

response to the first all-race multiparty election and the establishment of a united, democratic government in South Africa.

The mandatory economic sanctions imposed by the Security Council can be rescinded only by a decision of the Council because it can terminate the effects of the decision which it has taken. In November 1994, for example, the Council refused to lift its economic sanctions against Iraq, rejecting that country's claim that it had recognized Kuwait as an independent nation within the borders specified by the United Nations, thereby having met the conditions necessary to lift the oil embargo and other sanctions imposed after its 1990 invasion of Kuwait. The sanctions were in fact extended after the Gulf war, to force Iraq to destroy its missiles and other weapons of mass destruction. Therefore, the sanctions remained in place and will not be lifted until other requirements have been fulfilled.

On the other hand, in October 1993 the General Assembly lifted voluntary economic sanctions against South Africa in Resolution 48/1, urging all nations to repeal their boycott legislation. In this respect it should be said that the resolutions of the Assembly, unlike the decisions of the Security Council, are not legally binding for member countries, but they unquestionably carry considerable moral weight as an expression of the will of the international community. Moreover, in November 1994, in Resolution 49/10, the Assembly urged the Council to lift the arms embargo on the Bosnian Government, condemning the Serb aggression in Bosnia. As in the case of South Africa, the vote of the Assembly is merely an expression of international opinion and requires no action on the part of the Council.

In September 1994 the Security Council authorized, in Resolution 942 (1994), the easing of sanctions against Serbia for closing its frontier with Bosnia. At the same time, it authorized the imposing of sanctions against the Bosnian Serbs in an attempt to force them to accept the peace plan drawn up by the contact group.

In brief, then, economic sanctions are slow and cumbersome measures. Nevertheless, military enforcement action, another collective measure, is not likely to be possible until the special agreements are concluded between individual member states and the Security Council under Article 43 of the Charter. Consequently economic sanctions will be increasingly relied upon in the future. The success or failure of economic sanctions depends upon the will of the international community to strictly implement such sanctions to maintain or restore international peace and security.

ASSESSING THE LAWFULNESS OF NONMILITARY ENFORCEMENT: THE CASE OF ECONOMIC SANCTIONS

*By W. Michael Reisman**

I was dispatched to Haiti three times in the course of the military dictatorship there. As a human rights observer, I was able to travel widely through Haitian Hispaniola and to meet people in every social stratum, from General Cedras, his staff and their wealthy supporters, through to the poorest people in the countryside; and I was able to benefit from the insights of observers in the diplomatic corps and the NGO community. From the first moment, it was apparent to me, as I believe it would have been to anyone who had the opportunity to see things on the ground, that the techniques the international community had selected to expel the usurpers—economic and propagandistic sanctions—were not working and could not work. The wealthy elite and the military command

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were waxing rich off the contraband industry the economic sanctions had spawned. The rest of the population, which had been deprived of its popularly elected government and whom we were supposed to be helping, was—without exaggeration—starving to death. The shard of social and economic infrastructure that had survived the Duvaliers and the indistinguishable succession of their would-be clones was rapidly decomposing. I need not elaborate; you are all familiar with the details.

Incredibly, the response of the international community to this situation was to tighten and intensify the economic sanctions, make the diplomacy more threatening and the propaganda more shrill. That, of course, only made things worse. Finally the world came to its senses. The economic instrument ceded place to the military instrument and an invasion was mounted. It worked in days, if not hours. It probably would have worked even more quickly, thoroughly and economically had it been done sooner.

Constitutional government has been reinstalled. Now the world faces at least a generation of work reconstructing the infrastructure that the economic sanctions helped destroy. Unfortunately, mortals and money cannot recreate the lives and life opportunities that were lost thanks to an international sanctions program purporting to help those it was hurting.

While the so-called “non-lethal” sanctions may not have worked in Haiti, they are used often and sometimes succeed. They are a potentially powerful instrument in the right circumstances. This is balanced by their great potential for destruction. If nothing else, the case of Haiti should prompt a fundamental reconsideration—in terms of political science, international law and natural law—of the mechanisms, politics and law of non-lethal sanctions and of the contingencies and policies that should be applied to their role in international enforcement action.

