
The Applicability of International Law Standards to United Nations Economic Sanctions Programmes

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Abstract

In the first half-decade after the fall of the Berlin Wall, the UN Security Council repeatedly decreed mandatory economic sanctions programmes under Chapter VII of the UN Charter. Some of the programmes were severely criticized for their allegedly disproportionate effects on the populations of target states. The authors identify economic sanctions as a coercive instrument and assess the applicability of international law standards, including the traditional criteria of necessity, proportionality and discrimination, to mandatory UN economic sanctions programmes. After an overview of the theory of economic sanctions and their place among strategic instruments of enforcement, the authors review the instances of mandatory UN economic sanctions programmes, assessing their effects on the populations of the target states and the extent of the Council's consideration of international legal norms in designing and carrying out sanctions. Concluding that the Council has given inadequate consideration to international law standards in implementing these programmes, the authors propose five legal principles for mandatory economic sanctions programmes: that highly coercive sanctions follow prescribed contingencies; that they be necessary and proportionate; that the sanctioners reasonably maximize discrimination between combatants and non-combatants; that sanctions programmes be periodically assessed; and that relief be provided to injured third parties.

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1 Introduction

Economic sanctions have become a preferred policy instrument of foreign policy-makers in recent years. With the end of the Cold War, multilateral sanctions regimes in particular have proliferated, especially at the United Nations: nine times since the fall of the Berlin Wall, the Security Council has acted under Chapter VII of the UN Charter to create mandatory economic sanctions programmes.

The effectiveness of economic sanctions has long been a subject of debate among policy-makers and jurists. Largely missing from this debate, however, has been any sustained analysis of the international law standards that should govern decisions about the use of economic sanctions. Only recently, as concerns have mounted in a number of circles over the manifest deprivations endured by the people of Iraq and Haiti as a result of the application of mandatory UN sanctions, has this issue drawn the attention of international legal scholars, policy-makers, and ethicists.¹ In this article, we analyse the question of the mandatory applicability of critical international law standards to the design and implementation of economic sanctions programmes, focusing in particular on the inadequacies of UN practice in clarifying a legal framework under which policy-makers can effectively and properly assemble and enforce economic sanctions regimes.

2 Preliminary Considerations

'Economic sanctions' may take many forms and may be applied unilaterally or multilaterally. They involve the purposive threat or actual granting or withholding of economic indulgences, opportunities and benefits by one actor or group of actors in order to induce another actor or group of actors to change a policy. Targeted policies may be external, such as the withdrawal of the target state from territory it has seized or illegally occupied (e.g., South Africa's long occupation of Namibia in defiance of the United Nations' termination of the Mandate), or internal, such as ending patterns of human rights violations (as in present-day China). Economic sanctions may even seek the replacement of the elite in the target state (e.g., Peron in Argentina after the Second World War or Saddam Hussein in Iraq at the moment).

A Prevalence

Economic sanctions are often used as a unilateral technique in international politics, though not necessarily explicitly — indeed, sometimes demurrers or denials are declared by the sanction-feasor, who may insist that the consequences, which are, of course, regrettable, are the ineluctable result of some other lawful action.² An

¹ See, e.g., United Nations Sanctions as a Tool of Peaceful Settlement of Disputes: Non-Paper Submitted by Australia and the Netherlands, UN Doc. A/50/332 (1995); Damrosch, 'The Civilian Impact of Economic Sanctions', in L.F. Damrosch (ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (1993), 274, 305; Pierce, 'Just War Principles and Economic Sanctions', 10 *Eth. & Int'l Aff.* (1996) 99.

² In this respect, we would depart from the approach taken by G.C. Huftbauer *et al.*, *Economic Sanctions Reconsidered* (2nd. ed., 1990), which is the indispensable work in this field and must be consulted for any

agriculture-exporting state's perishable products aboard a ship in harbour may slowly compost, as the importing state's customs inspectors, with unprecedented care, examine each hold 'by the book', all this occurring at a moment when the two states are engaged in a critical negotiation. Denials or not, the target state always gets the message.

Uses of power by one actor against another are, by definition, based on a general or momentary power-superiority, whose fluidity can be obscured by stereotyping terms, in common parlance, such as the 'strong' and the 'weak'. Economic sanctions are not quite 'equal opportunity' instruments, but their use is certainly not limited to the greatest states against the smallest states. Any disparity in power — in general or as a result even of a transitory situation — can provide the basis for the design and application of an economic sanctions programme. For example, during the stormy election of the Secretary-General of the Organization of American States (OAS) some three years ago, some Caribbean states angrily accused Costa Rica of using banana diplomacy to persuade certain states to support the candidate it had put forward.³ Costa Rica is hardly a superpower.

Conversely, immunity from economic sanctions is a matter of degree. Even large and powerful states such as the United States may be targeted effectively. The People's Republic of China has mounted an extraordinarily effective economic sanctions programme against the United States, through which it has secured virtually all the adjustments it seeks in America's China policy. One of the most fascinating aspects of this particular economic sanctions programme is that the target, the United States, seems possessed of the idea that *it* is the economic sanctioner, while China is the target! The seemingly interminable national debate about the utility and wisdom of economic sanctions proceeds on this flawed assumption. The point of emphasis is that opportunities to use economic sanctions unilaterally are rather widely distributed.

B Effectiveness of Economic Sanctions

Are economic sanctions effective? If that question means: 'When used without the military strategy, can and do economic sanctions induce desired adjustments in the external or internal policies of the target?', the answer is, under certain conditions, yes, decisively and demonstrably so. In 1919, Woodrow Wilson, one of the great enthusiasts of economic sanctions, said:

inquiry. The authors only examine explicit cases of economic sanctions. We believe that the 'implicit' use of economic sanctions is much more common than they allow and that it is particularly important to consider, *inter alia*, covert uses of the economic instrument, such as shifts of hard currency reserves to strengthen or weaken the currency of the target state before an election. See generally W.M. Reisman and J. Baker, *Regulating Covert Action* (1992).

³ On this issue, see Collymore, 'Banana Squabble Helps Gaviria Gain OAS Presidency', *Inter Pr. Serv.*, 28 March 1994, available in Westlaw.

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 the nation boycotted, but it brings a pressure upon the nation which, in my judgment, no modern nation could resist.⁴

Wilson was speaking as a propagandist for the League of Nations and did not need, in that role, to specify the conditions for the success of the instrument. But his basic point still holds: economic sanctions can be highly effective.

Part of Wilson's subtext — that economic sanctions are, in his words, silent, deadly and terrible — also holds. Another part of his subtext, however — that the instruments are 'peaceful' — certainly does not apply to the targets of the sanctions. It is that comfortable astigmatism that prompts the present inquiry. Precisely because economic sanctions are now used more frequently by the international community, a re-examination of what they are, how they stake and how they miss, and how they should be normatively organized is timely.

Economic sanctions are a potentially powerful instrument in the right circumstances. They are also of great potential destructiveness. If nothing else, the case of Haiti,⁵ which we consider in detail below, where sanctions were used with tremendous and indiscriminate force, should prompt a fundamental reconsideration — in terms of social science, international law and natural law — of the mechanisms, politics, and law of the use of non-lethal sanctions in the international arsenal and of the contingencies and policies that should be applied to their role in international enforcement action.

C Strategic Instruments of Enforcement

To understand the way economic sanctions are used, it is necessary to locate them in the context of all strategic instruments and to understand the sequences in which these instruments are deployed. 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 ideologic or propagandic⁶ 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 ambit of choice of the target by constraining it to adopt policies or positions it would otherwise eschew.

⁴ S.K. Padover (ed.), *Wilson's Ideals* (1942), 108, cited in G.C. Hufbauer et al., *Economic Sanctions In Support of Foreign Policy Goals* (1983), at 9.

⁵ See *infra* part 3.E.

⁶ We apologize for the rather ugly term 'propagandic', but this inquiry needs a clear designation for what Lasswell called the 'ideological' instrument.

Indulgent techniques seek to secure this compliance by promising rewards or giving bribes. The consequence of an indulgent strategy is still to attenuate the freedom of choice of the target, which must forego advantages or opportunities it expected to gain, but neither the target nor the people nor 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.

D Sanctions and Threat Theory

Threats are an actor's credible communication of interest, capacity, and contingent intention; they are designed to warn another actor that if it does not desist from or adjust certain behaviour, 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 behaviour 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 programme: 'do such and such *or else*'.⁷ Let us refer to this stage as the 'communication' stage. The second stage involves the effective application of the sanctions, the actual delivery of the 'or else'. We shall call this the 'application' stage. Sanctions accomplished by the communication stage alone certainly have transaction costs,⁸ but they involve fewer costs to the sanctioner and the target than do sanctions that require the second, applicative phase.

Generally, insofar as the actors involved are rational, the communication stage should ensure the desired change in behaviour if two cumulative conditions are met: (i) the content of the programme is clearly sufficient to accomplish its manifest objectives; and (ii) the communication of capacity and intention ('political will') is credible. The target will obviously not comply when the content of the threatened programme is manifestly inadequate, for instance, where the target perceives the programme as essentially symbolic, staged for certain internal or external audiences. Nor will the target comply when the content of the programme 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 a 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

⁷ The 'or else' may also be an 'and': a promise of a reward as well as the threat of a deprivation.

⁸ For the sanctioner, the direct costs are incurred in mobilizing and pre-positioning the various assets to be used in the sanctions programme. Opportunity costs, which are lost once those assets have been diverted to the sanctions, are also incurred.

programme. Whether the target's perceptions are correct or not, the communication phase alone will not suffice to ensure compliance, and the enforcement programme 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 programme is more likely to be a successful application of threat theory than is the communications stage of a credible economic sanctions programme and, *a fortiori*, a credible propaganda programme. Excluding for the moment military actions such as 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 effective, irreversible. When the economic instrument is used, in contrast, the effects are slow and cumulative, especially if they are being 'cranked 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' could be rational if the programme about to be mounted against the target is an economic or propagandic one, for the target can still haggle over terms of compliance or, indeed, turn off the programme directed against it at any time, simply by saying 'yes'. That is not to say that 'wait-and-see' has no costs for the target. The infrastructural costs of sanctions and the sunk costs of reactive attempts to transform the economy may prove as durable and politically costly as those following limited use of the military instrument, even if the target subsequently responds affirmatively. Indeed, in some ways it may prove more politically costly, for damage from the military instrument is easily and plausibly blamed on outsiders; damage from internal preventive, anticipatory action is not.

'Wait-and-see' is not always the strategy that a target will or should follow. In at least two instances, economic sanctions have obtained the desired policy goals at the communication stage: the League of Nations' sanctions against Yugoslavia in 1921 and the American and Canadian sanctions against South Korea to stop nuclear reprocessing in 1975.⁹ Whether the target should follow such a passive strategy depends on the credibility of the threat, based on the target's observation of the sanctioner's previous behaviour and other contextual indications of authority and control intent, and on the ability of the target's elites to hedge the impact of the threatened economic shocks.

The target's elites may adopt a defensive strategy at the communication stage. But, as suggested above, such a strategy is not costless and its adoption will depend on a balancing of expected costs and rewards. These strategies may include, but are not limited to, transforming the economy's structure toward import substitution or seeking temporary alternative markets in which to purchase and sell goods and services. The expected benefit from these strategies, in turn, will depend on the costs of redirecting production, on the size of the internal market, and on the elasticity of world supply and demand for those goods in which the target trades.

⁹ Van Bergeijk, 'Success and Failure of Economic Sanctions', 42 *Kyklos* (1989) 385, at 388.

In most cases, the costs of adopting these reactive strategies at the communication stage may be prohibitively high. As a result, economic sanctions would tend to be less effective at the communication stage than uses of the military instrument, unless the sanctioner has a well-known record of threatening sanctions and carrying them out if necessary. Mere assertions of power or authority are unlikely to make the target change its policies at this stage for they convey little information about the sanctioner's credibility. The differential effect of threat theory on enforcement instruments means that the quantum and nature of damage flowing from a sanctions programme will vary depending on which instrument is selected as the primary sanction tool.

E 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 strategies, for no weapon regularly delivers its punch with the 'surgical precision' claimed by its manufacturers and operators. Customary international law, now codified, has long tried to define lawful primary targets and to establish boundaries of tolerance 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 the combatants and non-combatants in the actual circumstances of the case.

The critical notions of damage and collateral damage have been conceived for and applied primarily to uses of the military instrument. Some scholars and politicians believe that the other strategic instruments are essentially, or at least comparatively, non-damage-causing. But if one examines facts contextually and systematically, it is readily apparent that none of the four instruments of policy is inherently non-destructive. 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 military weapons in many contexts. Consider a recent example: the destruction, by 'smart' missiles, of Iraqi intelligence headquarters in Baghdad, which President Clinton ordered in reaction to the Iraqi plot to assassinate former President Bush, produced some collateral damage in the suburb of Baghdad in which the intelligence headquarters was situated.¹⁰

The inevitability of collateral damage is less obvious for some of the other instruments. The propagandic instrument — the purposive 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 it were successful, would ignite a chain of events ultimately causing substantial collateral damage in the insurrection and the brutal

¹⁰ See Reisman, 'The Raid on Baghdad: Some Reflections on Its Lawfulness and Implications', 5 *EJIL* (1994) 120.

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. The other instruments are often used in highly destructive ways. In fact, though often counter-intuitive, the military instrument, as we have seen, in its communicative or threat stage, can be and usually is used in non-destructive 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 non-belligerent adjustments. The military instrument is more likely than 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 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.

In sum, then, considered in terms of threat theory, the collateral damage caused by non-military instruments — the economic and propagandic — may be greater than that of the military instrument, precisely because the elite, presented with a credible threat of the application of one of these non-military instruments, will often adopt, quite rationally, a 'wait-and-see' posture. During the time that this posture is followed, collateral damage can accumulate. Precisely because 'wait-and-see' is always irrational in the face of a credible threat to use the military instrument, its effective employment may actually cause less collateral damage than the use of non-military instruments.

F *The 'Appeal' of Economic Sanctions*

Economic sanctions are unquestionably the flavour 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, they do have retro-costs, which may be considerable, that are borne by particular sectors of the national economy of the sanctioning state. But

economic sanctions do not generate sombre processions of body bags bringing home the mortal remains of the sons and daughters of the constituents. Even when it is glaringly obvious that economic sanctions are not going to be effective, as for example with the US 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 international tolerance for unilaterally applied economic sanctions may be declining. Economic interdependence is a long-standing fact. The *perception* of just how integrated the international economy has become, however, and how inclusively disruptive some heretofore tolerated unilateral actions can be to that interdependence has increased. One manifestation of this perception is the growing criticism of the unilateral application of economic sanctions. But the concern about the use of these sanctions has been motivated entirely by self-interest rather than by a concern for the essential lawfulness and morality of the general or particular use of economic sanctions. Indeed, those who press for general or particular economic sanctions programmes feel that it is they who control the moral high ground.

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 non-violent and non-destructive ways of implementing international policy. 'At least', one hears again and again, 'we're not killing anyone'. 'At least, we're giving non-lethal sanctions a chance.' In this line of thinking, economic sanctions are always to be preferred to the application of 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.

G The Relevance of the Law of Armed Conflict

The basic postulates of the law of armed conflict are the sharp distinction between combatants and non-combatants and the imperative that any use of force be demonstrably necessary, proportional to the necessity, and capable of discriminating between combatants and non-combatants.¹¹ It is a cardinal principle of the

¹¹ See generally W.M. Reisman and C. Antoniou, *The Laws of War: Basic Documents on the Law of International Armed Conflict* (1994); M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961), reprinted with new introduction as *The International Law of War: Transnational Coercion and World Public Order* (1994).

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 non-military strategies are inherently non-destructive or non-lethal 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 between different groups. Surely this is a violation of the Convention on the Elimination of Racial Discrimination.¹²

Non-military 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 non-military instruments were 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 propagandic instruments are problematic, mainly because of their relative incapacity to discriminate between licit targets and because of their durable resultant collateral injuries, which persist long after the conclusion of the campaign in which they were deployed.

These considerations should apply, *a fortiori*, to international organizations when they elect to use the economic instrument.¹³ Since GATT and WTO prescriptions are placing an increasing number of limitations on the unilateral uses of economic sanctions, their most common and intensive lawful use in the future is likely to be through international organizations. Our thesis is that in these applications, compliance with international law, and particularly the criteria of lawfulness of the law of armed conflict, is mandatory. A preliminary, factual question is whether and to what extent the international organizations that have mounted economic sanctions programmes have complied with this requirement. Thereafter, we will turn our attention to the question of under what circumstances and through which procedures economic sanctions programmes should be planned and applied in the future.

¹² Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1965, 660 UNTS 195 (entered into force 4 January 1969; adopted by the United States 20 November 1994).

¹³ Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, 34 ILM (1995) 482.

3 The Application of Economic Sanctions by the United Nations

Although the UN General Assembly has periodically passed non-binding resolutions calling on all Member States to apply economic sanctions,¹⁴ it is the UN Security Council that has decided upon and applied the regimes of UN-enforced economic sanctions.¹⁵ In the first 50 years of existence of the United Nations, the Security Council, acting pursuant to Chapter VII, has on ten different occasions mandated that Member States implement economic sanctions of varying degrees of stringency against offending states. Our question here is not whether these sanctions programmes succeeded in achieving their objectives, a subject that is keenly disputed among scholars and policy-makers.¹⁶ We are concerned, rather, with the question whether UN bodies and decision-makers have considered the requisite legal issues of proportionality and discrimination when using any coercive instrument and, if so, the procedures and criteria by which key UN actors have reached their judgments. As the following case studies reveal, UN practice has generally been to either ignore the legal issues raised by the effects of economic sanctions on the population of target states or to address these issues only on an ad hoc basis. It is only as a result of the persistent complaints of Iraq regarding the allegedly unjust impact of post-Gulf War sanctions on its populace and the perception among many in the international community that UN economic measures against Haiti primarily harmed the impoverished people of the country rather than the Haitian military and its supporters that the legal questions raised by sanctions have become a subject of sustained international concern.

