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Joy Gordon

Loyola University Chicago, cgordon3@luc.edu

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## DUE PROCESS AND THE IRAQ SANCTIONS: A RESPONSE TO DEVIKA HOVELL

*Joy Gordon\**

Devika Hovell raises deeply significant questions about the role of due process in the legitimacy of the United Nations Security Council (UNSC).<sup>1</sup> Hovell gives us a fine-grained analysis of what exactly makes due process so compelling; in her approach, the reasons why it is compelling will vary in different contexts, depending upon the particular value and function it serves. In particular, she discusses three ways of articulating the values underlying due process, and the models of due process that would follow from each. She then discusses how her analysis would play out in two situations: The Council's use of asset freezes, and the role of the UN in the cholera epidemic in Haiti. In her case studies, she looks at situations where due process has been insufficient, and discusses some of the UN's attempts to remedy this, and the organizational difficulties in doing so.

I would like to look at two other Chapter VII actions by the UNSC, both related to the sanctions regime imposed on Iraq from 1990 to 2003: The denial of humanitarian exemptions; and the payment of reparations through the UN Compensation Commission (UNCC). I will suggest that these aspects of the sanctions regime lacked due process by *any* of the models proposed by Hovell.

In both cases, I will suggest that the practices of the Security Council were illegitimate, in that they exceeded the scope of their mandate, or acted in contravention to it. But we might go a step further as well, and consider whether the failure of due process is, in some contexts, deliberate. It seems unlikely that there would be real disagreement with the values of due process, as Hovell has articulated them: Ensuring factual accuracy in decision-making settings; respecting the voices of those who are affected; and serving the well-being of the broader community. Thus, we might think that, to the extent there are systematic failures of due process, these would surely be unintentional.

But in looking at the denial of humanitarian exemptions, and reparations under the authority of the UNCC, we see that the lack of due process allowed powerful states on these committees to obscure their roles and avoid accountability. If we look a bit more closely, we then also see that some of the actors involved had economic interests or a political agenda which would be compromised by procedures ensuring transparency and inclusion. The problem, in other words, is not the lack of a shared value-based theory of due process, but a lack of political will on the part of powerful states.

### *Denial of Humanitarian Exemptions*

The sanctions imposed on Iraq, in response to Iraq's invasion of Kuwait, were certainly the most extensive, complex, and draconian sanctions regime ever used as a tool of global governance. All Member States were prohibited from importing any goods from Iraq, or from exporting any goods to Iraq, other than medicine.

\* *Ignacio Ellacuria, S.J. Professor of Social Ethics at Loyola University Chicago.*

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<sup>1</sup> Devika Hovell, *Due Process in the United Nations*, 110 AJIL 1 (2016).

Even food exports were conditional.<sup>2</sup> Iraq was highly dependent on oil exports for its income, and was also highly dependent on imports for a wide range of needs. Iraq had imported two-thirds of its food supplies, and relied on imported machinery and spare parts to maintain its electricity production, water treatment, telecommunications, and oil production.<sup>3</sup>

The sanctions were not immediately devastating. From August 1990 to January 1991, there were sufficient supplies to maintain water treatment and electricity. Food rations were introduced, and agricultural production was increased. However, the Persian Gulf War of early 1991 devastated all of Iraq's infrastructure—every major electrical generator, water treatment plant, telecommunications facility, every major industrial and petroleum facility, as well as roads, dams, and bridges. Iraq was, within a matter of weeks, reduced to a pre-industrial state.<sup>4</sup>

The sanctions regime was overseen by the UNSC's "661 Committee." The membership of the 661 Committee paralleled that of the UNSC itself, with representation from each member serving on the UNSC. However, unlike the UNSC, the 661 Committee met behind closed doors, and held no public meetings. The minutes of its meetings were not available to any government or party outside the committee. Indeed, the minutes of the committee's meetings were not even distributed to all of its own members: Only the permanent members regularly received them.

