



2009

Sanctions and International Law

W. Michael Reisman
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers



Part of the [Law Commons](#)

Recommended Citation

Reisman, W. Michael, "Sanctions and International Law" (2009). *Faculty Scholarship Series*. 3864.
https://digitalcommons.law.yale.edu/fss_papers/3864

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

SANCTIONS AND INTERNATIONAL LAW

Keynote Address, The Cuban Embargo and Human Rights
Intercultural Human Rights Law Review Annual Symposium
October 24, 2008

W. MICHAEL REISMAN*

The focus of our deliberations today is on the economic measures directed against Cuba. With your indulgence, I propose to inquire about the larger question of the circumstances under which it may be lawful to use coercive economic measures against others. For the next half hour, looking toward the future, let us think through the international law that should regulate the application of intense coercions whether applied by the organized community against a targeted state or by one state against another state without the authorization of a competent international organization. This should enable us to make assessments about all or parts of the Cuban Embargo, and more generally, to consider the circumstances under which this extremely complex and destructive instrument should be used in the future.

I.

Harold Dwight Lasswell once remarked that you can summarize the essential techniques of politics with two words: bribery and thuggery. At all levels of social life, people try to get others to do what they want through agreements—by negotiation, persuasion or inducements—or through compulsion—by intimidation or the actual application of violence. Writ large, and deployed in myriad

* Myres S. McDougal Professor of International Law, Yale Law School, and Recipient, First Annual Human Rights Award, *Intercultural Human Rights Law Review*.

combinations, these are indeed essential techniques of politics.

They are also inescapable components and concerns of the law. Within efficiently organized states, the use of the most coercive of these techniques is supposed to be monopolized by the government apparatus and is expected to be employed solely for the maintenance of community order and the implementation of its law. Much municipal constitutional law is dedicated to setting and then monitoring procedures for supervising the moments of and the constraints on the state's use of its monopoly against its own citizens.

Since the second decade of the last century, major efforts have been mounted on the international political plane to create and endow international organizations and certain ad-hoc arrangements of states with a comparable monopoly. These initiatives have been accompanied by efforts to impose various restraints on, and punishments for the use of force both within and between states, when it has not been internationally authorized. Many scholars view these initiatives as the major enterprise and a test of the meaningfulness of modern international law.

Alas, most of these international initiatives to control the use of force have not proved brilliantly successful. Pareto, the great Italian scholar, observed that where the State's monopoly of violence is ineffective, other formations fill the vacuum. In acknowledgement of the cogency of Pareto's observation and in acknowledging its own limitations, international law has also tried to prescribe and supervise contingencies and permissible modes and levels of intensity by which states and other actors may use violence when the international community is unable to deliver on its assigned responsibility.

The conference today focuses on the economic instrument, but in fact there are four generic instruments of policy by which individuals and groups try to influence others. The first is the *military instrument*, which involves the application through different modalities, of high levels of coercion by specialists in violence against the target. The second is the *economic instrument*, involving the granting or withholding of indulgences or deprivations from the target. The third is the *diplomatic instrument*, involving

communications ranging from persuasion to coercion, directed at the elite of the target. The fourth is *propaganda*, which involves the modulation of signs and symbols directed to the politically relevant strata of a community rather than to its elite. States use all of these four instruments in varying combinations. Even non-state entities, ranging from human rights organizations to private armies, gangs and terrorist groups, use many of them as well. International law tries, with varying degrees of success, to prescribe for the contingencies for and modalities of their use.

When these instruments are used by or with the authority of the international community, let's say the United Nations, it is appropriate to call them "sanctions" – military sanctions, economic sanctions, diplomatic sanctions or ideological sanctions. When they are used by individual states without the authorization of an international organization, the states using them try to appropriate the word 'sanctions,' but in fact these are forms of intense unilateral violence. This does not mean that the action is therefore unlawful: that is a different question.

Now, all of you are aware of the fact that the foundational principles of international law regarding the lawful use of force are based on distinguishing between combatants, those who are actually carrying armaments, and non-combatants or civilians. Every lawful use of coercion against other human beings must be necessary, must be proportional to that necessity, and must be capable of differentiating between those who are actively ranged against you and non-combatants. These principles, which I call the 'MNPDP' principles of military necessity, proportionality and differentiation, have only been applied by international legal scholars to the military instrument. I submit to you that this is too constricted and that international law should also be applying these same principles to uses of the economic instrument and uses of the ideological instrument – so called psychological warfare or 'psychwar.'

My submission is, then, that, in the twenty-first century, all intense uses of coercion should be subjected *mutatis mutandis*, for purposes of the evaluation of their prospective lawfulness, to the same MNPDP tests which until now have been confined to appraisal

of military action. The reason is that the economic instrument can be very destructive and can be applied in ways that do not differentiate between those who are responsible, who make decisions, and those who are not. In concrete cases, application of the MNPD tests may lead either to a refashioning of the planned economic measures or a decision not to apply it at all.