Strategic Instruments of Enforcement

Analytically, policies can be implemented by combinations of four strategic instruments: the military instrument, involving the application of varying degrees of coercion by specialists in violence against a target; the economic instrument, involving the granting or withholding of indulgences or deprivations from a target; the diplomatic instrument, involving communications ranging from persuasion to coercion, directed against the elite of a target; and the ideological or propagandistic instrument, involving the modulation of carefully selected signs and symbols to politically relevant parts of the rank-and-file as a means of influencing the elite that governs it.

All strategic instruments are directed toward reducing the target’s ambit of choice by constraining it to adopt policies or positions it would otherwise eschew. Indulgent techniques try to secure this compliance by promising rewards or bribes. The consequence of an indulgent strategy is still to attenuate the freedom of choice of the target that must forgo advantages or opportunities it expected to gain, but neither the target nor the people or things on its peripheries suffer manifest damage. Deprivatory techniques, in contrast, try to secure compliance by sequestering or destroying certain power bases or instruments of influence of the target elite.

Sanctions and Threat Theory

Threats are an actor’s credible communication of interest, capacity and contingent intention; they are designed to forewarn another actor that if it does not desist from or adjust certain behavior, more destructive instruments will be applied. Although the term “threat” suffers a generally pejorative connotation in ordinary language usage, threats are a critical, indeed indispensable, part of politics. Like anything else they can be abused; but they can be beneficial to certain public order configurations, precisely because they facilitate adjustments without requiring overt conflict.

Sanctions are, in part, an application of the theory of threats. Like threats, all instruments

of strategy are designed to change the attitudes and resultant behavior of the target. They do this in two stages. The first stage involves the credible communication of capacity and intention to carry out a particular program; “do such and such *or else*”¹—the “communication” stage. The second stage involves the effective application of the sanctions, the actual delivery of the “or else”—the “application” stage. Sanctions accomplished by the communication stage alone certainly have transaction costs² but they involve less costs to the sanctioner and the target than do sanctions that require the second, applicative phase.

Insofar as the actors involved are rational, the communication stage should ensure the desired change in behavior if two cumulative conditions are met: (1) the content of the program is clearly sufficient to accomplish its manifest objectives; and (2) the communication of capacity and intention (“political will”) is credible. The target will obviously not comply when the content of the threatened program is manifestly inadequate, for example, when the target perceives it as essentially symbolic. Nor will the target comply when the content of the program is manifestly adequate, but the target has reason to believe that the sanctioner will not follow through. For example, the target, monitoring the sanctioner’s internal political processes, may detect at the elite level the most fragile unity of purpose; or the target may conclude from prior cases that the sanctioner’s political will often collapses when sanctions are resisted by a target. Under both conditions, the target will have cause to believe that the sanctioner will be unable to initiate or to sustain the application stage of the program. Whether the target’s perceptions are correct or not, the communication phase alone will not suffice to ensure compliance and the enforcement program will have to proceed to application.

The relevance of threat theory varies depending on the strategic instrument being used. The communications stage of a credible military sanctions program is more likely to be a successful application of threat theory than is the communications stage of a credible economic sanctions program or, a fortiori, a credible propaganda program. Excluding for the moment military actions like quarantines, which are actually economic deprivations accomplished by carefully defined and limited military means, the effect of the military instrument is generally rapid and, if successful, irreversible. When the economic instrument is used, in contrast, the effects are slow and cumulative, especially if they are being “ratcheted up” in measured increments. Faced with a credible threat of overt military sanctions, a “wait-and-see” attitude is not a rational option for the target. But “wait-and-see” is virtually always rational if the program about to be mounted against the target is economic or propagandistic, for the target can still haggle over terms of compliance or turn off the program directed against it at any time, simply by saying “yes.”

The differential effect of threat theory on enforcement instruments means that the quantum and nature of damage flowing from a sanction program will vary depending on which instrument is selected as the primary sanction tool. This has implications for strategy and for law.