A Southern Rhodesia, 1965–1979

The Security Council first acted under Chapter VII to define and enforce a mandatory programme of economic sanctions in 1968 in response to the crisis in Southern Rhodesia.¹⁷ The genesis of the Security Council's actions lay in the illegal unilateral declaration of Rhodesian independence (UDI) from the United Kingdom made by the

¹⁴ For example, the UN General Assembly, together with the Organization of African Unity (OAU), passed resolutions throughout the 1960s and early 1970s calling on all Member States to impose economic sanctions on Portugal for its failure to permit self-determination by the peoples of its colonial holdings in southern Africa. See M.P. Doxey, *International Sanctions in Contemporary Perspective* (1987), 34–35.

¹⁵ Chapter VII of the UN Charter empowers the Security Council to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression' (UN Charter, Art. 39). When the Security Council determines that such a situation exists, it may decide on measures short of armed force that the United Nations and its Member States must implement to restore international peace and security (Art. 41). Of course, the Security Council may also decide to resort to the use of force (Art. 42). Security Council decisions made under Chapter VII are binding on UN members (Art. 25).

¹⁶ For a sampling of the debate, see Doxey, *supra* note 14; G.C. Hufbauer *et al.*, *Economic Sanctions Reconsidered: History and Current Policy* (2nd ed., 1990); G.C. Hufbauer *et al.*, *Economic Sanctions Reconsidered: Supplemental Case Histories* (2nd ed., 1990). This last volume contains case histories of virtually all instances of unilateral and multilateral economic sanctions from the First World War to 1990 and, using a variety of criteria, assesses the effectiveness of the sanctions regimes.

¹⁷ The literature on UN dealings with Southern Rhodesia, including sanctions, is enormous. See, e.g., M.P. Doxey, *Economic Sanctions and International Enforcement* (2nd ed., 1980), at 65–79; Doxey, *supra* note 14.

white minority government of Prime Minister Ian Smith on 11 November 1965. Acting on behalf of the British Commonwealth, the United Kingdom immediately imposed a series of economic sanctions against Southern Rhodesia to pressure the Smith government into renouncing the UDI and guaranteeing political participation by the disenfranchised black African majority. By early 1966, the UK sanctions included a complete ban on imports from and exports to Southern Rhodesia as well as a series of drastic financial measures ranging from the removal of Rhodesia from the sterling area and a prohibition on capital exports to Rhodesia to the freezing of Rhodesian assets in the United Kingdom.¹⁸ Other nations, including France and the United States, also implemented selective sanctions programmes, and the OAU declared a total economic boycott. In November 1965 the Security Council also acted, passing Resolution 217, which recommended that all states 'break off all economic relations' with Southern Rhodesia.¹⁹

When the sanctions failed to achieve the quick reversal of the UDI that had been hoped for, the Security Council turned to a programme of mandatory sanctions under Chapter VII. In December 1966, the Security Council decided that Member States should implement selective mandatory sanctions against the Smith government, including a prohibition on exports to Rhodesia of petroleum, armaments, vehicles and aircraft, and a ban on imports of Rhodesian agricultural products and minerals.²⁰ These selective sanctions also failed to bring about an end to the Rhodesian 'rebellion' or to persuade the Smith regime to terminate its racist policies.

Accordingly, in May 1968 the Security Council passed Resolution 253, which imposed a ban on all exports to and imports from Rhodesia, prohibited the transfer of funds to Rhodesia for investment, denounced the purported Rhodesian passport, and severed air links with the country.²¹ A limited humanitarian exception existed for exports to Rhodesia of foodstuffs and medical, educational and informational materials.²² Because this resolution was expressly passed under Chapter VII, it was binding on all Member States. Resolution 253 also established a special Sanctions

at 35–46, 110–123; V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (1990); L.T. Kapungu, *The United Nations and Economic Sanctions against Rhodesia* (1973); D.L. Losman, *International Economic Sanctions: The Case of Cuba, Israel, and Rhodesia* (1978) 80–123; J. Nkala, *The United Nations, International Law, and the Rhodesian Independence Crisis* (1985); R. Renwick, *Economic Sanctions* (1981), at 25–58; H.R. Strack, *Sanctions: The Case of Rhodesia* (1978); Anglin, 'United Nations Economic Sanctions against South Africa and Rhodesia', in D. Leyton-Brown (ed.), *The Utility of International Economic Sanctions* (1987), 23. Unless otherwise noted, the narrative that follows is based on commonly-known events as detailed in these sources.

¹⁸ The UK economic sanctions are detailed in Doxey, *supra* note 14, at 37.

¹⁹ SC Res. 217 (1965).

²⁰ SC Res. 232 (1966).

²¹ SC Res. 253 (1968).

²² *Ibid.*, para. 3(d).

Committee of the Security Council to monitor compliance of Member States with the mandatory sanctions.²³

The compulsory UN sanctions regime endured for 11 years, expanding to prohibit, *inter alia*, transportation to or from Southern Rhodesia;²⁴ insuring exports to and imports from the territory; licensing trade names, trademarks and franchises there; and transferring Southern Rhodesian funds to or from, or using such funds in, Member States.²⁵ By the time the Security Council terminated the economic sanctions in late 1979, after the signing of the British-mediated Lancaster House agreement that provided for a constitutional transition to African-majority rule and an independent Zimbabwe,²⁶ the programme of mandatory economic sanctions was, at least on paper, quite comprehensive.

In framing this sanctions regime, UN bodies did periodically discuss the effects that sanctions might have or were having on the Rhodesian economy. Prior to the passing of Resolution 253, for example, the UN Secretary-General commissioned a report on the effects on Southern Rhodesia of an embargo on petroleum products.²⁷ In debates in the Security Council leading up to the enactment of comprehensive economic sanctions by Resolution 253, the representatives of many countries noted the ambiguous effects on the Rhodesian economy of the selective sanctions mandated by Resolution 232.²⁸ The only formal measure that the Security Council expressly took to ascertain the impact of the sanctions on Rhodesia, however, was extending the mandate of the Sanctions Committee to study ways to increase the sanctions' effectiveness. As a minor part of its activities, the Sanctions Committee did analyse the Rhodesian economy in recommending measures to expand the sanctions.²⁹ Yet despite the comprehensive nature of the sanctions, for the 13 years in which they were in force against Southern Rhodesia, there was virtually no formal consideration within the United Nations of the extent to which these sanctions were having a disproportionately injurious impact on the Rhodesian populace and economy.

²³ *Ibid.*, para. 20.

²⁴ SC Res. 277 (1970).

²⁵ SC Res. 409 (1977).

²⁶ SC Res. 460 (1979).

²⁷ Renwick, *supra* note 17, at 28, 110 note 6 (citing W.J. Levy, Inc., *The Economics and Logistics of an Embargo on Oil and Petroleum Products* (1966)). Before implementing its unilateral sanctions measures, the United Kingdom had considered the prospects of a Rhodesian economy subject to sanctions. For example, on 12 November 1965, Prime Minister Harold Wilson stated before the House of Commons that the 'whole financial and banking structure of Rhodesia revolves around tobacco farming in such a way that the decision [to impose sanctions] will have a pretty serious and speedy effect'. *Ibid.*, at 26.

²⁸ See, e.g., UN Doc. SPV1399 (1968) (statement of Ethiopian representative); UN Doc. SPV 1408 (1968) (statement of Pakistani representative); UN Doc. SPV 1428 (1968) (statement of Soviet representative). For an overview of the issues discussed in these debates, see Kapungu, *supra* note 17, at 59–69.

²⁹ For example, the Sanctions Committee rejected a proposal to cut off all communication links with Southern Rhodesia after debating the consequences of the measure for Rhodesia. See Gowlland-Debbas, *supra* note 17, at 438–439. The committee, however, was primarily concerned with investigating cases of sanctions evasion. See *ibid.*, at 605–625.

Three features of the sanctions programme account for this omission. First, the United Nations was primarily concerned with sanctions evasion by both Member States *and* non-members, which was widespread throughout the life of the sanctions. Western multinationals continued to engage furtively in commerce with Southern Rhodesia, many African regimes closed their eyes to trade links between their nationals and Rhodesia, and the US Congress disregarded the mandatory Security Council resolutions by enacting the Byrd Amendment in 1971, which permitted the import of chrome, a strategic mineral, from Southern Rhodesia. Portugal, which still ruled Southern Rhodesia's eastern neighbour, Mozambique, and South Africa, the regional power directly to Rhodesia's south, condemned and openly flouted the UN sanctions regime: for the first decade of the sanctions' operation, the governments of both nations sympathized with Smith's white minority regime and actively sought to help Southern Rhodesia mitigate the effects of the sanctions.

Thus, it was the issue of non-compliance with the sanctions regime which virtually monopolized the Security Council's consideration of Southern Rhodesia. This was the near-exclusive concern of the 13 reports filed by the special sanctions committee of the Security Council established by Resolution 253.³⁰ Moreover, rather than considering the moral issues raised by the impact of the sanctions on the target populace, the General Assembly repeatedly called on the Security Council to widen the scope of the sanctions to include all measures permissible under Charter Article 41, condemned Member States (particularly the United States) for failing to comply with Security Council resolutions imposing sanctions, and demanded that the Security Council extend the sanctions to Portugal and South Africa.³¹ This crisis in sanctions enforcement left little space for considering whether the sanctions were disproportionate.

The second reason that neither the United Nations nor its Member States considered the effects of the sanctions programme on the Rhodesian populace was the manifestly limited impact that the sanctions were having on Southern Rhodesia's economy.³² In short, at least for the first decade or so of their imposition, the sanctions were ineffective. Anticipating such a response to UDI, the Smith government had taken preparatory measures, such as encouraging the formation of long-term contracts, in order to minimize the impact of the sanctions. Furthermore, after

³⁰ The Sanctions Committee held its meetings in secret, Kapungu, *supra* note 17, at 134, so it is impossible to say that the Committee never addressed the issue of proportionality — although the absence of any evidence to that effect on the record strongly suggests that it is unlikely that the Committee did so in any depth. This pattern of secrecy in the administration of sanctions by the bodies established for that purpose by the Security Council has persisted to the present.

³¹ A representative General Assembly resolution to this effect is GA Res. 2652 (XXV) 1970.

³² The discussion that follows of the effects of the economic sanctions on the Rhodesian economy is based on G. Arnold and A. Baldwin, *Rhodesia: Token Sanctions or Total Economic Warfare?* (1972); Doxey, *supra* note 14, at 41–46; Hufbauer, *Supplemental Case Histories*, *supra* note 16, at 288–290; Losman, *supra* note 17, at 84–92, 97–121; Renwick, *supra* note 17, at 31–34, 37–38, 45–50; R.T. McKinnell, 'Sanctions and the Economy of Rhodesia', unpublished paper presented before the African Studies Association, 19 October 1968.

sanctions were imposed, Southern Rhodesia did a remarkable job at thwarting them by internalizing its economy, successfully promoting rapid import-substitution and economic diversification, and minimizing harm to the white settlers who constituted its political base. Indeed, morale remained high in the white community as it rallied around the common purpose of defying the UN. Although traditional export sectors, such as tobacco and mining, were initially hard hit, and other sectors, including petroleum imports, never fully adjusted to economic isolation, after the first year of sanctions the Rhodesian economy — much to the exasperation of the international community — resumed its rapid growth. Not until the mid-1970s did the economic distortions caused by the sanctions, factored, at this point, by the withdrawal of Portuguese and South African support, the external shock of the 1973 OPEC oil embargo, and intensifying guerrilla warfare, truly begin to bite. In such a situation of ambiguous effects, questions about a disproportionate or discriminatory impact of the sanctions on the population of the target state and its economic bases of support simply did not arise.

A third possible reason for the world community's obliviousness to the plight of the bulk of the African population caused by the sanctions may have been a self-serving stereotypical view of a 'Third World' dual economy. In this stereotype, all the Europeans in Rhodesia were exclusively engaged in the modern sector and were most likely to be affected by international sanctions, while Africans were exclusively engaged in the traditional sector, which was not incorporated into the global economy and, hence, not susceptible to injury by the sanctions. This, however, was not a realistic appraisal of the Rhodesian economy.

The Security Council and other UN bodies had ample opportunity to consider such questions. For example, evidence indicated that the sanctions disproportionately harmed Rhodesia's black population, which was particularly concentrated in the sanctions-sensitive sector of tobacco cultivation.³³ Moreover, the Security Council did authorize relief measures for Zambia, Rhodesia's neighbour to the north, to alleviate the considerable economic harm and dislocation that this nation suffered as result of the sanctions.³⁴ The predominant attitude towards the Africans' plight, however, was symbolized by the chairman of Zimbabwe's African National Council, who declared in a statement before the Security Council that sanctions should not be weakened solely because they were hurting Africans; pain was a price for freedom, and the white minority was suffering as well.³⁵ The ease with which these self-authorized affirmations and waivers of others' human rights were accepted by a United Nations

³³ Contemporary studies noted these disproportionate effects on Africans. See, e.g., M.P. Doney, *Economic Sanctions and International Enforcement* (1st ed., 1971), 76–77, 79; Losman, *supra* note 17, at 114–116; McKinnell, *supra* note 32, at 19–20.

³⁴ Zambia's economy had been heavily dependent on trade with and employment of its nationals in Southern Rhodesia. In 1973 the Security Council passed a series of resolutions that authorized aid to Zambia to ameliorate the effects of the Rhodesian sanctions. See, e.g., SC Res. 329 (1973).

³⁵ See (1972) UNYB 113, UN Sales No. E.74.L.1. The UK-sponsored Pearce Commission that was sent to Rhodesia to gauge the reaction of black Africans to the sanctions reached an identical conclusion. See Renwick, *supra* note 17, at 44.

ostensibly bent on protecting human rights manifested a troubling disregard for the welfare of 'non-combatants'. The presumed consent of African Rhodesians to the hardships engendered by the sanctions was, thus, a fourth feature that contributed to the failure of the United Nations systematically to address questions of proportionality.

In brief, the persistent problem of sanctions evasion and the extraordinary ability Rhodesia demonstrated to minimize the impact of the sanctions did not create the conditions for considering the legal implications of the disproportionate impact of an economic sanctions programme on the population of a target state. The Sanctions Committee set up by the Security Council to monitor the sanctions regime addressed itself exclusively to technical problems of enforcement and effectiveness.

B Iraq: 1991–Present

The United Nations adopted its most comprehensive programme of mandatory sanctions under Chapter VII against Iraq in response to that country's invasion of Kuwait on 1 August 1990. On 6 August, the Security Council adopted Resolution 661, which forbade all imports from and exports to Iraq, froze the assets of the Iraqi government and nationals abroad,³⁶ and suspended pre-existing commercial contracts with Iraqis and Iraqi entities.³⁷ The trade embargo did not apply to 'supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs',³⁸ or to the financial transactions necessary to effect such supplies.³⁹ Resolution 661 also established a Sanctions Committee, whose membership consisted of the members of the Security Council, to monitor implementation of the sanctions.⁴⁰ The original intent of the sanctions was to peacefully compel Iraq to withdraw from Kuwait.

The sanctions programme was quickly modified and expanded. In Resolution 666, the Security Council delegated to the Sanctions Committee the task of determining what constituted 'humanitarian circumstances' under Resolution 661.⁴¹ To minimize sanctions evasion, the Council also reiterated that humanitarian shipments of foodstuffs and medical supplies should be provided under the auspices of international humanitarian agencies, not the Iraqi government.⁴² The extent of the 'humanitarian circumstances' exemption became a point of concern in the Sanctions Committee, particularly among those states with nationals working as expatriates or guest workers in Iraq and Kuwait.⁴³

³⁶ SC Res. 661 (1990).

³⁷ *Ibid.*, para. 5.

³⁸ *Ibid.*, para. 3(c).

³⁹ *Ibid.*, para. 4.

⁴⁰ *Ibid.*, para. 6.

⁴¹ See SC Res. 666 (1990).

⁴² *Ibid.*, paras. 6, 8.

⁴³ For these debates, see the summaries of 'Sanctions Committee Meetings in the Late Summer and Fall of 1990', D.L. Bethlehem (ed.), *The Kuwait Crisis: Sanctions and Their Economic Consequences*, vol. 2 (1991) 773–985. The work of the Sanctions Committee is described by its former deputy secretary in Conlon,

To enforce the trade embargo, the Security Council authorized Member States to halt Iraq's inward and outward maritime shipping in order to inspect the cargoes of ships suspected of trading with Iraq or Kuwait.⁴⁴ The Council also banned air traffic to and from Iraq and required Member States to deny overflight rights to Iraqi aircraft.⁴⁵ When the Council judged that the sanctions regime had failed peacefully to dislodge Iraqi forces from Kuwait, it passed Resolution 678, which authorized Member States to 'use all necessary means' to ensure Iraq's withdrawal.⁴⁶

Pursuant to this authorization, Member States whose forces had been deployed in the Persian Gulf region launched air and land operations against the Iraqi armed forces in January and February of 1991, and decisively expelled Iraq's army from Kuwait. As part of the ceasefire that ended the Gulf War, the Security Council decided in Resolution 687 to maintain the programme of sanctions against Iraq.⁴⁷ Medical and health supplies were completely exempted from the trade embargo, and proposed shipments of foodstuffs were also exempted so long as they were notified to the Sanctions Committee.⁴⁸ The Council also authorized the Sanctions Committee to approve 'materials and supplies for essential civilian needs' under an accelerated no-objection procedure.⁴⁹ The trade and financial embargo would terminate when Iraq complied with the provisions of Resolution 687 requiring it to destroy its weapons of mass destruction and to permit international monitoring to ensure that it did not resume its nuclear, chemical and biological weapons programmes.⁵⁰ Because Iraq refused fully to comply with Resolution 687, particularly its provisions regarding the destruction of weapons of mass destruction, the Chapter VII sanctions regime remained in effect without significant modification from August 1990 to December 1996.