The lack of transparency became particularly problematic once it became clear that the 661 Committee's primary function was to review requests for exemptions to the sanctions regime on humanitarian grounds. For example, between August 1990 and January 1991, there were numerous requests from vendors for permission to deliver foodstuffs to Iraq. However, Resolution 661 permitted food exports to Iraq only "in humanitarian circumstances." Behind closed doors, the members of the 661 Committee argued intensely over how "humanitarian circumstances" should be interpreted. The United States, Britain, and France maintained that this condition meant food exports to Iraq should be allowed only after there was irrefutable evidence of famine, or near-famine. Cuba and Yemen, who were on the Council at the time, argued that a civilian population has a right to food under any circumstances, and that "humanitarian circumstances" would be present if there was a likelihood of any degree of food shortages.<sup>5</sup>

However, neither the Iraqi government nor any other organization was permitted to meet with the 661 Committee to present its evidence of human needs. The request for exemptions could only come from the UN mission or the companies or organizations seeking to export food to Iraq, who were not in a position to argue whether the requirement for "humanitarian circumstances" had been met. It would have been helpful to have recourse to a judicial body, or even an external legal advisor, such as the UN's Office of Legal Counsel, in interpreting "humanitarian circumstances." But instead, the matter was resolved within the framework of the 661 Committee's internal political process: Those opposing food exports simply invoked their interpretation of the clause as grounds for blocking consensus.

In the end, no food exports to Iraq were allowed from August 1990 to March 1991. At that point, UN observers described Iraq's devastation from the massive bombing campaign as "near apocalyptic."<sup>6</sup> It was only then that the 661 Committee agreed that "humanitarian circumstances" were present, and began allowing food exports to Iraq.

<sup>2</sup> SC Res. 661 (Aug. 6, 1990).

<sup>3</sup> Secretary-General, Letter Dated 20 March 1991 to the President of the Security Council, UN Doc. S/22366 (Mar. 20, 1991).

<sup>4</sup> *Id.*

<sup>5</sup> Paul Conlon, memorandum, *Historical Note on the Security Council's Disputed Right to Ban Supplies of Foodstuffs to a State under Sanction*, June 26, 1998.

<sup>6</sup> Secretary-General, Letter Dated 20 March 1991 to the President of the Security Council, UN Doc. S/22366, Annex, para. 8 (Mar. 20, 1991).

In 1996, the Oil for Food Program (OFFP) was introduced, allowing Iraq to sell oil and use the proceeds to buy humanitarian goods. Within the framework of the program, there was increased transparency in some regards. UN agencies (such as UNICEF, WHO, and FAO) were tasked with reporting on the equity, adequacy, and efficiency of the Oil for Food Program, and these reports were posted publicly. However, all decisions concerning equipment and goods for Iraqi infrastructure, including electricity and water treatment, were still subject to approval on a case-by-case basis by the 661 Committee, and were routinely denied. The 661 Committee's votes and the decision making process continued to be entirely opaque.

Many of these due process concerns, such as the lack of judicial review, were also applicable to the Security Council itself. But the 661 Committee was even less transparent and had fewer mechanisms of accountability. The Security Council holds public meetings, adopts resolutions that are publically available, and holds public votes of its members. By contrast, the 661 Committee did not make available its decisions or the votes of its members. Thus, while public pressure might in principle be brought to bear in response to Security Council votes, the 661 Committee's opaque procedures made that impossible.

Within the 661 Committee, the United States and Britain blocked billions of dollars of contracts for critical humanitarian goods. In large measure as a result of these practices, critical public services, such as electricity, health care, and water treatment, were never restored to adequate levels, and the majority of the Iraqi population remained severely impoverished for the entirety of the sanctions regime.

#### *UN Compensation Commission*

There was a similar lack of accountability and absence of due process in the matter of Iraq's reparations to Kuwait. Security Council Resolution 687 provided for the creation of the United Nations Compensation Commission, which would receive claims related to Iraq's invasion of Kuwait in 1990. These claims were to be paid with the proceeds from oil sales under the Oil for Food Program (and a predecessor program in 1991). The oil sales were authorized in order to generate revenue to pay for imports, such as food and medicine, to meet humanitarian needs. However, a substantial portion of these proceeds were set aside to pay compensation claims. Initially, 30 percent of these proceeds were to be used for this purpose; later, this was reduced to 25 percent.