Collateral Damage

The destruction of people and objects on the periphery of a target is called, euphemistically, “collateral damage.” Some collateral damage is a virtually inescapable feature of destructive uses of strategies, for no weapon regularly delivers its punch with the “surgical precision” its manufacturers and operators claim. Customary international law, now codified, has long tried to define lawful primary targets and to establish boundaries of tolerance

¹The “or else” may also be an “and”: a promise of a reward as well as the threat of a deprivation.

²For the sanctioner, the direct costs are incurred in mobilizing and pre-positioning the various assets to be used in the sanction program; opportunity costs, which are lost once those assets have been diverted to the sanctions, are also incurred.

for collateral damage. Weapons are not per se lawful or unlawful, but must be selected for particular contexts and missions, taking account of their properties and, in particular, their capacities to discriminate between combatants and noncombatants in the actual circumstances of the case.

The critical notions of damage and its corollary of collateral damage have been conceived and applied primarily to uses of the military instrument. Some scholars and politicians believe that the other strategic instruments are essentially or comparatively non-damage-causing. But if one examines things contextually and systematically, it will be seen that no one of the four instruments of policy is inherently nondestructive. Each may be used in ways that produce significant destruction, often on the peripheries rather than on the target itself.

This is obviously the case with the various items in the military arsenal in many of the contexts in which they might be used. Consider a recent example: The destruction, by U.S. "smart" missiles, of Iraqi intelligence headquarters in Baghdad,³ produced some collateral damage in the suburb of Baghdad in which the intelligence headquarters was situated.

The inevitability of collateral damage is less obvious for some of the other instruments. The propagandistic instrument—the purposeful modulation of signs and symbols by one side to a conflict against the rank-and-file of the adversary—was used prior to, during and after Desert Storm, to encourage the Shi'a in the south of Iraq and the Kurds in the north of Iraq to rise against the Ba'ath regime. In both cases, it could be anticipated that the propaganda, if successful, would ignite a chain of events ultimately causing substantial collateral damage in the insurrection and the brutal suppression that would follow it, especially if the coalition that had encouraged the insurrection did not come to its assistance.

Two points must be emphasized. First, damage—in an empirically referential sense—is not caused exclusively by uses of the *military* instrument; other instruments are often used in highly destructive ways. Although this fact is often counter-intuitive, the military instrument, as we have seen, in its communicative or threat stage, can be and usually is used in nondestructive and essentially communicative ways. The sequence is quite simple: Threats and coordinate demonstrations of power are perceived by the intended target; they concentrate its mind in a way that words alone do not; and they stimulate careful assessments of relative power positions correlated with the degree of importance of the issues at stake. Where the assessments indicate probabilities of net losses, they lead to appropriate nonbelligerent adjustments. The military instrument is more likely, than are the other instruments, to be effective in this stage, precisely because "wait and see" is an inappropriate response.

Second, damage is not caused exclusively by the application of *material* assets, the "sticks and stones" of the arsenal. Words can cause direct and collateral damage as well. One of the common methods of propaganda—"psychwar"—seeks to exacerbate latent conflicts between different ethnic groups within the adversary in order to undermine elite control or to require the elite to divert resources to suppress internal resistance. Propaganda of this sort is hardly without potentially severe collateral damage—tensions between ethnic groups may produce violent incidents or even widespread pogroms. Even if they do not, long after the particular conflict has ended the residue of hatred that has been endorsed and made more acute will lurk in people's consciousness, like a time bomb or a quiescent

³ See W. M. Reisman, *The Raid on Baghdad: Some Reflections on its Lawfulness and Implications*, 5:1 E.J.I.L. 120 (1994).

virus to be transmitted from one generation to the next until it bursts forth or is detonated. Propaganda, unlike lawful land mines, cannot be set to self-destruct.

