligations. The Council is not a party to the relevant UN human rights instruments but it does not mean that it can ignore such important instruments.¹ From the perspective of the legal system, the Security Council's authority emanates from the Charter and legal obligations suppose legal accountability. In fact, the member states have agreed to carry out the Council's decisions which do not override the human rights obligations in the Charter and other human rights instruments.² In the Lockerbie Case Judge Jennings with regard to

the Security Council stated that " [T]he first principle of the applicable law is this: that all discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law."³ Therefore, states including members of the Security Council remain bound by the UN human rights instruments at the time of the establishment of a particular sanctions regime. In this regard, it should be stressed that General Comment No. 8, adopted by the Committee on Economic, Social and Cultural Rights in 1997, reminds the permanent members of the Security Council of their joint and several responsibilities under the Covenant of Economic, Social and Cultural Rights of 1966. According to this Comment, the economic, social and cultural rights of a population are not changed by the imposing sanctions by the Security Council because of the leaders of that state have violated norms relating to

1. Liesbeth Lijnzaad, *op. cit.* p. 262.

2. For more analytical discussions see: Vera Gowlland-Debbas, 'UN Sanctions and international law: an overview' in Vera Gowlland-Debbas, "United Nations Sanctions and international law", (Kluwer Law International, 2001, the Hague), pp, 11-14.

3. Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya vs. United Kingdom) (Libyan Arab Jamahiriya vs. United States of America) (Preliminary Objections), Decision of 27 February 1998, Dissenting Opinion of Judge Jennings.

The Fundamental Human Rights in the Situations of ...

international peace and security.¹ Therefore, human rights instruments, especially those that have attained the status of *jus cogens*, could not be violated by a state or UN organs.

Conclusion

The fundamental human rights require that everybody has the right to enjoy the life, with necessary standard of mental and physical health, the right of enjoying social activities, the right of development and the right to determine his/her destiny.

What deprives the people from accessibility to fundamental rights is the lack of full and progressive rules regarding the occupation and the economic sanction. In fact, the mere existence of rules related to the protection of fundamental human rights at the time of peace or war do not guarantee the respect of these rights. Perhaps, a day is reached that international organizations such as the United Nations, Red Cross and Red Crescent that have been pioneer in drawing up and enforcing the rules of humanitarian and human rights, promote and guaranty the existing rules. At that time, if a territory is occupied, the enforceable rules and restrictive regulations governing the behavior of occupier will compel him to leave the occupied state.

1. CESCR General Comment 8, The relationship between economic sanctions and respect for economic, social and cultural rights, 12 December 1997, UN Doc E/C.12/1997/8, p.12.

Economic sanctions during the last decade have come under harsh criticism because of its effects including vast human suffering, although under the United Nations Charter, economic measures would be implemented in response to perceived unlawful conduct of a UN member state. However, as it has been proved in recent years, economic sanctions widely hurt innocent civilians due to lack of observance of fundamental human and humanitarian principles discussed in this article. In such circumstances, collective or unilateral economic measures would be considered as mass destruction weapons that amount to genocide,² while according to Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, genocide³ is prohibited both at times of peace and war.

Therefore, the civilian population of any territory either under occupation or economic sanctions has the right to enjoy fundamental human rights. International treaties, international customs, the general principles of law and the principle of equity are governing the acts of international actors. Neither the

2. Ramsay Clark's Letter to the Security Council, letter can be found in the following internet address: <http://www.transnational.org/features/sanctionsIraq.html>, G. Simons, *The Scourging of Iraq* (2nd ed., 1998)

3. Genocide is inter alia killing members of the group, causing serious bodily or mental harm to members of the group, or deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part "committed with the intent to destroy in whole or in part.", Article 2 a, b and c of the Convention on the Prevention and Punishment of the Crime of Genocide (1948).

United Nations nor the states are allowed to commit human rights violations.

While the states and individuals are bound to be accounted for their actions before the international and internal forums, the United Nations Security Council is not required to be accountable before the international community, or its decisions be reviewed either by the General Assembly or the International Court of Justice, particularly for its Chapter VII measures and its effects on human rights of peoples. However, the vast mandate of the Security Council is not unlimited and it is bound to respect human rights. Its actions should be under the principles of good faith and full accountability to the world's people. It means this obligation is not merely political but is a legal one, even if no mechanism exists to enforce such obligations.

The legal obligation of the Security Council has been established by Article 24 of the Charter, which determines that the Council, for the maintenance of international peace and security, "shall act in accordance with the Purposes and Principles of the United Nations". Among the purposes and principles of the United Nations, Article 1 of the Charter expresses respect for the principle of equal rights and self-determination of people and promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction.

References

- [1] Alnasrawi A. (1996), "Does Iraq Have an Economic Future?" *Middle East Executive Reports*, New Jersey.
- [2] Bothe M., Partsch K.J., Solf W.A., (1982), *New Rules for Victims of Armed Conflict*, Martinus Nijhoff Publishers, London.
- [3] Bothe M. and Kondoch B. ed. (2001), *The Yearbook of International Peace Operations*, vol.7., Kluwer Law International.
- [4] CESCR General Comment 8, The relationship between economic sanctions and respect for economic, social and cultural rights, 12 December 1997, UN Doc E/C.12/1997/8.
- [5] Clark's R. *Letter to the Security Council*
<http://www.transnational.org/features/sanctionsIraq.html>
- [6] *Convention on the Prevention and Punishment of the Crime of Genocide* (1948).
- [7] Craven M. (2002), "Humanitarianism and the quest for smarter sanctions", 13 EJIL. respect for economic, social and cultural rights, 12 December 1997, UN Doc E/C.12/1997/8.
- [8] Crossette B. (1995), "Iraq Sanctions Kill Children" UN Reports', *New York Times*, Dec.
- [9] Davidsson E. (2003), "Legal Boundaries to UN Sanctions", *The International Journal of Human Rights* vol.7, no.4, (winter).
- [10] *Declaration on Principles of International Law concerning Friendly, Relations and*

The Fundamental Human Rights in the Situations of ...