The continued maintenance of mandatory UN sanctions against Baghdad has been controversial, in part due to the harm that the sanctions have inflicted on the Iraqi people. The Security Council and the Sanctions Committee have been aware of the

'Lessons from Iraq: The Functions of the Iraq Sanctions Committee as a Source of Sanctions Implementation Authority and Practice', 35 *Va. J. Int'l L.* (1995) 633.

⁴⁴ SC Res. 665 (1990).

⁴⁵ SC Res. 670 (1990).

⁴⁶ SC Res. 678 (1990).

⁴⁷ See SC Res. 687 (1991).

⁴⁸ *Ibid.*, para. 20. This resolution represented a change in policy towards shipment of foodstuffs: the Sanctions Committee no longer had to determine that the supply of food was justified by humanitarian circumstances. See Conlon, *supra* note 43, at 640–641.

⁴⁹ See SC Res. 687 (1991), para. 22.

⁵⁰ In October 1992, the United States persuaded the Security Council to pass Resolution 778, which froze the remaining foreign assets of the Iraqi government. See SC Res. 778 (1992). Iraq had previously used these assets to purchase humanitarian goods. Rouleau, 'The View from France: America's Unyielding Policy Toward Iraq', *Foreign Affairs* (January/February 1995) 59, at 64–65.

injuries suffered by Iraqis and have sought to minimize the impact of the sanctions on innocent Iraqi civilians by creating a liberal regime of humanitarian exceptions to the sanctions programme. Indeed, in 1994 the Sanctions Committee received \$6 billion in requests for humanitarian shipments to Iraq, leading the Committee's former deputy secretary to charge that 'the magnitudes eventually came to resemble normal commercial deliveries of no particular humanitarian merit'.⁵¹ In 1991, the Security Council approved arrangements whereby Iraq could export oil to earn funds to purchase food and other humanitarian goods.⁵² However, Iraq initially refused to participate in the oil-for-food scheme, claiming that the arrangement would violate Iraqi sovereignty.⁵³

The sanctions have caused a significant deterioration in the economic and social welfare of the Iraqi populace. The Iraqi economy virtually collapsed. Prior to the embargo, oil accounted for 95 per cent of Iraq's foreign exchange earnings, and medical and other advanced services were largely operated by (since-departed) foreign expatriates.⁵⁴ The dinar deteriorated from \$.60 to the dollar in 1990 to 1,200 dinars to the dollar in April 1995.⁵⁵ By mid-1994, inflation since 1990 had reached 6,000 per cent.⁵⁶ In 1993, industry was operating at only 10 to 15 per cent of capacity, and industrial unemployment was estimated to exceed 70 per cent.⁵⁷ The sanctions-induced economic collapse hit the poor particularly hard: the prices of staples such as bread, infant formula and flour have increased by several thousand per cent,⁵⁸ and the World Food Programme estimated that the cost of the average basket of goods had increased 50 times by 1993.⁵⁹ The middle and professional classes have also seen their incomes dramatically erode and have been reduced to selling durable goods and

⁵¹ Conlon, *supra* note 43, at 647.

⁵² See SC Res. 712 (1991); SC Res. 706 (1991).

⁵³ See Iraqi Compliance with UN Sanctions: Hearing Before the Near Eastern and South Asian Affairs Subcomm. of the Senate Foreign Relations Comm., 104th Cong., 1st Session (3 August 1995) (testimony of Patrick Clawson, Senior Fellow, Institute for National Strategic Studies, National Defense University), available in LEXIS, Congress Library, Testimony File. Particularly objectionable to Iraq were the provisions requiring it to use a percentage of the revenues generated in the oil-for-food scheme to pay the expenses of UN monitoring of Iraq and to compensate victims of Iraqi aggression.

⁵⁴ Reuther, 'UN Sanctions Against Iraq', in D. Cortright and G.A. Lopez (eds.), *Economic Sanctions: Panacea or Peacebuilding in a Post-Cold War World?* (1995) 121, at 127.

⁵⁵ 'Down but Not Out', *Economist*, 8 April 1995, at 21; 'Iraqis Count the Cost of Sanctions', *Economist*, 19 February 1994, at 46.

⁵⁶ Joffe, 'Iraq — The Sanctions Continue', 6 *Jane's Intelligence Rev.* (1 July 1994) 314, available in LEXIS, News Library, Mags File.

⁵⁷ Kocher, 'The Sanctions Against Iraq', *Swiss Rev. World Aff.*, August 1993, available in LEXIS, World Library, Swswid File.

⁵⁸ See Al-Samarrai, 'Economic Sanctions against Iraq: Do They Contribute to a Just Settlement?', in Cortright and Lopez, *supra* note 54, 133, at 137.

⁵⁹ Kocher, *supra* note 57. For a comprehensive evaluation of the effects of the sanctions on the Iraqi people, see Food and Agricultural Organization of the United Nations, *Evaluation of Food and Nutrition Situation in Iraq* (1995) (visited 17 March 1997), <<http://leb.net/LAC/FAO1-10t.html>>.

family heirlooms to survive.⁶⁰ By 1993, living standards had been reduced by one-third,⁶¹ and the situation has since worsened considerably. The deterioration of the economy has led to skyrocketing levels of crime, particularly in urban areas.⁶²

Iraq's economic collapse has precipitated a crisis in health, nutrition and education. An oft-cited 1992 study published in *The New England Journal of Medicine* reported that the Gulf War, civil strife and UN economic sanctions caused a threefold increase in infant mortality in Iraq between January and August 1991.⁶³ International organizations warned in 1993 that only 50 per cent of water purification and sewage treatment plants were functioning; UNICEF, for example, found in January 1993 that only 25 of Basra's 135 waste-water pumps worked.⁶⁴ In November 1993, Food and Agriculture Organization (FAO) nutritionists reported 'pre-famine' conditions characterized by 'very high food prices, collapse of private incomes, depletion of personal assets and rapidly increasing numbers of the destitute'.⁶⁵ The food ration that had previously provided most of the daily calorie intake of most Iraqis was cut by up to half by the government in October 1994.⁶⁶ In December 1994, UNICEF issued a report estimating that 3.5 million Iraqi civilians were at a significant health risk of malnutrition and death due to the sanctions, including 1.58 million children under the age of fifteen and 230,000 pregnant or nursing women.⁶⁷ A 1995 World Health Organization report noted shortages of medicine, medical supplies, foodstuffs, and water purification and sanitation parts and equipment.⁶⁸ At one point, Iraq had less than one-tenth of the medicines needed,⁶⁹ and minor surgeries were performed without anaesthesia.⁷⁰ The UN reported in May 1995 that 23 per cent of children under the age of five suffered from malnutrition and that water treatment systems had

⁶⁰ See Al-Radi, 'Iraqi Sanctions — A Postwar Crime', 260 *Nation* (27 March 1995) 416; see also Al-Samarrai, *supra* note 58, at 173 (reporting that doctor's average income deteriorated from \$1,400 in 1990 to \$270 in 1992).

⁶¹ Clawson, 'Sanctions as Punishment, Enforcement, and Prelude to Further Action', 7 *Ethics & Int'l Aff.* (1993) 20, at 27–29.

⁶² Joffe, *supra* note 56.

⁶³ Ascherio *et al.*, 'Effect of the Gulf War on Infant and Child Mortality in Iraq', 327 *New Eng. J. Med.* (24 September 1992) 931. The study did not establish the share that sanctions had in causing the increase in infant mortality.

⁶⁴ Kocher, *supra* note 48.

⁶⁵ 'Iraqis Count the Cost', *supra* note 55, at 46.

⁶⁶ 'Down but Not Out', *supra* note 55, at 21.

⁶⁷ Figures from the UNICEF study are cited by Clark, 'Sanctions on Iraq Take Toll on Children', *NY Times*, 21 January 1995, at 22 (letter to editor); Gibbs, 'A Show of Strength: Clinton's Charge Sends Saddam into Retreat, but Taming Him Is Another Matter', *Time*, 24 October 1994, at 34; Rouleau, *supra* note 50, at 64. The National Council of Churches confirmed this finding. See 'Easing of Iraq Sanctions Urged', 112 *Christian Century* (1 March 1995) 231, at 231.

⁶⁸ Iraqi Compliance with UN Sanctions, *supra* note 53 (testimony of Rend Francke, Director, Iraq Foundation). This report confirmed similar findings of the British Red Cross in December 1994. See Clark, *supra* note 67, at 22.

⁶⁹ 'Down but Not Out', *supra* note 55, at 21.

⁷⁰ Rouleau, *supra* note 50, at 64.

fallen apart, leading to water-borne diseases such as malaria and tuberculosis.⁷¹ Alarms about the crisis in the health of the Iraqi people have also been sounded by British medical groups,⁷² a German medical study group,⁷³ and the Red Cross.⁷⁴ Furthermore, the UN estimates that one in five students has dropped out of school because of shortages in educational materials and financial hardship.⁷⁵

While many have excoriated the Security Council for maintaining economic sanctions in the face of the economic, health and educational crisis endured by innocent Iraqi civilians,⁷⁶ others have charged that Iraqi policy has aggravated the harmful impact of the sanctions on the populace and that Iraq has overstated the effects of the sanctions to garner support for their lifting.⁷⁷ In October 1991, Saddam Hussein's regime pulled all government workers and services out of Kurdish Iraq in the north, forcing the United Nations to provide humanitarian aid.⁷⁸ The Iraqi government pursued the same policies towards the Shiite provinces in the south, which had rebelled after the termination of the Gulf War.⁷⁹ Most of the nation's transportation and energy infrastructure has been rebuilt, particularly around Baghdad,⁸⁰ and a 1993 US Congressional investigation found that Iraq had rebuilt most of its conventional weapons arsenal.⁸¹ The government also initiated a massive self-sufficiency campaign in agriculture that was successful for the first few years of the sanctions;⁸² even in December 1996, when the oil-for-food deal was implemented,

⁷¹ Iraqi Compliance with UN Sanctions, *supra* note 53 (testimony of Omar Duwalk, President, Reema International).

⁷² See 'Starvation in Iraq', 338 *Lancet* (9 November 1991) 1179.

⁷³ In 1995 a German medical study group found that death rates for children under the age of five from January to November 1994 were 6.5 times higher than in 1989; death rates were 3.5 times higher during that period for all other age groups. Clark, *supra* note 67, at 22.

⁷⁴ International Federation of Red Cross and Red Crescent Societies, *World Disasters Report 1995* (1995), at 26.

⁷⁵ Rouleau, *supra* note 50, at 66.

⁷⁶ See, e.g., Al-Samarral, *supra* note 58; Clark, *supra* note 67; Davidson, 'Ten Myths about the Sanctions against Iraq', *Gulf States Newsl.*, 15 July 1994; 'Easing of Iraqi Sanctions Urged', *supra* note 67, at 231. For essays bitterly attacking UN sanctions, see R. Clark *et al.*, *War Crimes: A Report on United States War Crimes against Iraq* (1992) 99–101, 164–169.

The Iraqi Action Coalition (IAC) has established an Internet site devoted to documenting the deleterious effects of UN sanctions on the Iraqi people. The site has extensive hyperlinks to related Web sites. See <<http://leb.net/IAC/>>. The IAC describes itself as 'a broad-based, independent, grassroots coalition dedicated to providing information on the devastating consequences of the blockade on Iraq and to providing assistance to the people of Iraq ... IAC supports an unconditional lifting of the illegitimate blockade on the people of Iraq.' *Ibid.*

⁷⁷ See, e.g., Relfenberg, 'How Iraq, Defying the West, Keeps Its Economy Going', *Wall St. J.*, 3 October 1996, at A11.

⁷⁸ Waterbury, 'Strangling the Kurds: Saddam Hussein's Economic War against Northern Iraq', *Middle East Insight*, July/August 1993, at 31–38.

⁷⁹ Reuther, *supra* note 54, at 127.

⁸⁰ Dowty, 'Sanctioning Iraq: The Limits of the New World Order', 17 *Washington Q.* (Summer 1994), at 179.

⁸¹ Gibbs, *supra* note 67, at 34.

⁸² *Ibid.*; Joyner, 'Sanctions, Compliance and International Law: Reflections on the United Nations' Experience against Iraq', 32 *Va. J. Int'l L.* (1991) 1, at 39–40.

there was food on the shelves — poor Iraqis just lack the resources to buy much of it.⁸³ Poor management of the Iraqi economy over the past four years, which resulted from Saddam Hussein's decision to become personally involved in economic policy, has aggravated the deteriorating humanitarian situation provoked by the sanctions.⁸⁴ Saddam Hussein has also insulated his family, the military command, and his supporters in the ruling Ba'ath party from the impact of the sanctions.⁸⁵ The Iraqi regime's deliberate policy of using the sanctions for domestic political purposes has resulted in a situation in which, in the words of a Catholic Relief Services official, '[t]he rich and the strong survive, the poor and the weak starve'.⁸⁶

Pressure that had been building for the Security Council to modify or terminate economic sanctions against Iraq initially diminished following revelations in the autumn of 1995 that Iraq had consistently deceived international monitors about the extent of its programme to develop weapons of mass destruction.⁸⁷ Some of that pressure, at least in the Security Council, arose more from the desire of European countries to do business with Iraq than from concern over the impact of the sanctions on innocent Iraqi civilians. Nevertheless, many developing countries continued to urge the Security Council to repeal or lighten the sanctions,⁸⁸ and the humanitarian situation for the majority of Iraqis steadily worsened.⁸⁹ Accordingly, in 1995 the Security Council passed a resolution that would permit Iraq to export \$1 billion in oil every three months to generate the funds to import food and medicine.⁹⁰ In January 1996, the UN and Iraq began a series of negotiations to finalize the oil-for-food agreement, with areas of disagreement centring on, *inter alia*, monitoring Iraqi imports and the 'equitable distribution' of food and medicines to the Kurds in the north and the Shiites in the south.⁹¹ Indeed, the mere announcement of negotiations in

⁸³ See Al-Radi, *supra* note 60, at 416.

⁸⁴ See Iraqi Compliance with UN Sanctions, *supra* note 53 (testimony of Patrick Clawson).

⁸⁵ See *ibid* (testimony of Rend Francke). Then-US Ambassador to the United Nations Madeline Albright has charged that the Hussein regime has built 50 new palaces for regime supporters since the end of the Gulf War at a cost of \$1.5 billion. Iraqi Compliance with UN Sanctions, *supra* note 53 (testimony of Madeline Albright, US Ambassador to the United Nations).

⁸⁶ Al-Samarrai, *supra* note 58, at 137. The Iraqi regime even used the introduction by the United States of a new \$100 bill to swindle ordinary Iraqis out of their hard currency reserves by falsely claiming that the US government had cancelled the old \$100 notes. See 'Scare over US Bills Fills Baghdad Coffers', *Chi. Trib.*, 3 April 1996, at 7.

⁸⁷ On the massive extent of Iraqi deception in this regard, see Tenth Report of the Executive Chairman of the Spectal Commission, UN Doc. S/1995/1038 (1995); Bruce, 'Playing Hide and Seek with Saddam', *Jane's Defence Wkly.*, 3 January 1996, at 15.

⁸⁸ See 'UN, Iraq Expect to Reach Deal on Oil-for-Food Plan', *Xinhua News Agency*, 16 April 1996, available in LEXIS, News Library, Curnws File.

⁸⁹ Jehl, 'Government Dexterity Eases Misery for Iraqis', *NY Times*, 15 April 1996, at A9.

⁹⁰ See SC Res. 986 (1995).

⁹¹ See 'Oil-for-Food Plan', *supra* note 88; Crossette, 'UN and Iraq Report Progress in Talks to Allow Limited Oil Sales', *NY Times*, 14 February 1996, at A1; Goshko, 'Negotiators Near Agreement on Deal to Ease Impact of Sanctions on Iraq', *Washington Post*, 13 April 1996, at A27; Jehl, *supra* note 89, at A9.