The "Appeal" of Economic Sanctions

Economic sanctions are unquestionably the flavor of the year nationally and internationally for enforcement action. They are preferred in advanced industrial democracies because they engage comparatively less *internal* political resistance than other candidate strategies. Comparatively speaking, economic sanctions are politically cheap. To be sure, economic sanctions do have retro-costs that are borne by particular sectors of the national economy of the sanctioning state, for whom they may be considerable. But economic sanctions do not generate somber processions of body bags bringing home the mortal remains of the sons and daughters of constituents. Even when it is glaringly obvious that economic sanctions are not going to be effective, for example, the U.S. grain embargo mounted against the Soviet Union in response to its invasion of Afghanistan in 1979, or when it is clear in advance that economic sanctions will actually prove more costly to the party imposing them than to the target, the sanctions are not without important political consequences: They still reinforce public commitment to the norm that has been violated and generate a sense of civic virtue, without incurring unacceptable domestic political costs. Whatever their economic costs, they are often likely to be the cheapest feasible political option. When, as often happens in democratic polities, political forces cannot agree on the appropriateness of response to some perceived international delict, economic sanctions become an easy point for compromise—not necessarily the most rational of options, but certainly the lowest common denominator.

Yet it is the militant sense of virtue and moral superiority that attaches to the application of economic sanctions that is so fascinating. Economic sanctions have enjoyed great popularity among people of pacifistic bent, because they seem to offer wholly nonviolent and nondestructive ways of implementing international policy. "At least," one hears again and again, "we're not killing anyone. At least, we're giving nonlethal sanctions a chance." In this line of thinking, economic sanctions are always to be preferred to the application of the military strategy and, in any case, are always to be exhausted before military action is initiated. As we have seen, however, such assumptions are unfounded.

The Relevance of the Law of Armed Conflict

The most important principles of the law of armed conflict are the sharp distinction between combatants and noncombatants and the imperative that any use of force be demonstrably necessary, proportional to the necessity and capable of discriminating between combatants and noncombatants.⁴ It is a cardinal principle of the international law of armed conflict that military strategies are to be planned and appraised taking due account of these criteria. Prospectively, rules of engagement must be designed to accommodate these principles in the anticipated context. Major military campaigns are subjected to critical post-mortems to determine the extent to which those principles were met and whether the application of coercion in that case was internationally lawful.

The same type of examination is not transposed, *mutatis mutandis*, for prospective assessment of applications of the other three instruments. The apparent reason for this persistent blind spot in international legal analysis has been the incorrect assumption that only the military instrument is destructive. The assumption that nonmilitary strategies are

⁴ W. Michael Reisman & Christos Antoniou, *THE LAWS OF WAR: BASIC DOCUMENTS ON THE LAW OF INTERNATIONAL ARMED CONFLICTS* (1994); Myres S. McDougal & Florentino P. Feliciano, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961), reprinted with new introduction and title, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* (1994).

inherently nondestructive or nonlethal has also insulated their prospective and retrospective appraisal in terms of basic human rights instruments. The consequences of this blind spot can be very grave. State-sponsored propaganda, for example, is often used to exacerbate hatred among different groups. Surely this is a violation of the Convention on the Elimination of Racial Discrimination.

It is clear that the nonmilitary instruments should be tested rigorously against the criteria of the international law of armed conflict and other relevant norms of contemporary international law *before* a decision is made to initiate or to continue to apply them. If the nonmilitary instruments are so tested, it is quite probable that in some cases they would be found to fail and to require adjustment or abandonment. The economic and propagandistic instruments are problematic, if for no other reason than their inherent comparative incapacity to discriminate between licit target and noncombatants and the persistent effects of the resultant collateral injuries.

Application to Prospective Sanction Programs

I would like to propose, in a tentative and preliminary fashion, nine principles of substance and procedure that should, it is submitted, be followed in designing sanctions programs to ensure their conformity to international law:

(1) *The use of highly coercive economic sanctions, like any other strategic instrument of high coercion, must be based on lawful contingencies.* International law permits coercion to be used, but only for prescribed contingencies and under prescribed conditions. For the United Nations, the contingencies are set out in Article 39 of the Charter. For individual states, acting unilaterally or in combination with others, the customary law of self-defense and the emerging law of countermeasures will prescribe the contingencies. Whether sanctions are applied by the United Nations or unilaterally, the analysis of prospective programs and the criteria for determining their lawfulness, as distinct from the contingencies for their operation, should be the same. While scholars may argue over whether determinations under Article 39 are to be governed by principles of law embedded in the Charter and subjected to judicial review in their light, I take it as unexceptionable that when the community of nations applies coercion in defense of public order, it is subject to the same laws of war that have been prescribed for others.