- Cooperation among States in Accordance with the Charter of the United Nations, (1970).
- [11] FAO, "Evaluation of Food and Nutrition Situation in Iraq", (Rome, 1995).
- [12] Fons Coomans and Menno T. Kamminga (eds.) (2004), " Extraterritorial Application of Human Rights Treaties", (Intersentia, Antwerp-Oxford).
- [13] Gill T.D. (1995), "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter", vol.26, *Netherlands Yearbook of International Law*, Asser Press.
- [14] Gowlland-Debbas V. (2002), "United Nations Sanctions and international law", (Kluwer Law International, The Hague).
- [15] *IAEA Board of Governor Res. GOV/2005/77*, 18 Nov. 2005.
- [16] *Hague Conventions of 1899 and 1907 are reprinted in: L. Friedman ed., 1 The Law of War: A Documentary History*, (1972).
- [17] I.C.J. Rep. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia), (1993).
- [18] I.C.J. Rep. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya vs. United Kingdom) (Libyan Arab Jamahiriya vs. United States of America) (Preliminary Objections) (1998).
- [19] Matheson M. (1997), "The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons", 91 *The American Journal of International Law*.
- [20] Lopez G. A. & Cortright D. (1997) "Economic Sanctions and human rights: part of the problem or part of the solution?", *The International Journal of Human Rights*, Vol. 1, No. 2.
- [21] Pictet J.S. (ed.) (1958), "Commentary on the Geneva Convention relative to the Protection of Civilian Persons in Time of War, (Geneva: ICRC).
- [22] Scott C. et al, (1994), "A Memorial for Bosnia. Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nation's Security Council's Arms Embargo on Bosnia and Herzegovina", 16 *Mich. J. Int'l L.*
- [23] Shehabaldin A. and Laghlin JR W.M. (1999), "Economic Sanctions against Iraq; Human and Economic Costs", *The International Journal of Human Rights*, vol.3 .no.4. (Winter).
- [24] Simons G. *The Scourging of Iraq* (2nd ed., 1998)
- [25] Schewebel E. (1972), "The International Court of Justice and the human rights clauses of the Charter", *The American Journal of International Law*, Vol.66.
- [26] *Two International Covenants on Human Rights of 1966*.

- [27] United Nations, “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”, 20 March 1991 (New York 1991).
- [28] UNICEF, “Iraq Country Situation Report”, (August 1995).
- [29] UN Doc.A/AC.182/L100,part II, 30 Jan.1998.
- [30] Watkin, K. “Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict “, 98 *The American Journal of International Law* (2004).
- [31] Walsh B. & Peleg I. (1998), “Human rights under military occupation: The need for expansion”, *The International Journal of Human Rights* vol.2, no. 1, p. 64.
- [32] WHO, “The Health Conditions of the Population in Iraq since the Gulf Crisis”, WHO/EHA/96. 1, New York, (March 1996)
- [33] Zaidi S. and Smith-Fazi M.C., “Health of Baghdad’s Children’, *The Lancet*, vol.346, no. 8988 (Dec. 1995).
- [34] Zwaneburg M. (1998), Compromise or commitment: Human Rights and International Humanitarian Law Obligation for UN Peace Forces”, *Leiden Journal of International Law*, Vol. 11.

حقوق بنیادین بشر در دوران اشغال و تحریم اقتصادی

الهام امین زاده^۱

تاریخ دریافت: ۱۳۸۶/۱/۱۸

تاریخ پذیرش: ۱۳۸۶/۸/۵

تعهد به احترام به حقوق بنیادین بشری در زمان صلح و جنگ امری است که بدون در نظر گرفتن زمان و مکان می بایست در هر شرایطی مورد رعایت قرار گیرد. از جمله وضعیتهای غیر صلح آمیزی که در دهه های اخیر به دفعات به وقوع پیوسته وضعیتهای اشغال و تحریم اقتصادی می باشند که در برخی موارد سالها بطول انجامیده اند. اشغال بخشی یا تمامی سرزمین یک کشور عموماً با نقض حقوق بنیادین بشر همراه است که اسناد بین المللی و قواعد آمره حاکم بر رفتار دولتها این اعمال ناقض حقوق را منع نموده اند. همچنین تحریمهای اقتصادی اعمال شده توسط کشورها یا سازمانهای منطقه ای و سازمان ملل متحد تابع قواعد موضوعه و غیر موضوعه بین المللی است که عدم توجه به این قواعد منجر به نقض وسیع حقوق بنیادین بشری می گردد. در این تحقیق سعی بر آن است تا قواعد بین المللی عرفی و قراردادی حاکم بر رفتار دولتها و سازمانهای بین المللی در دوران اشغال و تحریم اقتصادی و میزان تأثیر آنها در حمایت از حقوق بنیادین بشری مورد بررسی قرار گیرد.

واژگان کلیدی: حقوق بنیادین بشر، اشغال، تحریم اقتصادی، شورای امنیت سازمان ملل متحد، حقوق لاهه، حقوق ژنو، میثاق بین المللی حقوق سیاسی و مدنی

۱. استادیار دانشکده حقوق و علوم سیاسی دانشگاه تهران. (E-mail: aminzadeh@majlis.ir)