January 1996 caused food prices in Iraq to fall from 30 to 50 per cent overnight and the Iraqi dinar to stabilize.⁹²

The oil-for-food arrangement was not finalized, however, until early December 1996, after six months of negotiations between the Iraqi government, the Security Council and the Secretary-General. The final plan permitted Iraq to sell \$2 billion worth of oil over six months to raise funds to buy food, medicines and other humanitarian goods. Funds earned from the oil sales were to be placed in an escrow account in New York administered by the United Nations. About \$260 million was to be reserved for the Kurdish population of northern Iraq, and \$600,000 placed in a special fund established to compensate victims of the Iraqi 1990 invasion. The UN Special Commission charged with monitoring Iraq's destruction of its weapons of mass destruction was to receive \$20 million to cover operating expenses, with the remainder of the money to be distributed in Iraq. The Security Council could renew the oil-for-food plan after six months if Iraq complied with conditions; finding no major violations, the Council extended the plan for a second six-month term in June 1997.⁹³ Diplomats were confident that Iraq could not easily evade the restrictions: in the words of the US Deputy Representative to the United Nations, 'We designed a resolution for a cheater. . . . We know [Saddam Hussein] well.'⁹⁴ Since its implementation, the oil-for-food scheme has been criticized for chronic administrative delays.⁹⁵

The plight of innocent Iraqi civilians raises one of the thorniest legal dilemmas of any comprehensive, effective sanctions programme: the proper response of the UN to the government of a target state that deliberately adopts policies which aggravate the sanctions' impact on the most vulnerable, who are then exploited in public relations as a way of eroding the legitimacy of the sanctions programme. As one international aid worker characterized the dilemma, 'If [Saddam Hussein's] last weapon is the sacrifice of millions of Iraqis to the horrors of starvation and disease until the Western alliance is shocked into saying, "Enough!" and relaxing sanctions, then Mr. Hussein will not hesitate to reach for this weapon.'⁹⁶

C Libya, 1992–Present

In the spring of 1992 the UN Security Council imposed mandatory sanctions against the Qadhafi regime in Libya. The primary rationale for the sanctions was Libya's failure to extradite to the United Kingdom or the United States two Libyan nationals allegedly responsible for the bombing of Pan Am Flight 103 over Lockerbie, Scotland, in 1988.

⁹² 'Iraqis Celebrate Fall in Food Prices', *Agence Fr. Press*, 25 January 1996, available in LEXIS, News Library, Curmws File; Jehl, *supra* note 89, at A9.

⁹³ Crossette, 'UN Extends Plan for Iraq to Sell Oil to Buy Food', *NY Times*, 5 June 1997, at A1.

⁹⁴ Crossette, 'Iraq Gets Approval to Sell Oil to Meet Civilian Needs', *NY Times*, 10 December 1996, at A1. The account in the text of the oil-for-food plan is drawn from this article.

⁹⁵ See, e.g., 'Iraqi Health System near Collapse, WHO Says', *Reuters*, 27 February 1997, available at <<http://leb.net/IAC/>> (visited 16 March 1997).

⁹⁶ Tyler, 'Iraq: A Clear and Continuing Danger', *NY Times*, 1 December 1991, § 4.

The Security Council had previously passed a non-binding resolution urging the Libyan government, in effect, to extradite the two individuals.⁹⁷ Libya promptly filed suit in the International Court of Justice (ICJ) against the United States and the United Kingdom, invoking its rights under the Montreal Convention⁹⁸ not to extradite the accused Libyans. After oral argument in the provisional measures phase of the case, the Security Council, acting under Chapter VII, passed Resolution 748,⁹⁹ which imposed sanctions on Libya. The ICJ refused to disturb the UN sanctions regime and denied the provisional measures requested by Libya, holding, by virtue of Charter Articles 25 and 103, that the Security Council's decision pursuant to Chapter VII trumped Libya's rights under the Montreal Convention.¹⁰⁰

Resolution 748 banned air travel to and from Libya; prohibited supplying, servicing and insuring Libyan aircraft; imposed an embargo on arms shipments and military training and assistance to Libya; and directed all states to prevent the operation of Libyan Arab Airlines offices.¹⁰¹ The Council established a Sanctions Committee to monitor implementation of the sanctions, report on violations, consider special economic problems that implementing the sanctions might cause for any state, and approve special flights to or from Libya on grounds of significant humanitarian need.¹⁰² The sanctions programme went into effect on 15 April 1992,¹⁰³ and the Council was to review the sanctions measures every 120 days (or sooner if necessary) in light of the compliance by the Libyan government with the requests that Libya extradite the two accused Libyan nationals and that it cease supporting terrorism.¹⁰⁴

Despite regular reviews of the sanctions measures, the Security Council elected not to modify the sanctions. Indeed, mounting frustration with Libya's perceived non-cooperation led the Council in November 1993 to pass a resolution significantly tightening the sanctions regime.¹⁰⁵ The new Resolution 883, also enacted under Chapter VII, directed all states to freeze the assets of the government or public authorities of Libya and of any Libyan undertaking, and to ensure that none of the frozen assets be made available to any of those Libyan entities.¹⁰⁶ The resolution

⁹⁷ See SC Res. 731 (1992).

⁹⁸ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Sabotage), opened for signature 23 September 1971, 24 UST 564, 31 *ILM* 718 (entered into force 26 January 1973).

⁹⁹ SC Res. 748 (1992).

¹⁰⁰ See *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. US)*, ICJ Reports (1992) 3, at 114 (Provisional Measures of 14 April 14). For comment, see Franck, 'The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?', 86 *AJIL* (1992) 519; Reisman, 'The Constitutional Crisis in the United Nations', 87 *AJIL* (1993) 83.

¹⁰¹ SC Res. 748 (1992), paras. 4, 5(a)–(b), 6(b).

¹⁰² *Ibid.*, para. 9(b)–(f). The principal rationale for permitting humanitarian flights was to facilitate pilgrimages to Mecca.

¹⁰³ *Ibid.*, para. 2.

¹⁰⁴ *Ibid.*, para. 13.

¹⁰⁵ See SC Res. 883 (1993).

¹⁰⁶ *Ibid.*, para. 3. A 'Libyan undertaking' was defined as 'any commercial, industrial, or public utility undertaking' owned or controlled, directly or indirectly, by (1) the Libyan government or public

forbade the sale, supply or maintenance of specified equipment used in oil refining and the petrochemicals production process.¹⁰⁷ Finally, the Council tightened the measures relating to servicing and supplying Libyan aircraft and to Libyan Arab Airlines.¹⁰⁸ But in a significant concession to Western European states, many of which are heavily dependent on Libyan oil and have major oil-related investments in Libya, the resolution did not freeze assets derived from the sale or supply of Libyan petroleum, natural gas and agricultural products after 1 December 1993.¹⁰⁹ The sanctions took effect on that date.¹¹⁰

The Security Council insisted that it had considered the possible effects of the sanctions on the Libyan people in designing and imposing the initial sanctions regime of Resolution 748 in March 1992. Representatives from Iraq and Zimbabwe, for example, called the Council's attention to the impact that sanctions would have on innocent civilians.¹¹¹ In response, the US Ambassador to the UN argued that '[t]he means chosen in this resolution are appropriate; these sanctions are measured, precise and limited. ... They are tailored to fit the offence — Libya's wanton and criminal destruction of civilian aviation — and are designed to penalize the Government of Libya, not its neighbors or any other State.'¹¹² The UK and French representatives similarly argued that the sanctions, which were targeted to aviation and diplomatic privileges, fitted the crime, with the French Ambassador stating that the sanctions were 'not aimed at the Libyan people, who are not responsible for the acts of their leaders'.¹¹³

Similar exchanges occurred when the Security Council expanded the sanctions in November 1993. The Libyan representative reported that the air embargo had had deleterious effects on the populace because of the government's inability to arrange medical evacuations.¹¹⁴ Egypt warned that intensifying the sanctions would increase the harm to the Libyan people and called on the Council to monitor the humanitarian situation.¹¹⁵ In response, US Ambassador Albright flatly asserted that the sanctions were 'balanced and precisely targeted'.¹¹⁶

authorities, (2) any entity owned or controlled by the Libyan government or public authorities, or (3) any person acting on behalf of the entities identified in (1) and (2). *Ibid*

¹⁰⁷ *Ibid.*, para. 5. The list of proscribed equipment appears in the appendix to the resolution.

¹⁰⁸ *Ibid.*, para. 6.

¹⁰⁹ *Ibid.*, para. 4.

¹¹⁰ *Ibid.*, para. 2.

¹¹¹ UN Doc. S/PV.3063 (1992) (statement of Iraqi representative); *ibid.*, at 52 (statement of Zimbabwe's representative).

¹¹² *Ibid.*, at 67 (statement of US representative).

¹¹³ *Ibid.*, at 74 (statement of French representative). For the British statement, see *ibid.*, at 69.

¹¹⁴ UN Doc. S/PV.3312 (1993) (statement of Libyan representative).

¹¹⁵ *Ibid.*, at 29–30 (statement of Egyptian representative).

¹¹⁶ *Ibid.*, at 40 (statement of US representative).

Since the tightening of the sanctions in December 1993, however, the Security Council has not investigated, or even formally considered, the possibility that the sanctions might be having a disproportionate or discriminatory impact on the Libyan populace. Indeed, there has been sentiment in the Council, particularly on the part of the United States, for widening the sanctions to prohibit the sale of Libyan oil abroad as well as foreign investment in oil-related projects in Libya.¹¹⁷ Such a move, opposed by Western European states dependent on Libyan oil, would have a devastating effect generally on the Libyan economy.¹¹⁸ The Sanctions Committee established by Resolution 748 has issued only one report on its activities; that report did not address the issue of the effects of the sanctions on the Libyan people.¹¹⁹ Of the Council's permanent members, only China has questioned the sanctions on the humanitarian grounds that they aggravate the suffering of the Libyan people, without, however, supplying confirming data.¹²⁰

In fact, the impact of the sanctions on the Libyan people has been relatively mild, at least until recently. The prolonged internal debates in the Security Council prior to the adoption of Resolution 883, which tightened the sanctions programme, permitted Libya to anticipate and minimize the impact of the sanctions by concealing its overseas assets.¹²¹ Furthermore, financial manoeuvring by Libya and half-hearted enforcement of the sanctions by some Middle Eastern and Western European governments have led to widespread sanctions evasion.¹²²

Despite the difficulties in gathering data on the Libyan economy, it appears that the sanctions have recently become more effective. The oil-refining, petrochemicals and tourism sectors have experienced sanctions-induced setbacks.¹²³ In 1994, it was reported that Libyan factories were running at about 50 per cent of capacity due to a shortage of raw materials.¹²⁴ Inflation in mid-1995 was estimated at around 300 per cent.¹²⁵ The value of dinar-denominated salaries has plummeted, while the prices of imports and unsubsidized agricultural products (such as fruits) have risen dramatically.¹²⁶ The economy experienced a 7 per cent contraction in 1993 and 1994, and

¹¹⁷ See 'The Wrong Pressure on Libya', *NY Times*, 30 March 1995, at A22 (Editorial).

¹¹⁸ 'Libya Will Face Tougher Situation from 1996, with Embargo Squeeze Getting Painful', *APS Diplomatic News Service*, 5 June 1996, in LEXIS, Mdeaf Library, Zme1 File.

¹¹⁹ See Report of the Security Council Committee Established Pursuant to Resolution 748 (1992) concerning the Libyan Arab Jamahiriyah, UN Doc. S/1996/2 (1996).

¹²⁰ UN Doc. S/PV.3312 (1993) (statement of Chinese representative). China abstained from the votes on Resolutions 748 and 883.

¹²¹ Lewis, 'UN Tightens Sanctions against Libya', *NY Times*, 12 November 1993, at A10.

¹²² See Fount and El-Tahri, 'Sanctions: The Pluses and Minuses', *US News & World Rpt.*, 31 October 1994, at 58.

¹²³ On oil and petrochemicals, see 'Libya's Domestic Oil Refining and Petrochemical Sectors', *APS Rev. Downstream Trends*, 12 June 1995, available in LEXIS, Mdeaf Library, Zme1 File. On tourism, see Hedges, 'Sanctions Keep West Off the Road to Libya', *NY Times*, 28 June 1992, § 1, at 8.

¹²⁴ Barrouhi, 'Libya: With Gaddafi at Bank Helm, Libyan Economy Slips', *Reuters*, 23 September 1994, available in LEXIS, World Library, Trtnde File.

¹²⁵ 'Libya Will Face Tougher Situation', *supra* note 118.

¹²⁶ 'Sanctions Bite', *APS Diplomat Recorder*, 10 February 1996, available in LEXIS, Mdeaf Library, Zme1 File.

unemployment, which has been growing, hovers at about 30 per cent.¹²⁷ High and rising unemployment led Libya to seek permission from the Security Council to expel over a million African and Palestinian immigrant workers in the autumn of 1995.¹²⁸ Col. Qadhafi has also put down at least one coup attempt since the sanctions were imposed.¹²⁹

Libya has aggressively sought to portray the sanctions as having a devastating impact on its people, particularly in the area of health.¹³⁰ In August 1994, the Qadhafi government submitted a report to the Security Council that detailed the allegedly 'extremely harmful' effects of the sanctions on the Libyan health care system and on the agricultural, stock-raising, transportation, communications, industrial, financial and commercial sectors of the economy.¹³¹

The Libyan initiative was not without effect. Support for UN sanctions against Libya among developing and Arab states, which had initially implemented the measures, has weakened. In 1994, the League of Arab States¹³² and the Non-Aligned Movement¹³³ expressed 'concern' over the negative impact that the sanctions were having on the Libyan populace. The OAU, '[g]reatly concerned about the human and material damage that the Libyan Arab people and those of the neighbouring States are suffering as a result of the unjust sanctions imposed on Libya,' has called on the Security Council to lift the sanctions.¹³⁴

Some outside observers, however, regard the primary impact of the sanctions as 'psychological'¹³⁵ — 'It is generally recognized that irritating though the current sanctions might be, they come nowhere near exerting sufficient economic pressure on the Libyan regime to make it think seriously about complying with the UN demands.'¹³⁶

¹²⁷ See 'Libya Politics', *International Country Risk Guide: Middle East & North Africa*, 1 October 1995, available in LEXIS, Mdeaf Library, Zme1 File.

¹²⁸ See Elthaway, 'Egypt: Bad Economy behind Libyan Expulsions-Diplomats', *Reuters*, 19 October 1995, available in LEXIS, World Library, Txtmde File.

¹²⁹ Hedges, 'Qaddafi Reported to Quash Army Revolt', *NY Times*, 23 October 1994, at 5.

¹³⁰ See 'Libya Politics', *supra* note 127.

¹³¹ Consequences of the implementation of Resolutions 748 (1992) and 883 (1993) during the period from 15 April 1992 to 15 April 1994, UN Doc. S/1994/921 (1994).

¹³² See e.g., Resolution Adopted by the Council of the League of Arab States on 27 March 1994: Coercive Measures and Threats by the United States of America, the United Kingdom of Great Britain and Northern Ireland, and France against the Socialist People's Libyan Arab Jamahiriya, UN Doc. S/1994/373 (1994).

¹³³ Paragraph 117 of the Final Document of the Eleventh Conference of the Foreign Ministers of the Non-Aligned Countries, held at Cairo from 29 May to 4 June 1994, UN Doc. S/1994/681 (1994).

¹³⁴ Resolution on the crisis between the Great Libyan Arab Jamahiriya and the United States of America, the United Kingdom and France, UN Doc. S/1995/596 (1995). The OAU's request that the Council reconsider and terminate the sanctions appears in paras. 7 and 8 of the resolution.

¹³⁵ 'Libya-Internal Strategic Perspective', *APS Diplomat Strategic Balance in the Middle East*, 5 February 1996, available in LEXIS, Mdeaf Library, Zme1 File.

¹³⁶ 'Libya Politics', *supra* note 127.

D *Yugoslavia (Serbia and Montenegro), 1992–1995*

The Security Council imposed mandatory sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY) in 1992 as part of an international effort to contain and end the violent strife associated with the disintegration of the former Socialist Federal Republic of Yugoslavia. War in the Balkans broke out in the summer of 1991 between the Serb-dominated federal government and army and the republics of Slovenia and Croatia after the latter declared their independence from the federal state. In an effort to contain the conflict, the Security Council on 25 September 1991, imposed a Chapter VII arms embargo on the former Yugoslavia,¹³⁷ and in December of 1991 the Council created a special committee of the Council to monitor its implementation.¹³⁸

The arms embargo failed to bring an end to the Balkan conflict. Moreover, many in the international community concluded that primary responsibility for prolonging the war rested with the FRY, led by Serbia, and the Bosnian Serbs. Accordingly, on 30 May 1992, the Security Council, acting under Chapter VII, passed Resolution 757, which imposed an expansive, mandatory trade embargo against the FRY.¹³⁹ Resolution 757 prohibited exports to and imports from the FRY; banned foreign financial assistance to enterprises in the FRY; cut off the FRY's air links to the rest of the world; and severed scientific, technical and cultural cooperation and sporting exchanges with the FRY.¹⁴⁰ Foodstuffs and medical supplies were exempted from the trade embargo.¹⁴¹ The Security Council also expanded the mandate of the special committee, established by Resolution 713, to monitor the arms embargo, to overseeing the implementation of the economic sanctions.¹⁴² Two weeks later, another Security Council resolution permitted the sanctions committee to approve, via its accelerated, no-objection procedure, requests to export to the FRY any non-food, non-medical 'commodities and products for essential humanitarian needs'.¹⁴³

Over the next three-and-a-half years, the UN modulated the economic sanctions programme against the FRY in repeated attempts to compel the government of Serbian President Slobodan Milosevic to bring about an end to the war in neighbouring Bosnia and Herzegovina. When the economic sanctions and arms embargo proved porous, the Security Council sought to prevent shipments of strategic goods, such as fuel and industrial inputs, through the FRY.¹⁴⁴ At the same time, NATO and Western European Union forces began to monitor the FRY's borders and ply the

¹³⁷ SC Res. 713 (1991). The arms embargo against all states of the former Yugoslavia remained in effect even after economic sanctions were imposed against the FRY alone. See, e.g., SC Res. 762 (1992).

¹³⁸ SC Res. 724 (1991).

¹³⁹ SC Res. 757 (1992).

¹⁴⁰ *Ibid.*, paras. 4–5, 7, 8(b)–(c). The most important item of trade that the sanctions affected was oil. The sanctions regime did not apply to overland transportation to the FRY.

¹⁴¹ *Ibid.*, para. 4(c).

¹⁴² See *ibid.*, para. 13.