(2) *International law does not, however, prescribe restrictive contingencies for the use of economic sanctions of low coercion.* These actions fall into the category of “retorsions,” that is, discretionary punitive actions, whether diplomatic, ideological or economic, that states may resort to in order to indicate their displeasure with the policies or comportment in a particular instance of another state. What marks retorsions is their low level of coercion. If that level is exceeded, the state initiating the action would be obliged to justify its action by reference to the law of self-defense or countermeasures.

Level of coercion is determined, not by the structure or name of the program, but by its *predictable consequences*. Thus, if State A unilaterally mounts a general embargo against State B, the action, despite its avowed comprehensiveness, may only be retorsive because many other states continue to maintain full economic relations with B. But if State A is in a monopolistic or monopsonistic position vis-à-vis State B, a self-described partial unilateral embargo may have effects that go beyond the bounds of retorsion. Thus, to take one well-known example, the U.S. collapse of Cuba’s sugar quota in 1959 may have been more than retorsive.⁵ If this were so, it would have had to be substantively justifiable under international law.

(3) The theory of “trickle down” economic programs is that development strategies

⁵ In fact, the then Soviet Union promptly agreed to become the major purchaser of Cuban sugar, rendering the U.S. action retorsive, whatever its original intention may have been.

that primarily benefit wealthy strata rather than the neediest are morally defensible because they will ultimately prove more inclusively beneficial. Thanks to a process in which greater amounts of wealth will drizzle down on the wretched poor at the base of the social pyramid, they will be better off than they could expect if they were made direct beneficiaries. "Trickle up" economic sanction theories, in contrast, contend that the increased pain of lower social strata will percolate upward, by some remarkable osmosis, to those who have the capacity to influence decision. The leadership will, indeed, "feel your pain."

There is no empirical evidence to support either theory. *An economic sanctions program may not be justified on a "trickle up" theory of deprivation, any more than a military strategy such as carpet bombing of urban concentrations of noncombatants can be justified on the theory that the pain of death and injury will rise to higher, politically responsible levels.* From a legal standpoint, it is not enough to say that our economic sanctions are permissible because "we are hurting country X" or even that "we are hurting the government of country X," any more than it would be persuasive to use this type of reasoning to defend focussed bombing.

(4) *It follows that, at a theoretical level, economic sanctions, as opposed to retorsions, whether applied by the United Nations under Chapter VII of the Charter or unilaterally, must be designed with regard to the techniques selected, with as much attention to context and capacity for discrimination as would a sanction program using the military instrument.* Economic sanctions may be used when they are capable of discrimination. Sanctions that deprive an adversary of war materiel are presumptively lawful, for they are directed against combatants. Sanctions that are designed to change the political program of an adversary are lawful when they visit their impacts on the target elite or on rational economic maximizers within the target who have the capacity to influence the political elite.

The political structure of the target may then be an important consideration. More collateral damage may be permitted when the target is democratic, for more adults may be deemed to support and be implicated in the comportment that is the target of international condemnation and sanction. Far less collateral damage may be permissible when the target state is a dictatorship in which the population has no meaningful say in decisions.

Consider the complexity of the problem through the lens of a hypothetical case. Assume that chemical weapons are being assembled in State A from materials produced in five different factories, each employing several thousand people. A precise sanctions program can effectively deny A access to the raw materials needed in three of the factories. The program commences, the factories close and the chemical-weapons production is suspended. Ten thousand workers in the three factories are furloughed, they and their families suffer nutritional, health, educational and psychological deprivations, the cities in which they live slide into recession, the mortality and epidemiology of economic collapse manifests itself, and so on.