From the beginning, there were objections regarding the transparency and fairness of this process. Iraq was not considered to be a party to the process. According to Iraq's legal counsel, under the UNCC procedure Iraq had no right to be informed of the claims against it; and in some cases Iraq still had not been notified, years after claims were filed.<sup>7</sup> During the claim review process, Iraq was not entitled to see or address the evidence presented regarding the claims. Once the UNCC made its award determination, there was no venue where Iraq could challenge or appeal the UNCC's judgments. Iraq was permitted only to comment, one time, on the Secretariat's explanation for its position.<sup>8</sup> At the same time, there were significant questions in some cases about the legitimacy of the amounts awarded. For example, the UNCC awarded the Kuwait Petroleum Company \$15.9 billion as compensation for its claimed losses. But one commentator maintained that, of the \$15.9 billion awarded, the actual damages to Kuwait were overstated by at least \$12 billion.<sup>9</sup> In addition, the Iraqi government maintained that in 575 cases the UNCC compensated claimants twice for the same claim.<sup>10</sup> By 2003, the UNCC had paid close to \$20 billion in claims, from Iraqi funds.<sup>11</sup>

<sup>7</sup> Michael E. Schneider, *How Fair and Efficient Is the UNC System? A Model to Emulate?*, 15 J. INT'L ARB. 15 1, 2 (1998).

<sup>8</sup> *Id.* at 6.

<sup>9</sup> Thomas R. Stauffer, *Critical Review of UNCC Award for Lost Production and Lost Revenues*, 44(5) MIDDLE EAST ECON. SURV. (2001).

<sup>10</sup> *Statement by Riyadh Al-Qaysi*, United Nations Security Council, Provisional Verbatim Record of the 4336th Meeting, S/PV.4336 (Resumption 1), 17 (June 28, 2001).

*Applying Hovell's Framework*

Hovell's framework for analyzing the core justifications of due process is useful here in capturing exactly why the lack of due process in these two situations—the handling of humanitarian exemptions and the operation of the compensation commission—is problematic.

Insofar as due process is instrumentalist, the absence of due process undermined the ostensible interest of meeting humanitarian needs in the exemptions scenario. Because there were no clear, publicly stated criteria for approval of sanctions exemptions (and any member of the 661 Committee could block almost any goods indefinitely), the result was that the United States alone, sometimes accompanied by the United Kingdom, blocked billions of dollars of export contracts to Iraq for electrical generators, agricultural production, water treatment, pharmaceutical production, housing and road construction, and other goods critical to sustain a population.<sup>12</sup> Thus, if the purpose of the review was to grant the exemptions needed to ensure the basic well-being of the Iraqi population, this was compromised by the lack of transparency, the absence of clear and consistent guidelines, and the lack of a venue in which to provide factual information or contest factual claims.

Under the dignitarian model, we would likewise see a failure of due process. The Iraqi mission at the United Nations was not permitted to attend or participate in meetings of the 661 Committee; nor were organizations or entities that might speak to the interests of the stakeholders, such as NGOs. UN humanitarian agencies, such as UNICEF, were almost never permitted to attend committee meetings to advocate for exemptions or provide information on the humanitarian situation. And the due process model informed by the public interest and the international community is applicable as well. In the end, the policies of the 661 Committee were a major factor in the collapse of Iraqi health care and education, rampant malnutrition, and the systematic, extreme impoverishment of almost an entire country. Top UN officials and many others maintained that the resulting situation violated international law and human rights.