¹⁴³ See SC Res. 760 (1992).

¹⁴⁴ See SC Res. 787 (1992).

Adriatic Sea to minimize sanctions evasion.¹⁴⁵ In April 1993, the Security Council tightened the sanctions by freezing the FRY's financial assets and overseas property and by extending the economic sanctions regime against the FRY to areas of Bosnia and Herzegovina controlled by the Bosnian Serbs.¹⁴⁶ Sanctions against Bosnian Serb territory were eventually widened to include a ban on all 'commercial, financial, and industrial activities and transactions' with Bosnian Serb persons and entities and a freeze of Bosnian Serb assets held abroad.¹⁴⁷

In deciding whether to remove sanctions against the FRY, the UN pursued a carrot-and-stick approach that focused on influencing the behaviour of President Milosevic, with scant concern for the possible disproportionate or discriminatory impact that the sanctions might have had on the FRY populace. In September 1994, the Council partially suspended the sanctions programme pending certification that the FRY had closed its border with Serb-controlled Bosnia and Herzegovina and had ceased to provide military and financial support to the Bosnian Serbs.¹⁴⁸ International passenger air traffic with Serbia and Montenegro, passenger ferry service to Bari, Italy, and FRY participation in international sporting and cultural exchanges were permitted¹⁴⁹ — measures which benefited primarily the people of the FRY, not their rulers. Similar partial suspensions of the sanctions programme occurred in 1995 to reward the Milosevic regime for continuing to deny support to the Bosnian Serbs.¹⁵⁰ Only when FRY President Milosevic agreed to the Dayton Peace Accords on 21 November 1995, did the Security Council completely lift the economic sanctions against the FRY and provide for the gradual lifting of the arms embargo against all republics of the former Yugoslavia.¹⁵¹ Moreover, continued relief from the sanctions depends on Serbia and Montenegro's fulfilment of the Dayton Agreement; sanctions can be reimposed without a Security Council vote if there is evidence that the FRY is violating the peace accords.¹⁵²

The empirical evidence indicates that UN sanctions contributed to a significant decline in the Serbian economy, but socialist mismanagement of the economy and the dislocations produced by the war were also important factors in the FRY's economic

¹⁴⁵ Woodward, 'The Use of Sanctions in Former Yugoslavia: Misunderstanding Political Realities', in Cortright and Lopez, *supra* note 54, at 141, 143.

¹⁴⁶ SC Res. 820 (1993). The resolution permitted exports to and imports from territory controlled by the Bosnian Serbs only when authorized by the governments of Croatia and of Bosnia and Herzegovina. *Ibid.*, para. 12.

¹⁴⁷ SC Res. 942 (1994).

¹⁴⁸ SC Res. 943 (1994).

¹⁴⁹ *Ibid.*, para. 1.

¹⁵⁰ See, e.g., SC Res. 970 (1995); SC Res. 988 (1995); SC Res. 1003 (1995); SC Res. 1015 (1995); SC Res. 1021 (1995); SC Res. 1021 (1995); SC Res. 1022 (1995). Sanctions were terminated in October 1996. SC Res. 1074 (1996).

¹⁵¹ See Goshko and Harris, 'UN Votes to Withdraw Sanctions on the Balkans', *Wash. Post*, 23 November 1995, at A1.

¹⁵² *Ibid.* The resolution provided that the sanctions imposed by Resolution 942 could be lifted against the Bosnian Serbs only when they signed the Dayton Agreement and removed their forces into designated areas. See *ibid.*

collapse.¹⁵³ When UN sanctions were first imposed, it appeared that the FRY might be able to withstand them. The Belgrade government had stockpiled goods and fuel;¹⁵⁴ the Serbian economy had a relatively low dependence on foreign trade;¹⁵⁵ domestic oil production was constant and geared towards industry, rather than (dramatically reduced) consumer demand;¹⁵⁶ and analysts believed that the FRY could be agriculturally self-sufficient for some time.¹⁵⁷

In fact, however, the Serbian economy quickly began to deteriorate.¹⁵⁸ By early 1994, industrial production was estimated to be at about 20 to 30 per cent of its pre-war capacity.¹⁵⁹ Shortages of petroleum for industrial use and of heating oil for homes threatened the country's economy and health.¹⁶⁰ Food self-sufficiency was jeopardized when farmers began to hoard their harvests instead of selling them to the government for nearly worthless Yugoslav dinars.¹⁶¹ Analysts estimate that the Serbian economy shrank anywhere from 35 to 65 per cent between 1989 and 1995.¹⁶²

¹⁵³ Woodward characterizes the situation as follows: 'Under these conditions of political and economic collapse, it is extremely difficult to evaluate the separate effectiveness of sanctions [from the effects of the transition to a market economy during the 1980s]. It is, for example, impossible to determine what percentage of the decline in production has been due to the sanctions, to the collapse of the state and its economy, to the end of the communist system, or to the collapse of trade with the Eastern bloc and the Middle East.' Woodward, *supra* note 145, at 146. Similar conclusions are reached in *World Disasters Report 1995*, *supra* note 74, at 22–23; Mojses, 'Sanctions Observed: To Belgrade and Back', 110 *Christian Century* (27 October 1993) 1051 'Serbia's Difficult Return to Europe', *Swiss Rev. World Aff.*, 1 February 1996, available in LEXIS, World Library, Swswld File.

¹⁵⁴ Church, 'A Chronic Case of Impotence', *Time*, 8 June 1992, at 39.

¹⁵⁵ Hoeltschl, 'Belgrade under the Blockade', *Swiss Rev. World Aff.*, August 1993, available in LEXIS, World Library, Swswld File.

¹⁵⁶ *Ibid.*; 'The Sanctions Alternative', *Economist*, 12 February 1994, at 44. The government also attempted to substitute away from oil to other sources of energy. Hoeltschl, *supra* note 155.

¹⁵⁷ Hoeltschl, *supra* note 155.

¹⁵⁸ For an account of the effects of the economic sanctions on the FRY's economy written by Serbian government officials, see Filipovic *et al.*, 'Production and Services in 1994', *Yugo. Surv.* (1995) no. 1, at 59. Recent issues of this journal contain a number of articles from the perspective of the FRY government that directly and indirectly discuss the impact of sanctions on Serbia and Montenegro.

¹⁵⁹ 'The Sanctions Alternative', *supra* note 156, at 44.

¹⁶⁰ 'Serbs Step Up Anti-sanctions Campaign', *UPI*, 12 September 1993, available in LEXIS, News Library, Arcnws File.

¹⁶¹ Branson, 'Paying the price', *MacLean's*, 1 November 1993, at 39.

¹⁶² For estimates, see Pomfret, 'Balkans Must Confront a History of Hatred', *Washington Post*, 17 December 1995, at A1 (claiming that Serbian economy shrank 65 per cent from 1990 to December 1995); 'The Sanctions Alternative', *supra* note 156, at 44 (stating that GNP fell 50 per cent from 1989 to February 1994); 'All Things Considered: Bosnia Peace Talks Continue in Dayton', Ohio (NPR radio broadcast, 3 November 1995) (transcript No. 2020–13) (reporting EC official's estimate that economy had shrank 35–45 per cent by November 1995), available in LEXIS, News Library, Curnws File. A FRY minister reported that GNP per capita fell from \$2,230 before the sanctions to \$1,194 after sanctions were terminated. 'Anti-Yugoslav Sanctions Devastate Economy', *Xinhua News Agency*, 4 April 1996, available in LEXIS, News Library, Curnws File.

With the economic collapse came massive unemployment, which reached levels of 60 to 70 per cent.¹⁶³ Aggravating the effects of such high levels of unemployment on family income was a hyperinflation that rivalled that of Germany after World War I; the Belgrade government had taken to printing money to subsidize the economy and household consumption,¹⁶⁴ and annual inflation in January 1994 reached the incredible level of 313 million per cent before being halted.¹⁶⁵ At the same time, real wages were declining: a Red Cross study found that real household income had fallen to one-tenth of its 1990 level by 1994.¹⁶⁶ The same study showed that 2.2 million of the FRY's 10.5 million people lived in poverty, and half a million of those individuals lived in extreme poverty.¹⁶⁷ Competing for scarce domestic and international resources were 850,000 refugees from other parts of the former Yugoslavia.¹⁶⁸ Such dire circumstances provoked the emigration of professionals and the middle class — those most likely to oppose the Milosevic policies that had led to UN sanctions.¹⁶⁹

The sanctions also took a toll on the health of the populace. The government in Belgrade and international health officials claimed that the FRY had exhausted its foreign currency reserves and was thus unable to buy medical supplies, medical equipment and pharmaceuticals, which had been exempted from the trade embargo.¹⁷⁰ Raw materials for manufacturing drugs domestically, however, were not exempted.¹⁷¹ FRY doctors who headed three Belgrade hospitals warned that UN sanctions had caused a sharp rise in suicides and heart attacks in Serbia and Montenegro.¹⁷² Mental health services also deteriorated; international observers

¹⁶³ Branson, *supra* note 161, at 39 (70 per cent by November 1993); Post, 'A Price No One Can Justify', *Newsweek*, 6 December 1993, at 30, (66 per cent in December 1993); 'The Sanctions Alternative', *supra* note 156, at 44 (60 per cent in February 1994).

¹⁶⁴ Hoeltschl, *supra* note 155.

¹⁶⁵ MacKay, Comment, 'Economic Sanctions: Are They Actually Enforcing International Law in Serbia-Montenegro?', 3 *Tul. J. Int'l & Comp. L.* (1995) 203, at 225. Inflation in December 1993 alone was 25,000 per cent. Post, *supra* note 163. The annualised rate of inflation for January to September of 1993 was 1.7 billion per cent. Branson *supra* note 161. The government managed to halt the hyperinflation in January 1994 by pegging the dinar to the Deutschmark. *World Disasters Report 1995*, *supra* note 74, at 23.

¹⁶⁶ *World Disasters Report 1995*, *supra* note 74, at 23. UNICEF reported similar data. See 'All Things Considered', *supra* note 162. One international visitor noted that 'some retirement pensions are barely sufficient to buy two rolls of toilet paper'. Mojzes, *supra* note 153.

¹⁶⁷ *World Disasters Report 1995*, *supra* note 74, at 23. A FRY minister put the poverty figure at 3.5 million people. 'Anti-Yugoslav Sanctions Devastate Economy', *supra* note 162.

¹⁶⁸ See 'All Things Considered', *supra* note 162 (statement of FRY Ambassador to UN).

¹⁶⁹ Woodward, *supra* note 145, at 148.

¹⁷⁰ For the observations of international health officials, see Black, 'Collapsing Health Care in Serbia and Montenegro', 307 *Brit. Med. J.* (20 October 1993) 1135. For the claims of the FRY, see *Effects of the Security Council Sanctions on the Health Situation of the Population of the Federal Republic of Yugoslavia*, UN Doc. S/1994/506 (1994); 'The Impact of International Community's Sanctions on the Health of the Population of FR Yugoslavia', *Yugo. Surv.* (1994) no. 1, at 97; 'Serbs Step Up Anti-sanctions Campaign', *supra* note 160.

¹⁷¹ Black, *supra* note 170.

¹⁷² 'Yugoslav Doctors Say UN Sanctions "Genocide"', *Reuters*, 18 February 1994, available in LEXIS, News Library, Arcnews File.

reported a tripling of mortality in mental institutions in less than one year, and mental health budgets were cut drastically.¹⁷³

Accordingly, preventive health care suffered; the government claimed that it declined by 50 per cent between mid-1992 and late 1993.¹⁷⁴ A report issued by the Milošević government also claimed that because the sanctions regime prohibited the import of chemicals used to purify water, the incidence of preventable contagious diseases rose substantially: in the first six months of 1993, 108 people died of contagious diseases, a figure that was 5.4 times higher than the same period in 1992.¹⁷⁵ The Red Cross found that a decrease in vaccinations also contributed to the increase in disease.¹⁷⁶ FRY officials noted, both during and after the sanctions programme, that malnutrition and infant mortality had increased significantly,¹⁷⁷ assertions confirmed by the Red Cross.¹⁷⁸ This situation was aggravated by growing food shortages, which led the FRY to begin rationing food in September 1994 for the first time since 1948.¹⁷⁹

However, throughout the life of the sanctions, despite the economic downturn and declining health situation, stores in the FRY were filled with goods, restaurants remained open, and gas was freely available on the black market.¹⁸⁰ Indeed, it was estimated that 40 per cent of all economic activity occurred in the black market,¹⁸¹ a phenomenon that the Belgrade government encouraged in order to meet the large needs left unfulfilled by its relatively unsuccessful re-assumption of socialist-like control of the economy.¹⁸² On the other hand, profits from black marketeering went primarily to the criminal gangs that controlled it.¹⁸³

Four factors must be taken into account in evaluating the legality of UN sanctions against the FRY. First, it is difficult to measure how much of Serbia and Montenegro's post-1991 economic crisis is attributable to the sanctions and how much to other factors, such as economic mismanagement. Second, it is not clear that the Yugoslav people suffered disproportionately from the sanctions: while some claim that the average family struggled just to meet its basic needs,¹⁸⁴ others argue that the

¹⁷³ Black, *supra* note 170.

¹⁷⁴ 'Serbs Step Up Anti-sanctions Campaign', *supra* note 160.

¹⁷⁵ Effects of Sanctions on the Yugoslav Economy and the Humanitarian Situation, Agenda Item: Strengthening of the Coordination of the Humanitarian Emergency Assistance of the United Nations (1993), cited in Licht, 'The Use of Sanctions in Former Yugoslavia: Can They Assist in Conflict Resolution?', in Cortright and Lopez, *supra* note 54, at 160. See also 'Effects of the Security Council Sanctions', *supra* note 170, at 3 (providing additional statistics on incidence of contagious disease).

¹⁷⁶ *World Disasters Report 1995*, *supra* note 74, at 23–24.

¹⁷⁷ 'Effects of the Security Council Sanctions', *supra* note 170, at 3–4; 'Anti-Yugoslav Sanctions Devastate Economy', *supra* note 162; 'Serbs Step Up Anti-sanctions Campaign', *supra* note 160.

¹⁷⁸ *World Disasters Report 1995*, *supra* note 74, at 23, 24.

¹⁷⁹ MacKay, *supra* note 165, at 225.

¹⁸⁰ Hoeltzschl, *supra* note 155.

¹⁸¹ 'The Sanctions Alternative', *supra* note 156, at 44.

¹⁸² See Woodward, *supra* note 145, at 149.

¹⁸³ See Hoeltzschl, *supra* note 155.

¹⁸⁴ See, e.g., *ibid.*

sanctions did not unduly burden the populace and that they brought about long-needed changes in the FRY's previously state-dominated and inefficient economy.¹⁸⁵ Third, at least some evidence supports the conclusion that the Serbian and Montenegrin people were not innocent victims of UN sanctions; in December 1992, voters in the FRY chose Slobodan Milosevic, and his vision of a Greater Serbia, over Milan Panic, who had 'promised a change of policies that could have led to a lifting of the sanctions'.¹⁸⁶ The question that must be faced in such a situation of apparent consent by citizens in the target state to the governmental policies that brought on international economic sanctions is what role such consent should play in assessing the legality of the impact of sanctions on innocent parties, such as children. Finally, the sanctions did appear to have influenced policy-makers in the FRY: Western diplomats attribute Milosevic's willingness to cease supporting the Bosnian Serbs and to negotiate the Dayton Peace Agreement in part to the effects that sanctions had on his country.¹⁸⁷

E Haiti, 1993–1994

The UN Security Council imposed economic sanctions under Chapter VII most recently against Haiti. On 30 September 1991, the Haitian military, under the command of General Raoul Cedras and supported by the country's small and wealthy elite, overthrew the left-wing populist government of President Jean-Bertrand Aristide. The Haitian electorate had voted for Aristide by a large majority in December 1990 in an election that international monitors, including the UN and the OAS, had judged to be free and fair. Following the coup, President Aristide went into exile in the United States.

While both the UN General Assembly¹⁸⁸ and the OAS condemned the coup, the locus of the first phase of sanctions against Haiti was the OAS. Within ten days of the coup, the Ministers of Foreign Affairs of OAS Member States had passed two resolutions recommending diplomatic, economic and financial sanctions against the Haitian government, requesting the suspension of non-humanitarian aid, and urging OAS Member States to freeze the assets of the Haitian government and to impose a trade embargo on all but humanitarian goods.¹⁸⁹ By mid-1992, the OAS was calling upon Member States to reinforce the embargo, to freeze the private assets of the Haitian military and those who supported the coup, and to deny port access to ships

¹⁸⁵ See Bonner, 'Balkan Accord: In Belgrade, The Serbs Hope Rise as the Sanctions Fall', *NY Times*, 28 November 1995, at A15.

¹⁸⁶ Damrosch, *supra* note 1, at 305.

¹⁸⁷ Goshko, *supra* note 91 Kempster and Meisler, 'UN Suspends Serbia Sanctions', *LA Times*, 23 November 1995, at A1; Tran *et al.*, 'UN Suspends Sanctions', *Guardian*, 23 November 1995, at 13.

¹⁸⁸ See GA Res. 46/7 (1991).

¹⁸⁹ See OAS Res. 1/91, OEA/Ser.F/V.1, MRE/RES.1/91 (2 October 1991); OAS Res. 2/91, OEA/Ser.F/V.1, MRE/RES.2/91 (8 October 1991).

trading with Haiti.¹⁹⁰ Consistent with the OAS resolutions, the Bush Administration froze Haitian government assets in the United States and imposed an embargo on imports from and exports to Haiti.¹⁹¹

Implementation of the OAS sanctions programme by OAS Member States was haphazard. Sanctions evasion was particularly egregious along Haiti's porous eastern border with the Dominican Republic. The Haitian military and its supporters further minimized the impact of the sanctions by continuing to trade with countries from other regions, such as Western Europe, that were not subject to the OAS regime. In sum, the sanctions failed to dislodge the Haitian military, which had begun a savage campaign of repression to eliminate domestic supporters of President Aristide.