The workers and their families have suffered collateral damage. That does not necessarily render the program unlawful. Lawfulness will turn, in part, on the degree of precision of the instrument and the consequent limitation of damage. How can that be measured? Compare the projected effects of this program with other possible uses of the economic instrument. For example, imagine a construct in which the chemical-weapons production is terminated by a total embargo against State A, with much more widespread deprivation and infrastructural deterioration. In the first hypothetical, there would be considerably less collateral damage.

Contrast these examples with an enforcement program applying a different strategic instrument—a surgical bombing raid against the factories, using visually corrected "smart bombs," on the model of the Israeli attack on the Osirak reactor in Iraq; assume that there are five fatalities.

The three hypothetical situations indicate that when planning an enforcement program

international law requires, among other things, assessing the collateral damage of different strategic options through comparative projections of the costs to noncombatants or nonresponsible parties of the application of the military, economic or propagandistic instruments, alone or in various combinations.

The value spectrum of the New Haven School may be useful in this regard, for it provides a focus, whether prospectively or retrospectively, at whatever level of detail is desired and in every social sector, on changes precipitated by specific sanctions programs in the production and distribution of values. International law now prescribes for virtually all of these social slices, in some instances with nonderogable human rights norms. Hence appraisals of projected enforcement programs must be made, not simply in terms of quanta of collateral damage, but in terms of priorities of human rights norms. As in other social scientific research, investigation here should distinguish between structural or infrastructural injury and short-term deprivation. It must also develop techniques for assessing cumulative injury.

International law has now assumed explicit responsibility for supervising protection of the environment. With regard to uses of the military instrument, environmental concerns are a venerable part of the literature, from prohibitions with regard to the poisoning of wells until the present. It is clear that any inquiry undertaking to assess the prospective lawfulness of a particular sanction program must consider the implications for the environment.

Let me emphasize again that the mere fact that the nonlethal instruments cause collateral damage does not mean that they are per se prohibited in international law. International law does not preclude collateral damage. Rather it insists, as one condition of lawfulness, that the strategic instruments selected minimize it to the extent possible and, as a minimum, never exceed the bounds of proportionality.

(5) *Comparative examinations of "more-than" or "less-than" do not address the fundamental question of quantum: How much, if any, collateral damage is permissible in a particular case?* The concept of necessity in the law of war is supposed to deal with this matter, but it is often interpreted to mean whatever is minimally necessary to achieve a given military objective without relating the inquiry to the legal quality of the *political* objective for which the military objective is only an instrument. Necessity, in this sense, would not be a restrictive criterion, but would become extensive and facilitative. Yet the concept of necessity must be elastic enough to allow for substantial collateral damage when the dangers to public order warrant it. Otherwise, the economic instrument, indeed all instruments, become, by definition, techniques that must be ineffective in order to be lawful. The question, then, is how to incorporate the necessity factor into calculations of lawfulness of prospective economic sanction programs.

In first impression questions such as these, the methods of inquiry of "natural law" are indispensable, for they help us to consider and then fashion and appraise legal instruments in terms of social goals, costs and alternative consequences. The bigger the bullet, the bigger the hole. Assume that the more lethal the sanctions, the more extensive the corresponding collateral damage is likely to be. We would all agree that it would be unacceptable, in a period of breakdown of public order, for police to be ordered to shoot looters, with the collateral damage such rules of engagement might entail; and it would be equally unacceptable for police not to be ordered to shoot armed irregulars with a record of terrorism who were moving to seize an undefended elementary school. In the first instance, whatever damage might ensue to seizure of property by looters could be largely repaired by ordinary police work *after* public order was restored. In the second instance, the damage that might ensue could not be repaired after public order was restored. In other words, the tolerance for lawful violence, with the corresponding level of collateral

damage that will ensue, varies according to the degree of injury that is posed to public order and the degree of irreparableness of injuries if they occur.