II.

Economic strategies have become the preferred foreign policy instrument in recent years. With the end of the Cold War, multiple economic sanction regimes have proliferated, especially through decisions within the United Nations. Nine times since the fall of the Berlin Wall, the Security Council has acted under Chapter Seven to create mandatory economic sanction programs. Since 9/11, the economic instrument has been used widely in the war against Al-Qaeda; even before that, the Security Council in 1999 had established the 'Al-Qaeda Taliban Sanctions Committee' pursuant to Resolution 1267. Part of this Committee's role continues to be to designate funds which are linked to the Taliban which states are obligated to freeze.

Are economic measures really critical modes for influencing the behavior in others? Woodrow Wilson was one of the great enthusiasts of economic measures. In 1919, he said, "A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside of the nation boycotted, but it brings oppression upon the nation, which in my judgment no modern nation could resist." The point is well taken. If you ask whether economic measures, applied alone and without the military strategy, are effective in inducing adjustments in the internal or external policies of a target, then the answer is, under certain conditions, yes. But Wilson was only partly right. He used the word "peaceful" to describe them and that certainly may be the perspective of the party deciding to apply economic measures, but from the standpoint of the party receiving the economic measures, they are certainly not peaceful. If you look at Wilson's text

carefully, you will note that even he acknowledges that these sanctions are: “silent,” “deadly,” and “terrible.” The point is that under the right circumstances, they are a potentially powerful instrument but they can also have great destructiveness.

Consider the case of Haiti, where United Nations authorized sanctions was used with tremendous and indiscriminate destructiveness. Most of the violence of the sanctions was visited on the most vulnerable strata of the population who were responsible for neither the expulsion of President Aristide nor the military dictatorship that ensued. The people actually responsible for the putsch benefited from the sanctions. The indiscriminate and promiscuous violence of those sanctions forced a reconsideration by the United Nations of economic sanctions programs in general.

At that time, I was President of the Inter-American Commission on Human Rights and went to Haiti many times in the course of the year Aristide returned. I had ample opportunity to see the consequences of the sanctions and they were, in a word, horrible. They destroyed what was left of the economy of the poorest state in the hemisphere but had had no effect whatsoever on the elite which was responsible for the situation and against which the sanctions had been directed. They had yielded power in the face of a United States invasion.

III.

One of the attractions of economic measures, especially for the leaders of democracies, is that they engender less internal political resistance than other feasible strategies. Comparatively speaking, economic measures are politically cheap. To be sure, they may have certain retro-costs, in the sense that one section of the economy of the sanctioning party will have to bear the costs of the sanctions. But in terms of your overall national economy, they may hardly be noticeable. They are also less troubling than military measures: they don't generate solemn processions of body bags bringing home the mortal remains of your sons and daughters. Even when it is glaringly obvious that economic measures are not going to be effective, for example, the grain embargo that President Carter

imposed on the Soviet Union in 1979 because of its invasion of Afghanistan, they may still be taken, ostensibly to express our policy or condemnation. But in these circumstances, they really conceal the fact that nothing is being done. When, as often happens in democratic politics, political forces cannot agree on the appropriateness of the response to some perceived international delict, economic measures, even if they are manifestly unlikely to be effective, often recommend themselves as a compromise. Not necessarily the most promising of options, but certainly the most acceptable.

In the future, the attractiveness of economic measures may decline because of the interdependence of states in an integrated global economy in which unexpected action by one actor against another actor will, in a type of butterfly effect, have polymorphous consequences and even rebound against the actor who initiated them. The more integrated the international community has become, the more generally and reflexively disruptive can be punitive economic measures. But the measures may still be resorted to, and the question facing you will be whether economic measures should not be used in these circumstances because they will violate principles of international law. I turn now to these questions.

IV.

It is the militant sense of virtue and moral superiority of those in the human rights community promoting economic measures that I find so fascinating. They appeal to some people precisely because they seem to offer only non-violent and non-discriminatory ways of implementing international policy. 'At least,' friends tell me, 'we're not killing anybody; at least we're giving non-lethal sanctions a chance.' In this line of thinking, economic measures are always to be preferred to the application of the military strategy. Under this theory, economic measures are always to be exhausted before resorting to the military instrument. What is missing here, I submit, is an analysis of the prospective compliance of economic sanctions and economic measures programs with the basic principles of international law.