When the ineffectiveness of the OAS sanctions became manifest, the focus of activities shifted to the UN Security Council. In June 1993, acting under Chapter VII of the Charter, it passed Resolution 841, which imposed an embargo on the sale and supply of oil and arms to Haiti, froze the funds of the Haitian government and its officials, and established a Sanctions Committee to monitor compliance with the sanctions regime as well as to approve requests, on a no-objection basis, to ship petroleum to Haiti 'for essential humanitarian needs'.¹⁹² The sanctions were suspended when UN and US negotiators brokered an agreement between General Cedras and Haiti's government-in-exile at Governors Island, New York in July 1994 for the gradual return of President Aristide to power by 30 October 1993.¹⁹³ The Security Council reimposed the sanctions when the Haitian military violated the Governors Island Agreement by refusing to allow US military personnel to land in Haiti in mid-October as part of a UN mission.¹⁹⁴

In view of the failure of renewed efforts to mediate an end to military rule, the ongoing human rights violations and the deteriorating economic situation in Haiti, the Security Council in May 1994 passed Resolution 917.¹⁹⁵ This resolution required UN Member States to deny landing and overfly permission to all but regularly scheduled commercial passenger flights flying to or from Haiti;¹⁹⁶ to deny entry into their territories of members of the Haitian military, its agents, and Haitian government officials;¹⁹⁷ to ban imports to or exports from Haiti;¹⁹⁸ and to observe a trade embargo with Haiti.¹⁹⁹ The resolution also strongly urged, but did not require,

¹⁹⁰ See OAS Res. 3/92, OEA/Ser.F/V.1, MRE/RES.3.92 (17 May 1992). For a summary of early OAS actions taken against the military regime in Haiti, see *The Situation of Democracy and Human Rights in Haiti: Report of the Secretary-General*, UN Doc. A/47/599 and Corr.1 (1992).

¹⁹¹ An overview of the programme of economic sanctions implemented against Haiti by the United States appears in Matthews, 'Economic Sanctions and Economic Strategies: Toward Haiti's Integration into the World Economy', 6 *St. Thomas L. Rev.* (1994) 281, at 286–289.

¹⁹² SC Res. 841 (1993).

¹⁹³ See SC Res. 861 (1993).

¹⁹⁴ See SC Res. 873 (1993).

¹⁹⁵ SC Res. 917 (1994).

¹⁹⁶ *Ibid.*, para. 2.

¹⁹⁷ *Ibid.*, para. 3.

¹⁹⁸ *Ibid.*, paras. 6–7.

¹⁹⁹ *Ibid.*, para. 9.

Member States to freeze the funds of members of the Haitian military, its agents, and Haitian government officials.²⁰⁰ The Sanctions Committee that had been established by Resolution 841 was authorized to use the no-objection procedure to grant individual exemptions to the ban on the export to Haiti of food and fuel for humanitarian purposes.²⁰¹

With international frustration mounting at the failure of the sanctions to dislodge the Haitian military or to persuade it to agree to a negotiated solution, the Security Council approved Resolution 940, under Chapter VII, in July 1994.²⁰² This resolution authorized Member States 'to form a multinational force . . . to use all necessary means to facilitate the departure from Haiti of the military leadership'.²⁰³ Economic sanctions were to be lifted only upon the return of President Aristide to power.²⁰⁴ Acting under the authority of this resolution, President Clinton gave the Haitian military an ultimatum: surrender power by 19 September 1994, or face invasion by a multinational force under the leadership of the United States. Following a frenzied weekend of negotiations between General Cedras and President Clinton's special emissaries, former President Jimmy Carter, former Chairman of the Joint Chiefs of Staff Colin Powell, and Senator Sam Nunn, the Haitian military agreed to relinquish power and permit President Aristide to return and resume power. On 19 September 1994, a multinational force led by the United States was deployed in Haiti pursuant to the Cedras-Carter agreement. President Aristide returned to a tumultuous welcome in Haiti on 15 October 1994, and economic sanctions against the country were lifted the next day pursuant to Security Council resolutions.²⁰⁵

Because of their devastating effects on the Haitian economy and their impact on the health and social well-being of the mass of impoverished Haitians, the OAS and UN sanctions programmes against Haiti were particularly controversial.²⁰⁶ Within four months of the imposition of OAS sanctions, Representative Robert Torricelli of New Jersey was urging President Bush to terminate the embargo and intervene militarily to oust the Haitian military regime because the economic situation in Haiti had reached the point where military intervention was 'the most humane solution'.²⁰⁷ In October

²⁰⁰ *Ibid.*, para. 4.

²⁰¹ *Ibid.*, para. 7.

²⁰² SC Res. 940 (1994).

²⁰³ *Ibid.*, para. 4.

²⁰⁴ *Ibid.*, para. 17.

²⁰⁵ See SC Res. 948 (1994); SC Res. 944 (1994).

²⁰⁶ For a sample of both the effects of OAS and UN sanctions on the Haitian economy and people and the debate over the advisability of the sanctions, see Constable, 'Dateline Haiti: Caribbean Stalemate', *Foreign Policy*, 22 December 1992, at 175; Matthews, *supra* note 191, at 285-294; Booth, 'Still Punishing the Victims', *Time*, 11 April 1994, at 55; Cleaver, 'Notes from the Hell That Is Haiti: On the Verge of Collapse', *New Leader*, 17 January 1994, at 5; Farah, 'Fuel Aid Sharpens Debate over Haiti', *Washington Post*, 15 January 1994, at A13; 'Voodoo Politics', *Economist*, 21 May 1994, at 47; Werleigh, 'The Use of Sanctions in Haiti: Assessing the Economic Realities', in Cortright and Lopez, *supra* note 54, at 161.

²⁰⁷ Letter from Rep. Robert Torricelli to President George Bush (30 January 1992), quoted in 'United States to Fine-Tune Embargo against Haiti, State Department Says', *Int'l Trade Rep.* (BNA) (12 February 1992) 264.

1992, one year after the coup, an inter-agency committee under the direction of the UN Secretariat's Department of Humanitarian Affairs issued a report detailing the desperate economic and humanitarian situation in Haiti. As a result of the OAS sanctions, tens of thousands of jobs in the industrial and service sectors had been lost and unemployment had risen. Farm income and production had dropped off and deforestation had accelerated due to the embargo on petroleum imports.

The resulting decline in family purchasing power had led to increased levels of malnutrition, particularly among children. Other indicators of social welfare, such as the delivery of health services and education, had also reached a state of crisis.²⁰⁸ An influential study by the Harvard Center for Population and Development Studies found that the embargo and cessation of foreign aid may have caused up to 1,000 extra child deaths per month.²⁰⁹

The impoverished majority of Haitians continued to suffer the brunt of OAS and UN sanctions.²¹⁰ Particularly galling to many in the international community was the ease with which Haiti's economic elite and military avoided their impact; indeed, many military officers amassed huge fortunes by controlling the black market in food and fuel spawned by the sanctions.²¹¹

The international community, and in particular the United Nations, was slow to consider formally the disproportionate and discriminatory impact of the sanctions on Haiti's poor and negligent in tailoring sanctions so as to maximize their impact on the Haitian military and its supporters. In addition to reports from humanitarian agencies in Haiti and accounts in the popular press, UN decision-makers were apprised through official channels of the disproportionate effects of the sanctions on Haiti's poor. In November 1992, the Secretary-General bluntly informed the General Assembly that Haiti's economy was 'in a state of free fall' and detailed the effects of the OAS sanctions regime on different sectors of the Haitian economy and on the social welfare of the impoverished masses.²¹² The Secretary-General repeated these characterizations to the Security Council after it imposed mandatory UN sanctions in 1993, noting, for example, that Haiti was 'economically paralysed'²¹³ and that

[t]he Haitian economy is on the verge of collapse. Since last month, the national currency has lost 40 per cent of its value. There is galloping inflation, and shortages are becoming more

²⁰⁸ The findings of this report are summarized in 'November 1992 Secretary-General's Report', *supra* note 190, at 14–15.

²⁰⁹ Harvard Center for Population and Development Studies, *Sanctions in Haiti: Crisis in Humanitarian Action* (1993). The methodology of this study has been criticized. See *World Disasters Report 1995*, *supra* note 74, at 24.

²¹⁰ As late as August 1994 the Secretary-General was warning the Security Council of continued economic deterioration in Haiti. See Report of the Secretary-General on the Question Concerning Haiti, UN Doc. S/1994/1012 (1994).

²¹¹ On the minimal impact of the sanctions on the Haitian economic elite and the military's profiteering from sanctions evasion, see Cleaver, *supra* note 206; Farah, *supra* note 206; French, 'Explosion of Black-Market Fuel Exposes Leaks in Haiti Embargo', *NY Times*, 14 February 1994, at A1.

²¹² 'November 1992 Secretary-General's Report', *supra* note 190, at 14–15.

²¹³ 'August 1994 Secretary-General's Report', *supra* note 210, at 1.

severe. The prices of staple food products have more than doubled. According to international economists, almost four fifths of the population are unemployed.²¹⁴

Despite the early evidence that the sanctions were crippling Haiti's poor, the world community was generally slow to react. In February 1992, the Bush Administration lifted US implementation of the OAS embargo on a case-by-case basis for US-owned maquiladora plants in Haiti.²¹⁵ The State Department characterized this measure as 'fine-tuning' and 'retarget[ing]' the sanctions so as not to 'hurt innocent people' — in this case, the 40,000 Haitians who had been employed in the US-owned maquiladoras prior to the coup.²¹⁶ Critics charged that the measure was ill-conceived²¹⁷ and that the Bush Administration had merely caved in to pressure from corporate lobbyists.²¹⁸

There was no mention of the possibly disproportionate or discriminatory impact of economic sanctions on the poor in the Security Council meeting in which UN sanctions were first imposed.²¹⁹ The Council, however, did gradually refine the sanctions regime in the face of the public outcry over the ravages the sanctions inflicted on the Haitian economy. During the interregnum in the summer and autumn of 1993 during which the sanctions were suspended pending implementation of the Governors Island accord, the Council repeatedly issued Presidential Statements warning the Haitian military that non-compliance with the agreement would result in the reinstatement of sanctions 'appropriate to the situation, with particular emphasis on those measures aimed at those deemed responsible for the non-compliance with the Agreement'.²²⁰ When the Haitian military disregarded the Governors Island Agreement and the Security Council reimposed the sanctions regime set up under Resolution 841, the Council's president stated that it was 'deeply concerned by the suffering of the Haitian people'.²²¹ The Council attributed responsibility for that suffering 'directly' to 'the refusal of the military authorities to comply with the Governors Island Process'.²²² Two weeks later in another Presidential Statement, however, the Council did express 'its determination to minimize the impact of the present situation on the most vulnerable groups and call[ed] upon Member States to continue, and to intensify, their humanitarian assistance to the people of Haiti'.²²³

Such expressions of concern for the plight of the Haitian people surfaced with more frequency in centres of power in the United Nations over the following few months.

²¹⁴ *Ibid.*, at 2.

²¹⁵ 'United States to Fine-Tune Embargo', *supra* note 207, at 264.

²¹⁶ *Ibid.*, at 264, 265.

²¹⁷ *Ibid.*, at 265.

²¹⁸ See Constable, *supra* note 206, at 175.

²¹⁹ See UN Doc. S/PV.3238 (1993). The representatives from Canada and Venezuela did express concern over the ineffectiveness of the OAS sanctions in returning Aristide to power.

²²⁰ UN Doc. S/26480 (1993); see also UN Doc. S/26567 (1993) (repeating this language).

²²¹ UN Doc. S/26668 (1993).

²²² *Ibid.*

²²³ UN Doc. S/26747 (1993).

For example, when the ‘Friends of the Secretary-General on Haiti’ — France, Canada, Venezuela and the United States — called for ‘new comprehensive trade sanctions’ against Haiti in February 1994, they were careful to note that the sanctions should be ‘aimed at the military authorities in Haiti and their supporters’.²²⁴ Nevertheless, not until May 1994 did the Security Council specifically target its sanctions at the wrongdoers, when the Council required that Member States deny entry visas to the Haitian military and its supporters.²²⁵ In the same resolution, however, the Council merely ‘strongly urge[d]’, rather than required, Member States to freeze the financial resources of those persons.²²⁶ Furthermore, the sanctions imposed by Resolution 917 supplemented UN sanctions already in place;²²⁷ none of the previous sanctions that had placed such an onerous burden on the destitute Haitian economy were lifted or adjusted.

Statements by representatives of Member States in the Security Council in the meeting in which Resolution 917 was approved show the Council’s awareness of the desperate situation of the Haitian people. The representatives of Canada, Venezuela, Argentina, Spain, the United States, France and Brazil all expressly referred to the suffering that sanctions had inflicted on Haiti’s poor.²²⁸ US Ambassador to the UN Madeline Albright acknowledged that sanctions are ‘a blunt instrument’.²²⁹ Many Security Council members attempted to shift blame for the economic and human crisis to the Haitian military: in the words of Canada’s representative, ‘[i]t is the failure of the military authorities to fulfil their commitments which is solely responsible for the plight of the Haitian population’.²³⁰ Other Security Council members, in what can charitably be regarded as an expression of pious hope rather than a hard-headed assessment of the probable real-world effects of policy, echoed France’s declaration that

[t]he Council has seen to it that that objective [of returning Aristide to power] will not be achieved at the cost of the infliction of intolerable suffering on the Haitian people, which has suffered too much already. The Council intends to censure a minority, including through the use of measures that are exceptional in that they are aimed at individuals. In so doing, the Council has also made sure that the poorest people will not be crushed even more.²³¹

²²⁴ Letter dated 2 February 1994 from the Representatives of Canada, France, the United States and Venezuela to the President of the Security Council, UN Doc. S/1994/116 (1994). At this time the Security Council also trumpeted the arrival of fuel approved by the Sanctions Committee for humanitarian purposes. See UN Doc. S/PRST/1994/2. The fuel shipment was greeted with cynicism in Haiti, however, in light of the ineffectiveness of the embargo and military profiteering on black-market oil sales. See Farah, *supra* note 206, at A13.

²²⁵ See SC Res. 917 (1994), para. 3.

²²⁶ *Ibid.*, para. 4.

²²⁷ See *Ibid.*, pmb., para. 1 (reaffirming Resolutions 841 and 873).

²²⁸ See UN Doc. S/PV.3376 (1994).

²²⁹ *Ibid.*, at 7.

²³⁰ *Ibid.*, at 4.

²³¹ *Ibid.*, at 8 (statement of French representative). Similar sentiments and prognoses were offered by the Spanish representative. *Ibid.*, at 6.

Although the Brazilian representative expressed some trepidation about the additional suffering that the expanded sanctions might engender in Haiti, only the Chinese representative addressed the Security Council's responsibility to craft proportionate and discriminatory sanctions:

Ironically, this suffering [of the Haitian people] is at least partially attributable to the sanctions already applied to Haiti by the Security Council and by other bodies. The question is then whether the newly introduced sanctions regime, if applied, could possibly increase the suffering of the ordinary people in Haiti; and we cannot but express concern about this.²³²

While some Council members undertook to continue to review the humanitarian situation in Haiti,²³³ the economic plight of the Haitian people caused by the sanctions subsequently received virtually no formal attention from the Security Council and played no explicit role in its decision to authorize a multinational force to remove the Haitian military and restore President Aristide to his post.²³⁴

Two reasons account for the world community's delay in recognizing the disproportionately harmful impact the sanctions were having on the Haitian people and the inadequate tailoring of sanctions to affect primarily the Haitian armed forces and their supporters. First, Jean-Bertrand Aristide, Haiti's elected president, strongly supported wide-ranging economic sanctions against his country from the time of the coup up to the day the multinational force was deployed in Haiti.²³⁵ President Aristide's unwavering support for imposing, maintaining and expanding economic sanctions would have made it politically difficult for the OAS or the Security Council to loosen the sanctions programme, even had it been inclined to do so.

A more important factor in the poorly-designed sanctions regime was Haiti's strategic insignificance to the great powers on the Security Council. On the one hand, the human rights violations committed by the Haitian military and the desperate economic plight of the Haitian people aroused international and popular outrage. The Haitian coup also bucked the post-Cold War trend toward democratization in the Western Hemisphere, a matter of particular concern to the OAS. On the other hand,

²³² *Ibid.*, at 10.

²³³ *Ibid.*, at 8 (statement of French delegation).

²³⁴ The Secretary-General included a brief reference to Haiti's woeful economy in an August 1994 report to the Security Council. See 'August 1994 Secretary-General's Report', *supra* note 210, at 2. Moreover, in approving Resolution 940, which authorized the use of force to dislodge the Haitian military, the Nigerian and the Spanish representatives mentioned the unintended suffering of the Haitian people brought about by the sanctions. See UN Doc. S/PV.3413 (1994). While the Sanctions Committee continued to make exceptions to the sanctions regime and approve shipments of food and fuel for humanitarian reasons, on no other occasion did the Security Council formally address — or even informally refer to — the economic crisis in Haiti and the issues of proportionality and discrimination in applying its sanctions regime.