This type of analysis can, it is submitted, be applied to determine the level of tolerance for quanta of collateral damage in economic sanctions programs. Contrast the sanction programs against the dictatorships of Saddam Hussein and Fidel Castro. The precipitating events for the sanctions against Saddam were past and projected aggressive wars and the development of nuclear, chemical and biological weapons arsenals for those purposes. The sanctions are designed to prevent the development and use of such weapons in future aggressive wars. The precipitating events for the sanctions against Castro (which are not, in fact, comprehensive and effective) are internal authoritarianism and systematic denial of human rights. The sanctions are designed to hasten the end of the dictatorship, but not to forestall any aggressive external policy. Both sanction programs will cause collateral damage. Surely a higher level of collateral damage should be legally tolerable for Saddam than for Castro.

(6) *Economic sanctions are not required to precede the application of military sanctions.* The Drafters of the UN Charter were aware of the highly deprivatory consequence and destructive potential of any instrument of policy. Chapter VII of the Charter, which establishes the authority of the Security Council to use intense coercion to support binding decisions and prescribes the procedures to be followed, implicitly acknowledges the potentially destructive capacity of any strategic instrument of coercion. The initiation of *any* instrument requires, as a precondition, a finding of one of the contingencies for action under Article 39—threat to the peace, breach of the peace or act of aggression. Nor does the Charter suggest that one instrument is inherently more destructive than another. A number of scholars have suggested that there is a necessary sequence of steps leading up to the use of the military instrument—implying that the military is viewed in the Charter as the most destructive instrument and, hence, the last to be used. This is not correct. While Article 41 of the Charter introduces “measures not involving the use of armed force” before its discussion of the military instrument, Article 42 states explicitly:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. . . .

Thus, the Charter authorizes the Council to commence with any strategic instrument, depending on its assessment of which would be optimum in the context of each case.

(7) *More limited and precise economic sanctions are to be preferred over more general and indiscriminate programs.* Given the destructiveness of economic sanction programs, it would seem that genuinely effective general embargoes, which by definition cannot discriminate between combatant and noncombatant, should be impermissible, and that there is now a need for a much more refined use of the economic sanction. In this respect, UN Security Council Resolution 661 was probably exorbitant in its sweeping restriction on foodstuffs for Iraq; it may have been ameliorated in Resolution 666 of September 13, 1990,⁶ which assigned a certain discretionary competence to the Sanctions Committee to determine whether “humanitarian circumstances” warranted a departure from Resolution 661.

Preliminary studies indicate that there have been few if any prior examinations of the prospective lawfulness of an economic sanctions program against the target state before a political decision was made to put it into place. I know of no case in which the Security Council or the Council of the League of Nations commissioned a study of projected

⁶29 ILM 1330 (1990).

collateral damage likely to be caused by an economic sanctions program before ordering the program. I submit that any economic sanctions program, to be lawful, must undertake a preliminary "impact assessment" study, based on a contextual inquiry.

(8) *To ensure that their effects are consistent with international law, economic sanction programs must continuously update their information as the program proceeds.* The necessity for context here is very important, to ensure compliance no less than to test allegations of abuse. In sanction programs, the target state is likely to seek to exaggerate the injuries it is suffering and, in particular, the burden falling on noncombatant strata of the population as a way of challenging the lawfulness and morality of the sanctions program and undermining the political will to continue it. Fidel Castro, for example, has insisted that the U.S. economic embargo is wreaking havoc among Cuban children by denying them access to medicine. Of course, virtually all of the other states in the Western hemisphere have economic relations with the Castro government, and in all of them medicines are far cheaper than in the United States. Castro is, in fact, conducting a propaganda program in which he is trying to blame the United States for the woeful state of Cuba's political economy. A contextual examination of the allegation readily exposes it. One is struck by the lack of rigorous analysis by the media that report these claims.

(9) *Collateral damage for economic sanction programs is not always limited to sectors within the targeted state. Third parties may also suffer collateral damage and are entitled to relief.* Article 50 of the Charter provides:

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

This form of collateral damage has received the most attention from the sanctions committees of the United Nations. When the committees have been persuaded, they have often waived the trading prohibition for the third state.