Turning to the reparations process, we could certainly say that due process here would serve an instrumentalist function, and the key process value would be accuracy. In this case, the exclusion of Iraq from the process meant that the accuracy of the claims was uncertain. This uncertainty characterized both the determination of whether Iraq's acts were the cause of the particular damage at issue, and the measurement of that damage. We can also see the dignitarian model at play here as well, where the key process value is the representation of the interests of the stakeholder. In this case, the stakes were quite high. The Oil for Food program, running at maximum capacity, barely generated enough revenue to cover basic needs for the Iraqi population. The use of 25-30 percent of those revenues to pay UNCC claims had a direct impact on Iraq's ability to maintain its infrastructure, pay for food rations, and meet basic needs and provide public services to the Iraqi population. For this reason, we might also say that there was also a lack of due process as articulated in Hovell's third model, which is grounded in the broader public interest.

Thus, both the reparations under the UNCC and the humanitarian exemptions within the broad sanctions on Iraq were characterized by a lack of due process in many of the ways that Hovell discusses. Insofar as due process serves to ensure legitimacy, we might well say that the practices of the UNCC and the 661 Committee did not constitute legitimate acts of global governance. Indeed, if there had been greater transparency, it would have been apparent that both entities exceeded the scope of their authority, and may have acted in contravention of the UN Charter and international law. The Security Council resolutions authorized only the partial disarmament of Iraq, not the subjection of the population as a whole to widespread malnutrition and

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<sup>11</sup> Stauffer, *supra* note 9.

<sup>12</sup> Campaign Against Sanctions on Iraq, *CASI Newsletter* 5 (July 2002).

epidemics of water-borne diseases. Article 1 of the Charter provides that one of the purposes of the United Nations is “solving international problems of an economic, social, cultural, or humanitarian character,” not worsening such problems. Article 55 of the Charter reiterates this. Similarly, the mandate of the UNCC was to provide compensation for damages suffered, not to exhaust Iraq’s resources well beyond any legitimate claims for reparations.

### *The Problem of Political Will*

The public position of the Security Council and the 661 Committee was that the sanctions were never intended to do indiscriminate harm to the Iraqi population or to bankrupt the country, but only to pressure the state to comply with international law and the disarmament requirements. However, the policy of the United States was to create as much economic pressure on Iraq as possible, in order to bring about regime change. Driven by this agenda, throughout the history of the sanctions regime, the United States (and to a lesser extent Great Britain) took extreme positions that would have been untenable in a public or impartial venue: Child vaccines, antibiotics, toothpaste, and equipment to manufacture cheese were all blocked by the United States on the dubious grounds that they might be used by Iraq to produce weapons of mass destruction. On the occasions when these decisions became known, U.S. officials were embarrassed, and responded by shifting policies in some fashion. For example, when the press reported that the United States was preventing the export of child vaccines to Iraq,<sup>13</sup> then-Secretary of State Colin Powell sought to introduce a new procedure whereby the entire 661 Committee would adopt the United States’ list of goods to be blocked, and the United States would no longer be identifiable as the nation responsible for these measures.<sup>14</sup>

If there had been transparency or other forms of due process, it would have been readily apparent that the United States used the Security Council as a vehicle for pursuing its goal of removing Saddam Hussein from power. However, Article 2 of the Charter provides that the United Nations “is based on the principle of the sovereign equality of all its Members,” and many of the Council’s resolutions concerning Iraq reiterate its commitment to respecting Iraq’s sovereignty. Consequently, the United States also sought to ensure that its means for pursuing regime change in Iraq were not subject to scrutiny or challenge. To achieve the latter, it was necessary to preclude any form of due process.

In both cases, the lack of due process was not incidental. Rather, it reflected the tension between the stated purpose of the UN bodies and the political goals of some of the Council’s members. Hovell’s models for due process are instructive here in giving precision to the sense that the Security Council acted illegitimately in these cases. It is not just that due process is a guarantor of legitimacy. It is also the case that when we see elaborate efforts to prevent transparency and participation, we should examine these efforts with particular interest to see what is behind them.

<sup>13</sup> *Ruling Party Blasts US Over Vaccines*, AGENCE FRANCE-PRESSE (Mar. 13, 2001).

<sup>14</sup> SC Res. 1409 (May 14, 2002), implementing the Goods Review List.