²³⁵ For example, in late October 1993 President Aristide in an address before the General Assembly called for a total blockade against Haiti. (1993) UNYB 335. He also requested tougher sanctions through his representatives in meetings of the Security Council, see UN Doc. S/PV.3376 (1994), and in correspondence for the Security Council routed through the Secretary-General, see, e.g., Letter dated 15 October 1993 from the President of the Republic of Haiti addressed to the Secretary-General. UN Doc. S/26587 (1993).

no state — and, in particular, not the United States — had a strategic interest in intervening militarily in Haiti. Caught on the horns of this dilemma, the international community took the path of least resistance: It demonstrated its moral outrage by imposing ‘tough’ sanctions, but took the politically safe course of not intervening militarily, despite the manifest mistargeting of the impact of the sanctions. Indeed, President Clinton’s September 1994 ultimatum to the Cedras regime to relinquish power or face UN-authorized military intervention was arguably motivated more by the Clinton Administration’s need to shore up its sagging international credibility than concern for the suffering that the indiscriminately applied sanctions had inflicted on the Haitian people.

F Mandatory UN Arms Embargoes and Other Measures

A less comprehensive instrument applied by the United Nations to influence the behaviour of elites in target states is the mandatory arms embargo. Since 1992, the Security Council, acting pursuant to Chapter VII of the Charter, has imposed mandatory embargoes on supplying weapons and military assistance to Somalia, Liberia, Angola and Rwanda. In these situations, the Security Council has acted in response to ongoing civil strife that has led to internal anarchy and humanitarian crises of international dimensions.

In Somalia, the Security Council imposed an arms embargo in January 1992 in an effort to limit intense factional fighting among the country’s clans and to prevent the collapse of civil authority.²³⁶ In November 1992, the Council decreed an arms embargo with respect to Liberia,²³⁷ where the 1989 rebellion of forces led by Charles Taylor and the 1990 assassination of President Samuel Doe plummeted the country into an anarchy from which it has yet to fully emerge. The refusal of Jonas Savimbi’s National Union for the Total Independence of Angola (UNITA) to recognize the legitimacy of the results of UN-supervised elections in 1992 and to lay down its arms led the Security Council to impose an embargo on the supply of arms and petroleum to UNITA on 15 September 1993.²³⁸ Finally, the Security Council imposed an arms embargo against Rwanda in May 1994, when the country descended into genocidal carnage after the Rwandan President’s plane was shot down over Burundi.²³⁹

A universal arms embargo is a useful tool that the international community can make use of when it is foreseeable that mandatory economic sanctions will either be

²³⁶ See SC Res. 733 (1992).

²³⁷ See SC Res. 788 (1992). The arms embargo was reaffirmed in 1993, see SC Res. 813 (1993), and a committee was established in 1995 to monitor its porous enforcement, SC Res. 985 (1995).

²³⁸ See SC Res. 864 (1993). Although UNITA claims that the oil embargo is hurting innocent civilians, see ‘Angola Hurt by UN Embargo’, *AP Online*, 5 April 1994, available in LEXIS, News Library, Arcnws File; there is no evidence that the suffering of Angolans in UNITA-controlled territory is the result of anything other than the civil war in the country.

²³⁹ See SC Res. 918 (1994). When tensions in the Great Lakes region of Central Africa increased, the Council lifted the embargo on armaments as applied to the Rwandan government, subject to some administrative restrictions. See SC Res. 1011 (1995).

ineffective or will unjustly impact the innocent. For example, imposing economic sanctions against Somalia would have served only to deepen the existing humanitarian crisis by harming the starving civilians who were caught in the crossfire of the degradations of contending warlords. Liberia, Somalia and Rwanda have effectively been without national governments for much of the periods during which these countries have been subject to UN arms embargoes. Thus, it would have been difficult in these cases to identify a target elite whose behaviour could have been influenced by the application of sanctions — and the brunt of sanctions would likely have been felt most of all by the already-pressed civilian populace rather than by the fighters responsible for the violence. Finally, an arms embargo against a particular faction in a country can be an appropriate policy tool in some situations. The arms and petroleum embargo against UNITA in Angola, for example, is easier for the Security Council to apply than a programme of economic sanctions, and it avoids the danger that the Angolan government might use an international sanctions regime in a less than humanitarian fashion to advance its domestic political agenda. Furthermore, in Angola UNITA is the primary wrongdoer, and the civilian population already suffers tremendously from the effects of war alone.

Nevertheless, there are situations in which mandatory economic sanctions are preferable to, or should be a complement of, an arms embargo. For example, an arms embargo against Libya in response to the latter's involvement in the bombing of civilian aircraft would not have been adequately tailored to the illegal acts involved. Alternatively, as was the case with Iraq, countering an aggressor's threat to international peace and security can at times require not only cutting off a state's access to armaments, but also undermining its ability to make war by using economic sanctions to weaken its economy.

There are also situations when the imprecise application of an arms embargo can unjustifiably endanger a state to which the embargo applies. Thus, many have argued that the UN's maintenance of the arms embargo against all the republics of the former Yugoslavia prolonged the Balkan wars by indirectly giving an international imprimatur to Serbia and Montenegro's military advantages over the state of Bosnia and Herzegovina. Thus, even arms embargoes must be measured against the criteria of proportionality and discrimination.²⁴⁰

The Council has also recently enacted Chapter VII measures that fall short of an arms embargo or a comprehensive programme of economic sanctions. In 1995, the Sudanese government gave refuge to terrorists who had attempted to assassinate Egyptian President Hosni Mubarak in Addis Ababa. In response, the Council passed a series of resolutions designed to increase pressure on Sudan to extradite the terrorists to Ethiopia for trial. After unsuccessfully calling on Sudan to extradite the accused individuals,²⁴¹ the Council acted under Chapter VII first by mandating diplomatic

²⁴⁰ For further observations on the legal issues raised by arms embargoes, see Damrosch, *supra* note 1, at 284–291.

²⁴¹ SC Res. 1044 (1996).

sanctions against Sudan²⁴² and then by requiring states to deny aircraft substantially owned or controlled by the Sudanese government permission to take off from, land in or overfly their territories.²⁴³ Such measures represent, in appropriate circumstances, viable alternatives to arms embargoes and economic sanctions programmes.

4 Proposed Principles with Respect to Economic Sanctions

As these foregoing case studies demonstrate, a striking feature of the economic sanctions programmes and arms embargoes implemented by the United Nations under Chapter VII of the Charter is the Security Council's almost complete failure to consider international law standards, particularly the criteria of proportionality and discrimination, in defining and enforcing sanctions regimes. In only two cases, those of Iraq and Haiti, has the Council expressly acknowledged that the impact of economic sanctions on the population of the target state has a role to play in policy formation. While the oil-for-food arrangement was adopted in response to the deteriorating humanitarian situation in Iraq, there is no evidence that the Security Council's decision was guided by anything more than a superficial reference to international law standards. Moreover, in the case of Haiti, while the Council did formally recognize the devastating impact that the sanctions were having on the poor, instead of grappling with the legal issues raised by the sanctions programme, Council members in their public statements simplistically attempted to shift responsibility for their effects to the Haitian military.²⁴⁴

In response to the acknowledged shortcomings of its sanctions programmes, the five permanent members of the Security Council issued a short policy statement on the humanitarian impact of sanctions.²⁴⁵ The document states that 'further collective actions in the Security Council within the context of any future sanctions regime should be directed to minimize unintended adverse side-effects of sanctions on the most vulnerable segments of targeted countries' and that the 'structure and implementation of future sanctions regimes may vary according to the resource base of the targeted country'.²⁴⁶ Among the considerations that the Council deems relevant to designing sanctions regime are 'assess[ing] objectively the short- and long-term humanitarian consequences of sanctions in the context of the overall sanctions regime' and 'giv[ing] due regard to the humanitarian situation'.²⁴⁷ Such a policy

²⁴² SC Res. 1054 (1996).

²⁴³ SC Res. 1070 (1996).

²⁴⁴ See *supra* notes 219–234 and accompanying text.

²⁴⁵ Letter dated 13 April 1995 from the Permanent Representatives of China, France, the Russian Federation, the United Kingdom of Great Britain and President of the Security Council, UN Doc. S/1995/300 (1995) ('Humanitarian impact of sanctions').

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

statement from the Security Council is welcome. We believe, however, that the Council's consideration of the humanitarian impact of sanctions can and should be much more searching and systematic than the terms of that brief policy statement. To that end, and drawing on principles of international law and the experiences of the United Nations and individual nations in implementing economic sanctions programmes, we propose the following principles with respect to economic sanctions.

A Highly Coercive Economic Sanctions Must Follow Prescribed Contingencies

1 Lawful Contingencies

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-defence and the emerging law of counter-measures will prescribe the contingencies.

Whether sanctions are applied by the United Nations or unilaterally, the analysis of prospective programmes 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, we take it as unexceptional that when the community of nations applies coercion in defence of public order, it is subject to the same laws of war or humanitarian law that have been prescribed for others.

Economic sanctions are not required to precede the application of military sanctions. 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. And there is no reason to doubt that the drafters of the UN Charter were not aware of the highly deprivatory consequences and destructive potential of any instrument of policy. The initiation of *any* instrument requires, as a precondition, a finding of one of the contingencies for action under Article 39 — threats to the peace, breaches of the peace or acts of aggression. Nor does the Charter suggest that one instrument is inherently more destructive than another. Although 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...²⁴⁸

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.

International law, however, does not 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, to which states may resort to indicate their displeasure with the policies or comportment of another state. If a low level of coercion is exceeded, the state initiating the action is obliged to justify its action by reference to the law of self-defence or countermeasures.

2 Level of Coercion Must be Correlated with Predictable Consequentiality of Economic Effects

For the inquiries we propose, the level of coercion is determined, not by the structure or name of the programme, but by its *predictable consequentiality*. Thus, if state A unilaterally mounts a general embargo against state B, the action, despite its avowed comprehensiveness, may only be retorsive in terms of its consequences because many other states continue to maintain full and significant economic relations with state 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 United States' collapse of Cuba's sugar quota in 1959 was more than retorsive, in terms of the test of predictable consequentiality because it had foreseeable and substantial harmful economic effects.

If this were so, it would have to be substantively justifiable under international law. Within the framework of prospective effectiveness developed in this paper,²⁴⁹ an economic sanctions programme would be retorsive only if the sanctioner cannot foresee, in formulating its impact assessment, that substantial economic harm is reasonably likely to follow from implementation.

B Economic Sanctions Must Be Necessary and Proportional

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

²⁴⁸ UN Charter, Art. 42.

²⁴⁹ See *infra* Part 4.C.2.

economic instrument, indeed all instruments, become, definitionally, techniques which 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 sanctions programmes.

In first impression questions like these, the Natural Law criteria of necessity and proportionality 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 likely the corresponding collateral damage is to be extensive. Would we not 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 would it not 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 is restored. In the second instance, the damage that might ensue could not be repaired after public order is restored. In other words, the tolerance for lawful violence, with the corresponding level of collateral damage that will ensue, varies, in part, according to the degree of injury that is posed to public order and the degree of irreparability 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 programmes. Contrast the sanctions programmes 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 illicit adventures. 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 sanctions programmes will cause collateral damage. Surely a higher level of collateral damage should be legally tolerable for Saddam than for Castro.

But 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 programme can effectively deny state A access to the raw materials needed in three of the factories. The programme 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 programme 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? By comparing the projected effects of this programme with other possible uses of the economic instrument or with the other instruments. 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 situation, there would be considerably less collateral damage.

But contrast these examples with an enforcement programme applying a different strategic instrument, e.g., 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.

These three hypothetical programmes indicate, we submit, that, when planning an enforcement programme, international law requires, among other things, that an assessment be made of the collateral damage of different strategic options through comparative projections of the costs to non-combatants or non-responsible parties of the application of the military, economic or propagandic instruments, alone or in various combinations. These comparative projections will force the sanctioner to evaluate the consequences of its acts and facilitate internal, and perhaps external, appraisal of the programme's lawfulness.

The value spectrum of the New Haven School may be useful in this regard, for it provides a focus on changes precipitated by specific sanctions programmes in the production and distribution of values, whether prospectively or retrospectively and at whatever level of detail is desired and in every social sector. International law now prescribes for virtually all of these social slices,²⁵⁰ in some instances with non-derogable human rights norms. Hence, appraisals of projected enforcement programmes 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 inquiry and short-term deprivation. It must also develop techniques for assessing cumulative injury.

The principle of necessity in the law of armed conflict requires that, once a valid contingency is identified, alternative strategies be prospectively evaluated. Assuming various sufficient strategies, instruments and programmes should be selected on the basis of which ones accomplish the necessary objectives with the least possible quanta of harm. The cognitive process is necessarily comparative, but, in the end, it should

²⁵⁰ 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 sanctions programme must consider the implications for the environment.

yield selection of the least harmful, yet effective at a nation's level, of instrument technology.

The principle of proportionality under international law caps the quanta of damage that the necessity inquiry suggests. Therefore, even if necessary, a sanctions programme cannot exceed the somewhat broadly construed bounds of proportionality. Collateral damage, as part of general damage, must also be proportional. The referential point of evaluation for proportionality under the law of armed conflict is the immediate or prospective consequences of the act that triggered the contingency. This inquiry into proportionality must also necessarily be prospective.

C Sanctioners Must Reasonably Maximize Discrimination between Combatants and Non-Combatants

1 The Need for Discrimination

Economic sanctions are destructive. Potentially, they could be even more destructive, at least in terms of collateral damage, than uses of the military instrument. This is especially so if one takes into account the military instrument's effectiveness at the early communication stage. To allow unilateral or multilateral actors to use economic sanctions in a manner inconsistent with the minimization of collateral harm would undermine the fundamental goals of international law that are expressed in the prescribed law of armed conflict.

In all cases, the essential character of economic sanctions must be squarely faced. The theory of 'trickle down' economic programmes is that development strategies 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 sanctions 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. This percolation would occur because the political elites either prioritize the public interest or are particularly responsive to the claims of interest groups.²⁵¹ The leadership will, indeed, 'feel your pain'.

There is no empirical evidence to support either theory. An economic sanctions programme 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 non-combatants, can be justified on the theory that the pain of death and injury will rise to the 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 unfocused bombing.

²⁵¹ See generally Kaempfer and Lowenberg, 'The Theory of International Economic Sanctions: A Public Choice Approach', 78 *Am. Econ. Rev.* (1988) 787.

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 must a lawful sanctions programme using the military instrument. Economic sanctions may be used when they are capable of discrimination. Sanctions that deprive an adversary of war *matériel* are presumptively lawful, for they are directed against combatants. Sanctions that are designed to change the political programme of an adversary may be 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.

More limited and precise economic sanctions are to be preferred over more general and indiscriminating programmes. Given the destructiveness of economic sanctions programmes, it would seem that genuinely effective general embargoes, which, by definition, cannot discriminate between combatant and non-combatant, 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 was ameliorated in Resolution 666 of 13 September 1990, which assigned a certain discretionary competence to the Sanctions Committee to determine whether 'humanitarian circumstances' warranted a departure from Resolution 661.²⁵² But paragraph 5 of Resolution 666 did not make clear that the Security Council would be obliged to take account of the recommendations of the Sanctions Committee.²⁵³ Our review of the ten cases of UN sanctions programmes indicated that there have been few if any prior examinations of the prospective lawfulness of an economic sanctions programme against the target state before a political decision was made to put it into place. We know of no case in which the Security Council or the Council of the League of Nations commissioned a study of projected collateral damage likely to be caused by economic sanctions before ordering the programme. We submit that any economic sanctions programme, to be lawful, must undertake a preliminary 'impact assessment' study, based on contextual inquiry.

2 Realistic and Operable Techniques of Impact Assessment Must be Developed

In the past, economic sanctions have caused large amounts of collateral damage in the form of civilian loss of life and property. Even if other criteria of lawfulness were satisfied (i.e. contingency, necessity and proportionality), the goal of minimizing

²⁵² See *supra* notes 41–43 and accompanying text.

²⁵³ See *supra* note 41.

civilian harm through discrimination requires that prospective sanctioners inform themselves about the nature of the circumstances in which they undertake to change the behaviour of the target. Due to the nature of economic mechanisms, it is virtually impossible to contain harm *a priori* to those elites in the target state from whom policy changes are sought.²⁵⁴ Myriad macroeconomic multipliers and linkages simply do not allow for such precision. The law of armed conflict does not impose a complete prohibition on the use of weapons that cannot perfectly discriminate; in each case, lawfulness will turn on many factors. But the capacity of an instrument to discriminate relative to other available instruments will always be an important criterion, given the goals of humanitarian law.

With respect to the economic instrument, the principle of discrimination must be assessed through an *ex ante* determination of expected policy-effectiveness of the programme contemplated by the putative sanctioner. A policy-effective sanctions programme is one that accomplishes the objective of changing an external or internal policy while minimizing collateral damage. A policy-effective programme minimizes collateral damage by reducing the duration of economic suffering, concentrating harm on those who have material influence in policy-making, and targeting resources that are not essential for civilian survival or bodily integrity but whose neutralization is likely to lead to desirable adjustments in the target's policies. A policy-effective programme thus maximizes discrimination because it is narrowly tailored to achieve its policy goals subject to the constraint of harming non-combatants as little as possible. By requiring an *ex ante* determination of policy-effectiveness, in the form of an impact assessment, the target sanctioner, third-party states and other relevant international actors, who can impose real political costs on the target sanctioner at an early stage, would be able to invoke international law upon appraisal of the impact assessment. Collateral harm, therefore, would be prevented at an early stage through a process of authoritative communication.