Conclusion

As a policy matter, I submit that future nonretorsive uses of the economic strategy, whether by the international community or on a unilateral basis, must be examined prospectively in terms of the requirements of the law of armed conflict, and in each case much more refined economic sanction programs should be designed. More important, the egregious and potentially long-term social, economic and environmental consequences of economic strategies must be acknowledged; the mid-term and long-term, as well as the short-term consequences of prospective economic sanctions must be projected and appraised. As I said, I know of no case in which the political decision, whether at the UN or unilateral level, to undertake an economic sanctions program was preceded by an inquiry into the lawfulness of the program based upon considerations of necessity, proportionality and the capacity for discrimination of the technique to be used.

Rigorously contextual and honest assessments of the collateral damage likely to occur must be undertaken and inter-instrument comparisons of projected collateral damage must be run. More consideration should be given to the use of the military instrument as a technique for conveying credible threats and achieving its objectives with a lower likelihood of collateral damage—if that instrument is used first *and* credibly. Sometimes a precise use of the military strategy will more efficiently achieve the international objective and more closely approximate the tests of lawful international coercion than would an undefined economic sanction program. This may mean that the conventional wisdom that one must advance, through a slow process of escalation—from diplomatic, to propagandistic, to economic, to military instruments—should be discarded. The sequence may some-

times have to be reversed. Ideally, a political decision should be taken to compel a target to comply with a particular international decision or policy and then a group of experts should be tasked to determine the best and most lawful instruments or ensemble of instruments to achieve compulsion in the circumstances of that case. Only then should the particular sanction instrument or program of instruments be selected. In some cases, the military instrument may have to be used first, initially by threat communication and, if that fails, by actual application.

DISCUSSION

JEREMY P. CARVER:* Aren't UN sanctions under Article 41, which seek to excommunicate a state and define the conditions under which it can rejoin the international community, quite different from U.S. sanctions, which are mere instruments of foreign policy and which tend not to offer the target state a way out?

Professor REISMAN: I'm not sure I agree with your construction of Article 41; I believe it allows for a broad range of actions and purposes. As for the second part of your question, I would like to clarify that, to the extent that international law allows individual and collective self-defense and countermeasures, the instruments available to a state must include economic sanctions. My point is simply that when the economic sanctions involve a high degree of coercion, they should in fact be based in international law; the contingency should be justified.

Mr. HOFFMAN: The notion that the U.S. employs sanctions without any end game in mind is not accurate.

Mr. TROBOFF: Each of the most recent U.S. statutes dealing with economic sanctions has listed a series of actions that must occur as a basis for ending sanctions, so there has been some effort to identify the actions expected of the target state.

JORDAN PAUST:** My first question is for Professor Reisman: What limits are there on the power of the Security Council when imposing economic sanctions under Articles 24(2) and 25 of the UN Charter, and what obligations are there by states to monitor the consequences of economic sanctions? My second question is for Mr. Hoffman: It seems to me that you jumped over a very complex question concerning the duty of the United States to comply with self-executing or treaty-based Security Council resolutions.

Professor KAWAGISHI: Generally speaking, in Japan the decisions of the Security Council have the same force and validity as a treaty. So when the Japanese Government implements economic sanctions domestically, it need not enact any specific legislation.

Mr. HOFFMAN: The issue of whether the President can implement Security Council sanctions directly, without congressional action, is first and foremost a political problem. Few administrations will ignore congressional authority over foreign trade.

Mr. TROBOFF: But it is hard for me to think of any recent situations where the President has lacked sufficient authority, such as in the International Economic Emergency Powers Act, to implement sanctions.

Mr. HOFFMAN: The one thing that comes to mind is current resolutions involving the Federal Republic of Yugoslavia, particularly provisions regarding forfeiture of ships. Neither the UN Participation Act nor IEEPA has that kind of forfeiture authority.

BENJAMIN B. FERENCZ:** The panelists have correctly explained that economic sanctions generally do not work. Would it not be prudent for the Security Council, therefore, to create a special sanctions organ to enable it to effectively implement economic sanctions?

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