Economic measures grant or withhold economic indulgences, opportunities and benefits in order to induce another actor or group of actors to change a policy. Economic measures may take many forms and may be multilateral or unilateral. They may be directed against a state that is occupying a territory of another state. Consider, in this regard, the United Nations sanctions against South Africa for its continued occupation of Namibia (South West Africa) or the unilateral measures in the United States' Comprehensive Anti-Apartheid Act passed during the Ford Administration. These ultimately compelled South Africa to comply and ended Apartheid. But economic measures have not only been designed to secure such comprehensive objectives. Economic threats were successfully used against South Korea and the Shah of Iran to stop them from pursuing their nuclear weapons programs. The measures have also been used to seek replacement of an elite, for example, Perón in Argentina during the Second World War or Saddam Hussein in Iraq prior to the U.S./U.K. invasion.

Sometimes, the economic instrument is used unilaterally without acknowledging it. Thus a state that is actually using it may insist that the costly economic consequences of its conduct, which are, of course, "regrettable," are the unintended and unavoidable result of some other action. An agricultural exporting state's perishable products aboard a ship in harbor may slowly turn to compost, as the importing state's customs inspectors, with unprecedented care, zealously examine each hold "by the book," all this occurring at a moment at which the two states are engaged in critical negotiations. Denials or not, the target state quickly learns that the economic instrument has been wielded against it and it adjusts its behavior accordingly. Consider the recent example of Russia, suspending the supply of gas to Ukraine and saying that this was done because of certain supply or production problems. The message was clear and Ukraine acknowledged it. Unlike its military counterpart, the economic weapon can be used in subtle ways but its effects are not subtle, affecting the sovereignty and autonomy of the state against which it is directed.

Economic measures are more of an equal opportunity instrument as compared to the military instrument which only

relatively stronger states can use. In some circumstances, relatively weaker states may find that they enjoy a momentary economic advantage which can allow them to influence the decisions of another state. Even large states, such as the United States, may be economically targeted by states that are not as strong. For example, China has mounted an extraordinarily effective strategic economic program against the United States through which it has secured many of the adjustments it seeks in America's China policy. One of the most fascinating aspects of this particular economic program is that the target here, the United States, actually seems possessed of the idea that it is the economic strategist, while China is the target!

How then should the international community, first, determine the question of the very use of economic measures, the *jus ad bellum economicum*, or the right to resort to economic measures in some circumstances; and, second, especially important, the *jus in bello economico*, the way that those strategies should be designed and implemented in particular cases? I suggest that you apply the basic principles that international law has applied only to the military instrument: international lawyers should insist on a demonstration that the measures are necessary to achieve an explicit and lawful objective, that the severity of the measures is proportional to that objective and that the measures are designed in ways that enable them to differentiate between those who will actually make the decision and who are responsible for the offensive behavior—the elite of the country that is targeted—but do not target the rank-and-file. Let us not have economic sanctions or economic measures programs, the brunt of which are felt by children in the target state or by the poorest strata. This occurred in Haiti and should never be repeated. This may mean that the economic instrument will not be available in a number of cases. So be it. Other, more effective strategies may be deployed. Anyone concerned with the preservation and enhancement of human dignity, which is the ultimate objective of this part of international law, will be seriously compromised if coercive strategies target those who are not responsible and who cannot change the offensive behavior against which economic measures have been directed. Thank you for your attention.

QUESTION AND ANSWERS

Audience: How can we effectively lift the embargo or even economic sanctions without sending a message to the international community that we are willing to overlook the grave human rights violations such as disappearances and torture that are still going on in Cuba?

Response: I haven't focused on Cuba, but I'll be happy to share my own, rather primitive thoughts on that particular issue. There are many ways of expressing condemnation of action that offends international human rights. We should select ways that are effective and that demonstrate that they will lead to a change in the behavior concerned. In the case of Cuba, after fifty years, there is no indication that that particular objective has been achieved by our economic measures; so it would seem to me that it is time to reconsider. If the measures are being applied simply as a way of conveying contempt for a set of values and policies yet are seriously injuring those who have no capacity to change those practices, *à quoi bon?*

Audience: Professor Reisman, in your experience on economic sanctions and on how they apply, do you know of any another instance where the policy is as related to an internal political factor, domestic political factor as it may be the case with the Cuban Embargo?

Response: Consider South Africa. The United Nations Sanctions Program was rather ineffective. I had an opportunity to visit South Africa during their application. Speaking to members of the economic elite, then, it was quite clear that they viewed the United Nations efforts with contempt. There were numerous ways of circumventing them. By contrast, the Comprehensive Anti-Apartheid Act, which went into effect in the United States in the last year of President Ford's administration and which was directed at securing the transformation of the Apartheid regime into a non-racial or multiracial society, proved very effective.