Any estimate of the policy-effectiveness of a projected programme will necessarily be probabilistic, but past experiences and rigorous techniques of contemporary social inquiry may provide important insights into prospective effectiveness. These insights may serve as an initial evaluatory guidepost that, with the accumulation of evidence, may evolve into a technically sophisticated dialogue between sanction-planners and the international decision process that must assess the propriety of the programme under international law. The increasing sophistication of the cognate genre of environmental impact assessments exemplifies the process of communication that is likely to arise once sanctioners are required to conduct the type of assessment that we propose. Precisely this type of authoritative communication, indeed, seems to have commenced since the Security Council implicitly acknowledged the normative requirement to minimize the collateral damage caused by economic sanctions.

²⁵⁴ See Kaempfer and Lowenberg, 'A Model of the Political Economy of International Investment Sanctions: The Case of South Africa', 39 *Kyklos* (1986) 377, at 377.

The criterion of policy-effectiveness, rather than an a-contextual bright line rule, seems to be the most appropriate, and probably the only feasible, rule of decision for achieving, in the idiosyncracies of each case, the articulated goals of international law. Conclusions about the policy-effectiveness of an economic sanctions programme in any particular case are the outcome of two interrelated stages: first, economic effectiveness that produces the desired 'shock' in the target and, second, and causally, political change. An inquiry into policy-effectiveness, therefore, must disaggregate the concept into its component parts of economic effectiveness and political effectiveness. Economic effectiveness, which is also relevant in determining predictable consequentiality as we postulated earlier, is the capacity of a sanctions programme to cause a substantial economic shock. Political effectiveness is the capacity of such shock to make relevant actors introduce desired changes in the target's policy. Relevant actors may include the political elite, the economic elite, or any other social grouping with the capacity to change, in whatever way and through whatever means, the policy that has been targeted by the sanctioner. The following guidelines derived from past experiences and social-scientific approaches suggest that a reasonably reliable evaluation of policy-effectiveness is both practicable and administrable.

(a) Economic Effectiveness

Economic sanctions may take a wide variety of forms, but frequently they are embodied in trade restrictions (export controls and import barriers), investment restrictions (prohibition or licensing), and embargoes (specific or general). Theoretically, their capacity to create an economic shock in the trade or the capital accounts of the target state depends on contextual variables. In practice, the choice of instrument is usually constrained by other legal regimes such as the General Agreement on Trade and Tariffs, WTO or internal export control law.²⁵⁵

Economic effectiveness depends on the sanctioner's ability to increase significantly the prices of inputs and goods that the target country imports and/or to lower significantly the prices of goods and services that the target state exports by collapsing demand. In order for this to occur, the trade linkages between the sanctioners and the target must be substantial, although they do not need to be in a monopolistic-monopsonistic relationship.²⁵⁶ At either the communication or the implementation stage, the target will likely try to undertake reactive policies to neutralize those price effects. The effectiveness of reactive policies, however, will be limited by the flexibility of domestic means of production in redirecting toward import substitution or different exports, by the existence or development of alternative markets, and by the elasticity

²⁵⁵ See Leidy, 'The Theory of International Economic Sanctions — A Public Choice Approach: Comment', 79 *Am. Econ. Rev.* (1989) 1300.

²⁵⁶ See van Bergeijk, *supra* note 9, at 395. Even when they are not, the same effect may be achieved by military or political instruments directed against third parties with whom the target does have substantial economic relations. This, however, moves inquiry from primarily economic sanctions programmes to primarily military or political sanctions programmes with economic components.

of the worldwide demand or supply for an affected good or input.²⁵⁷ The tendency of local capitalists to engage in capital flight upon sudden increases in country risk, in the absence of offsetting inflows from third-party countries, is also likely to hamper effective reaction by depleting investment.

While it is counter-intuitive, some empirical studies suggest that sanctions programmes of shorter duration tend to be more effective. Economic shock, apparently, should be sudden to prevent conditioning.²⁵⁸ This finding, however, is only valid when the goods or inputs cannot, by their nature, be stockpiled, or, if possible, if both the communication and implementation come so unexpectedly that the need for developing warehousing sources is unforeseeable or too costly as a reactive strategy.

An impact assessment would require a factor analysis based on these guidelines for each target. Although complex dyadic and multi-country simulations have been available since the introduction of computers,²⁵⁹ once a legal requirement for impact assessment becomes clarified, the technical configuration of such assessment would, because of the legal requirement, evolve rapidly towards scientific optimality, as resources are devoted to its perfection. More importantly, an impact assessment of economic effectiveness would communicate to the international community what the sanctioner's expectations are. The world community thus could have access to, and perhaps mobilize itself about, otherwise private or unintegrated information. Relevant actors in the international arena would impose political costs on unilateral sanctioners who use inadequate methodologies or unreliable data in making their case.

(b) Political Effectiveness

(i) Yessibility

Economic sanctions are more likely to be effective when the change in policy sought from the target is, in Roger Fisher's terms, an essentially 'yessible proposition', i.e., the party to whom it is addressed can accept it without suffering a critical value loss. There are several corollaries to the theorem of 'yessibility'. First, the degree of yessibility of the policy adjustment sought will, in direct proportion, increase or decrease the quantum of destructive force necessary for the effectiveness of the sanctions programme. Put bluntly, the less yessible the policy adjustment sought from the target state, the more coercion the sanctioner must be prepared to invest in a sanctions programme.

A second corollary holds that yessibility will be increased by an accommodative formulation of the policy adjustment that is sought, i.e., a formulation that takes

²⁵⁷ See Kaempfer and Lowenberg, 'Determinants of the Economic and Political Effects of Trade Sanctions', 56 *S. African J. Econ.* (1988) 270, at 270-272.

²⁵⁸ Van Bergeijk, *supra* note 9, at 394.

²⁵⁹ See, e.g., Hubner-Dick and Seidelmann, 'Simulating Economic Sanctions and Incentives: Hypothetical Alternatives to United States Policy on South Africa', 2 *J. Peace Res.* (1978) 153.

account of the needs or circumstances of the target elite. In particular, change that can be accomplished in ways that permit the target to save face are more yessible. In some circumstances, a package deal, in which the sanctioner appears to be making a concession to the target in return for the target's concession to the sanctioner, may also increase yessibility. When this happens, economic sanctions programmes are more likely to be seen as part of a larger negotiation process, in which the economic instrument's role is not prominent and the result is likely to be attributed to negotiation rather than to the application of sanctions.

A third corollary, which is put forward much more tentatively, holds that adjustments in external policies will be more yessible than adjustments in internal policies, insofar as internal policies are likely to undermine the targeted political elite's power.

(ii) Political Regime

Sanctions aimed at securing policy changes are more likely to be effective when the political elite in the target state is itself composed of rational, profit-maximizing economic actors or when the internal political structure of the target is such that the political elite, though not economically oriented, must take account of the interest of other rational economic actors. The effectiveness of sanctions, from a political standpoint, thus depends on the particular coalition of relevant political actors that sustains the target's domestic political regime. Different patterns of political mobilization and legitimacy would yield different degrees of effectiveness, even assuming the same type and amount of economic harm. By examining the patterns of power and authority in a country's political system, a sanctioner can determine, at least in probabilistic terms, the political effectiveness of projected programmes. Such an inquiry would also focus the sanctioner on the *ex ante* maximization of such effectiveness.

A sanctioner will confront a wide variety of domestic political arrangements. Any typology of regimes is necessarily only a set of snapshots of discrete stages within a very broad and infinitesimally divisible spectrum of arrangements. Hence the need for contextuality in each case rather than reliance on standardized models. Economic sanctions that are directed against the rank-and-file will be less effective against totalitarian regimes in which tight and centralized political controls operate. Similarly, they will be less effective when elites and rank-and-file in the target share symbols communicating a common fundamental ideology, religion or nationality, especially if the sanctioner does not share that commonality or is viewed as unassimilably alien in it. Under these latter circumstances, the political elite of the target will easily be able to recharacterize the economic sanctions to the domestic polity as part of a larger military programme of foreign intruders aimed at destroying the nation's or group's physical or symbolic integrity. The domestic elite would thus be able to fend off the population's complaints regarding the sanctions' economic effects, redirecting them outwards.

In post-totalitarian regimes, i.e., those in which theretofore politically powerful symbols have lost their capacity to influence popular support, the regime's repressive mechanisms may still reduce the sanctions' effects on stability and increase the ability to resist policy pressures. Although the political costs of repression are not zero for the domestic elite, the threshold level at which the population, goaded by the economic pain of the sanctions, is likely to challenge the regime's authority is actually quite high. The low political cost of repression that this implies, however, can be offset by sanctions aimed at reducing the repressive capabilities of the sanctioned state. Wholly aside from the human rights windfall, economic sanctions aimed at raising the cost of military goods used in repression, if economically effective, may create a new social equilibrium in which the costs of repression are high enough and the costs of popular mobilization against the elites are low enough for change to become effective.

The effectiveness of economic sanctions is also likely to be low against despotic or sultanistic regimes, or societies in which the effective symbols of power and authority are not objective but personalized. In these regimes, characteristically, the essential vehicles through which political dissent can be effectively channelled are lacking. Low educational levels or socialization into value orders that encourage submission to patriarchal figures pose formidable obstacles to mobilization for change in the direction of the targeted internal or external policy.

As one moves away from domestic political systems in which mobilization depends on reactions to symbols or repression, economic sanctions seem to promise more effectiveness. Authoritarian regimes, which are usually sustained by a coalition between the military as government and the professional or middle classes, are probably more sensitive to economic sanctions than other non-pluralistic polities, but less so than democracies. These regimes tend to prioritize the protection of pre-capitalist economic interests, the 'liberalization' of civil society by incorporating interest groups into decision-making processes through institutionalization or cooptation, and the preservation of domestic public order through involvement of the military as a specially indulged institution. Because of its main bases of support, the stability of these regimes is highly dependent on the continuing expectation of the efficient and efficacious achievement of the middle classes' economic policy goals and the military's goal of public order. Under these conditions, economic sanctions aimed at commercial interests or the military as an institution are likely to be politically effective to the extent that they are economically effective.

Democracies, or regimes approaching it, indeed seem the most vulnerable to economic sanctions. The critical factor determining vulnerability appears to be the degree of the atomization or polarization of political groupings and the relative real influence of interest groups. In countries that have not consolidated their democracies, for example, the installation of authoritarianism or even a resurgence of post-totalitarianism could be triggered by economic shock. This should underline our caveat about reliance on models: real-world political configurations are likely to fall in between the broad categories discussed here. Moreover, economic sanctions will, to

some degree, dynamically affect the political configuration of the target, a second-order consequence that the sanctioner must always assess.

The relative vulnerability of pluralistic regimes is intriguing, for, of course, it is the liberal democracies that have, to date, made the most manifest use of economic sanctions and frequently, but not exclusively, used them against non-pluralistic governments. But non-pluralistic governments can also play the game, and this theorem should alert us to the possibility that they might be able to wield economic sanctions more effectively than their democratic counterparts. Consider the interesting situation in US-China relations: The threat and/or application of US sanctions against China in the post-Tianamen period has been ineffective in changing China's human rights policies and practices. In contrast, the threat and/or application of Chinese sanctions against the United States, in terms of reducing economic opportunities in China for US business while increasing them for our economic competitors, has been quite effective. Indeed, the current US administration has largely surrendered our hitherto major economic sanctions technique for securing Chinese compliance with international standards of human rights by decoupling the granting of Most Favored Nation status from human rights performance — exactly as demanded by the Chinese government!

In terms of this theorem, the sanctions target against which an American programme conducted or initiated is likely to be most effective is a state such as apartheid South Africa, in which a distinct commercial elite stands to suffer significant deprivations as a result of the sanctions *and* is in a position to influence the political elite. For the same reasons, the United States is likely to be a prime target for effective economic sanctions programmes mounted by other states with whom we have important economic ties. The least auspicious sanction target is a post-totalitarian regime such as Castro's Cuba, where there is no independent economic elite and the political elite and its security apparatus are not likely to be affected or threatened by wealth deprivations.

The critical factor in this theorem is the degree of political relevance of the internal wealth elite. A corollary to this theorem holds that the sanctions programme will fail, despite the political relevance of a wealth elite that is suffering the brunt of the sanctions, when the sanctions programme itself generates a new politically relevant wealth elite that actually benefits from the sanctions. Thus, in General Cedras' Haiti, the existing wealth elite suffered from the sanctions, but its removal of support for the military dictatorship was more than counter-balanced by a new elite which was enriching itself through trade in contraband and other transactions that had become profitable, thanks to the sanctions programme itself.

Sanctions programmes will be less effective when the target's elite has or can acquire supportive contacts within the sanctioning state. Thus, China can retain law firms, public relations firms, business lobbies and consulting firms composed of former high officials who continue to have great influence on policy in the United States, while the United States is unable to acquire comparable instruments of influence in China.

(iii) Reactive International Mobilization

The more civilians and non-combatants suffer in the target, the more popular indignation in other states (and even in the sanctioning state) will be directed against the sanctions. Hence the target will use the propaganda instrument intensively. Planning for extended sanctions programmes that cause widespread collateral damage will, accordingly, require coordinate propagandic programmes that justify the continuation of sanctions to politically relevant strata whose support is necessary for the sanctions programme.

(iv) Interdependence and Political Feedback

In circumstances in which there is a high degree of interdependence between the sanctioner and the target, such that many of the deprivatory effects of the sanctions programme will be felt by economic factors within the sanctioner state, the sanctions programme is less likely to be effective in proportion to the political relevance of the domestic factors likely to be hurt by the sanctions — for there will be pressure within the sanctioning state to reduce the scope and intensity of the programme to an essentially symbolic level. In these circumstances, one may find, under the rubric of an economic sanctions programme, what is essentially a propagandic programme, one of whose critical targets is that part of the targeting state's constituency that is demanding action and that is, thus, reassured that 'everything' possible is being done, when, in fact, virtually nothing is being done. This does not mean that the resulting symbolic sanctions programme has no political meaning, as we noted earlier. US responses to China may be an example of this theorem.

(v) Power Differentials in the Global Context

In situations of bipolarity, an economic sanction imposed by one superpower against a smaller state is unlikely to be effective because the smaller state has the capacity to turn to the other superpower to supplement what has been deprived. Thus, during the Cold War, Stalin's economic sanctions programme against Tito's Yugoslavia failed because Tito was able to turn to the West, which eagerly and generously embraced him. Conversely, the US sanctions programme against Cuba at the end of the Eisenhower Administration and thereafter was largely ineffective because Cuba could turn to the Soviet Union.

A corollary to this theorem is that in situations of competitive multipolarity, the unilateral imposition of sanctions is less likely to be effective. The operational implication of this corollary is that in situations of multipolarity, unilateral sanctions should be channelled through international organizations so that as many states as possible are obliged to participate in them. The compromises necessary to win organizational support may be more than offset by the effectiveness of the narrower, but multilateral, programme.

(vi) Plurilateralism and Multilateralism

Many of the preceding theorems suggest that the effectiveness of a sanctions programme may be enhanced by making it plurilateral or international. A sanctions

programme conducted through the UN Charter, under Chapter VII, has the benefit of being obligatory on all other states parties by virtue of Article 25 of the Charter. It also benefits from a monitoring mechanism that is not associated directly with the state primarily interested in having the sanctions programme.

D There Must be a Periodicity of Assessment

Everything, Herakleitos teaches, changes. Hence, economic sanctions programmes must continuously update their information as the programme proceeds to ensure that they are consistent, in their effects, with international law. The necessity for the use of explicit contextuality here is very important to ensure compliance no less than to test allegations of abuse. In sanctions programmes, the target state is likely to seek to exaggerate the injuries it is suffering and, in particular, the burden falling on non-combatant strata of the population as a way of challenging the lawfulness and morality of the sanctions programme and undermining the political will to continue it. Fidel Castro, for example, has insisted that the US economic embargo is wreaking havoc among Cuban children by denying them access to medicine. But, 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, far cheaper than in the United States. Castro is, in fact, conducting a propaganda programme through 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 such a rigorous analysis by the media that report these claims.

E Provision for Injuries to Third Parties Must be Provided

Collateral damage for economic sanctions programmes 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.²⁶⁰

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 (as was done for Zambia, for instance, with respect to the Rhodesian sanctions).

5 Conclusion

Future non-retorsive uses of the economic strategy, whether by the international community or on a unilateral basis, should be examined prospectively in terms of the requirements of the law of armed conflict: in each case much more refined economic

²⁶⁰ UN Charter, Art. 50.

sanctions programmes should be designed. If this is to be a meaningful and not a cosmetic exercise, the egregious and potentially long-term social, economic and environmental consequences of uses of economic strategies must be acknowledged. Mid-term and long-term as well as the short-term consequences of a prospective economic sanctions programme must be projected and appraised. As we noted, we know of no case in which the political decision, whether at the UN or unilateral level, to undertake an economic sanctions programme was preceded by an inquiry into the lawfulness of the programme based upon considerations of necessity, proportionality and the capacity for discrimination of the technique to be used. All too often, consideration of these issues after a sanctions regime has become entrenched has been disingenuous.²⁶¹

Policy-makers must undertake rigorously contextual and honest assessments of the collateral damage likely to occur and run inter-instrument comparisons of projected collateral damage. They must give more consideration 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 sanctions programme. Thus, the conventional wisdom that one must advance, through a slow process of escalation, from diplomatic, to propagandic, to economic, to military instruments should be re-examined. The sequence may sometimes 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 to achieve compulsion in the circumstances of that case. Only then should the particular sanctions instrument or programme 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.

²⁶¹ The statements made in the Security Council once it became undeniable that UN sanctions were crushing the Haitian people and enriching the military elite exemplify this. See *supra* notes 219–234.