Now, you may ask what features of the context in South Africa

rendered these particular economic measures effective and that might not in different contexts be effective (for example a context like Haiti or Cuba)? The context in South Africa was one in which the political elite was dependent on a wealth elite, which was vulnerable to the unilateral economic measures which the United States put into place. Precisely because these sanctions reduced profitability to a margin that was no longer acceptable to a critical part of the elite, they indicated to the political elite that changes were required. But in circumstances in which the political elite of the target is not dependent upon its economic elite, the sanctions will be ineffective. They may give us a sense of a virtue as we apply them, but they will not achieve the objective of securing an adjustment in policy or law. That was the situation in Haiti, where the sanctions actually opened up contraband opportunities for the wealth elite, which enriched itself rather than being injured. The wealth elite actually had an interest in keeping the sanctions in place. As to the situation in Cuba, fifty years of economic measures do not seem to have brought about any significant adjustments in internal politics.

Audience: In dealing with a communist nation/authoritative dictatorship such as Cuba, would you suggest that if we lift the embargo it would perhaps remedy the situation of oppression and maybe those human rights violations that are occurring?

Response: Once one has embarked on a policy that may have been ill-conceived, it is not always easy to change it. Consider the difficult situation in which the United States finds itself in Iraq. We can't simply say 'oops' and leave. The misadventure has become part of the process and that may apply to considerations of when, how, and in what sequence to change it.

Audience: Well, the embargo also applies not just to the human rights issues, but also to the Cuban government's confiscation of American assets and businesses, so can you address that issue? There was clear confiscation of American businesses so it [the Cuban Embargo] was such a way to punish them [Cuba] for a engaging in sanctions against them [the United States]. So how would you address that issue?

Response: Look at the experience in many countries in which

the U.S. government, acting on behalf of American investors, has tried to secure compensation. Sometimes through a lump sum settlement distributed through a national claims commission, sometimes through the establishment of an international tribunal, for example the Iran-U.S. Claims Tribunal. And sometimes through massive economic measures. The point to emphasize is that one must select strategies that promise to be effective and will not end up causing more injury to those who are not responsible for the offensive policy.

Consider the Cuban situation from the time of the revolution in 1959: The United States tried coercive economic measures in the last year of the Eisenhower administration. It collapsed the sugar quota, an economic measure that was the equivalent of a massive bombing of the infrastructure of an agricultural economy based on sugar. It proved ineffective. The United States invaded Cuba through proxies in 1961, and that proved ineffective. In 1962, the United States tried to stop the consolidation of Soviet influence in Cuba and that was of doubtful success. And then for a period of some forty-seven years, economic measures were in place. That, too, has proved ineffective.

Audience: Can you briefly describe how the third form of sanction that you mentioned, that being diplomatic and propaganda, can be used more effectively?

Response: Military manuals have a term called psychological warfare or ‘psychwar.’ It is a technique in which an attempt is made not to try to influence the elite in a country, the government, but to try and change the attitudes of the rank and file. Some scholars called it the ‘propaganda instrument.’ I prefer the term that Professor Lasswell coined: the ‘ideological instrument.’ Propaganda carries the connotation that what is involved is negative information but the information being conveyed may in fact be the truth. How is it used? Radio Martí, Radio Free Europe, Voice of America, Al-Jazeera, or comparable mass media that are used by other governments are designed to convey different views of the government to the rank and file population of the country, through some external medium.

Is this effective by itself? Sometimes. Consider ‘Desert Storm,’ President George H.W. Bush’s decision to expel Iraq from Kuwait.

As part of it, the United States conducted a program which was directed at the Shia in the south, encouraging them to rebel. That was a use of the ideological instrument. It succeeded, and there was an uprising. For reasons I do not understand, the United States did not support the rebellion, and it was brutally suppressed by Saddam Hussein's army.

I would submit that even for the use of the ideological instrument, the general principles of necessity, proportionality and differentiation should be applied. The ideological instrument is often used to stir up differences between ethnic groups (as occurred in 1991 when it was used in Saddam's Iraq). The Convention on the Elimination of Racial Discrimination prohibits hate speech and trying to promote hatred between groups. Would not that be a limitation on the use of the ideological strategy?

Audience: What would you say to someone who uses the necessary, proportional, differentiation analysis in order to skip over economic measures and argue for military action as a first response?

Response: A very good question. United Nations Charter Chapter VII talks about the range of measures that can be taken by the Security Council when there has been a threat to the peace, breach of peace, or act of aggression. There is no mandatory sequence. Some scholars have argued that first you have to engage in negotiation, then you have to use economic instruments, then you can resort to the military instrument. That has never made sense to me. I don't see why, for example, when crematoria and gas chambers are being used in a genocide, one has to go through a sequence: 'let's talk about it,' then 'oh, now we can try economic measures,' and so on while people are killed. It seems to me quite appropriate to say that if one applies the military necessity, proportionality and differentiation criteria, there will be circumstances in which some military action may in fact involve less violation of those principles than would a longer drawn-out and essentially undifferentiated economic program. Bear in mind that when you destroy an economy, you destroy lives, you destroy families; it has its own epidemiology. It is wrong to pretend that it is a "peaceful" strategy.