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## **Economic Sanctions and Human Rights/Preferential Trade and Human Rights**

Krista Nadakavukaren Schefer

### **ABSTRACT**

The law of trade liberalization found in WTO agreements and the protection of human rights are intimately bound through the use of economic sanctions. While the general international law perspective on economic sanctions is one of permissiveness within the limits of humanitarian and human rights law, the law of the World Trade Organization restricts its Members from applying economic sanctions against other Members unless the trade restricting measures fall within the general exceptions provisions. This leads to a constellation where potentially human rights-violating sanctions programs are explicitly excepted from WTO oversight, whereas sanctions by single Members, that are unlikely to impose human costs by virtue of their limited scope, face high barriers under WTO laws.

### **KEY WORDS**

Economic sanctions; Human Rights; Preferential trade; World Trade Organization.

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If we look at the historical development of the “trade and human rights” concept, one of the first connections between the two areas was *how* trade could be used to enforce human rights – or, how trade could be used to force a government to protect human rights. Next to the actual banning of certain trade because the traded “good” itself violated concepts of human dignity (slave trade), the “stick”-approach to trade and human rights is the most obvious connection between the two areas.

This morning I want to address an area of clear concern to both the international legal system and to the actors of international politics: the issue is that of economic sanctions. Let me start with a current example. Perhaps you have followed the debate about North Korea’s nuclear ambitions and seeming successes. Well, the result of NK’s refusal to concede to the international community’s demands to renounce the use of nuclear capabilities has led to the imposition of economic sanctions on North Korea by the United Nations Security Council (through Part VII, Art. 41 powers). That is, no member state of the UN may carry on normalized commercial transactions with North Korea and North Korean officials responsible for the nuclear programs may only travel outside of their country for limited reasons and may not access money located outside North Korea except for medical necessity. That is an example of an economic sanctions episode. Is it related to human rights? Well, actually only tangentially – insofar as nuclear proliferation threatens human lives. But you see how it works: one country does something that violates some norm (human rights, or environmental, or non-proliferation), and another country or countries does not like that and so reacts by saying “stop doing that or else we won’t deal with you”. The not-dealing threat works because trade brings benefits – whether the direct benefits of access to certain products not found locally or the benefits of economic gains from trade that come from specialization and efficiencies and the rest.

Now, economic sanctions can be imposed – as is the case with North Korea – by the United Nations Security Council (multilaterally); but they can also be imposed either regionally (as through the EC); or – as is most often the case – unilaterally: by one government. In addition, economic sanctions can be imposed by non-state actors (NGOs or just groups of like-minded individuals, but for lack of time, I am going to focus on *state-sponsored* sanctions.

A final word on my topic: the second angle of my talk is “preferential trade”, or, conditional preferential trade, to be more precise. That refers to benefits given to particular trade partners – particularly low, non-reciprocal tariff rates for products coming from developing countries, for example. I combine these with sanctions, because politically they are really just the other side of the sanctions coin – positive sanctions/negative sanctions – both are policy instruments to encourage the recipient to conform its behavior to what the grantor would like. The interesting thing about preferences, though, is that they are treated quite separately from the point of view of the World Trade Organization’s legal system. But first things first...

## What are Economic Sanctions?

As a first step, it is necessary to define “economic sanctions” and give you a couple of terms used in the sanctions literature. What I mean when I say “economic sanction” is an action of restricting economic activities or an action that does not liberalize economic activities taken by one party (*the “sender”*) in order to influence the behavior of another party (*the “target”*). Included in this definitions – and this is important – are actions by which the sender expresses dissatisfaction with the policies or practices of the target *without any objective likelihood of changing* the target’s behavior.

There are many types of economic sanctioning measures available to states. Some could be called *pure trade sanctions* (limiting the types or number of goods coming from or going to the target), some economic sanctions aim more at flows of money: *financial sanctions* (prohibiting new investments in the target state, freezing the bank accounts of persons believed to be influential policy-makers within a targeted regime or organization, freezing the flow of financial funds or loans); others have *mixed* characteristics of trade and non-trade sanctions, blurring the boundaries between economic and military (like the ending of trade in technology) or economic and diplomatic measures (like travel restrictions or the ending of exchange programs).

## Are Economic Sanctions Legal?

Throughout history, sovereigns have used various forms of economic sanctions against one another to achieve what could not be achieved through traditional diplomacy alone. Often used as either a forerunner to military action or as a complement to war, sanctions have also been used as a way of saying “we don’t like what you are doing”. As a tool of policy, the use of economic sanctions has a long history of being a legitimate instrument of persuasion. The state’s right to employ economic measures to its own interest – as opposed to military measures – was never seriously questioned until the later years of the Twentieth Century. That is, for the three thousand or so years from the Ancient Greeks right through the early post-World War II multilateralist system, the legality of the use of economic sanctions as a political instrument went basically unquestioned.

The first challenge to the legality of economic sanctions came from the 1960s beginnings of the concept of the New International Economic Order (NIEO). This challenge stemmed from the political fact that *senders* of economic sanctions were almost always wealthy industrial states and the *targets* more often than not were newly independent or developing. This constellation spurred the adoption of two General Assembly Resolutions condemning the use of economic sanctions on the basis of international law principle that prohibits states from interfering in one another’s “domestic affairs”. In 1965, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty declared:

1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.

2. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. (...) <sup>1</sup>

Just five years later, Resolution 2625<sup>2</sup> adopted the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (the Declaration on Friendly Relations). The Declaration on Friendly Relations also implies that economic sanctions use violates the general international law principles of non-interference:

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to seize from it advantages of any kind. (...) <sup>3</sup>

So, is the imposition of an economic sanctions program a measure of economic “coercion”? While it was clearly thought so in Resolution 2131, in the context of the Declaration, the question has been debated from the beginning. Despite the support of many economically and/or politically weak states, claims that would recognize the imposition of economic sanctions as illegal (or even politically unacceptable) intervention have not succeeded either in rising to the level of general acceptance or in stopping their use to any measurable degree.

Despite the Resolutions, however, the condemnation of the use of sanctions did not catch on with the majority of international lawyers. In part this was because economic sanctions were seen as a means of forcing human rights protection – or at least of protesting human rights abuses: the sanctions against Rhodesia (Zimbabwe) and South Africa typified such an approach. But politically, too, the idea of sanctions as a “moral alternative to war” persisted throughout the 1990s: the UN Charter, remember, outlaws the use of military force without the Security Council’s action, so states are left with diplomatic pressure and economic measures as a means of persuasion. When diplomatic statements don’t get the change desired, it is much more comfortable to look to economic sanctions than it is to turn to illegal and costly military means.

Then, the mood – political and legal – began to change: and this was directly due to the influence of sanctions on the protection of human rights. Now, the question was not just how can sanctions help protect rights, but how can sanctions cause violations of those rights.

It was the specific case of the U.N.’s comprehensive sanctions program in Iraq that began to change the views on the acceptability of economic sanctions. As analyses revealed that not only was Saddam Hussein’s regime in Iraq nearly impervious to the economic pain inflicted by the sanctions program on his country, but more importantly, that millions of civilians (mainly children and the elderly) were dying from the direct effects of the sanctions, sanctions literature increasingly began to take on a definite anti-sanctions slant as political concern about the human costs of sanctions increased.

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<sup>1</sup> GA Res. 2131 (XX) (21 Dec. 1965).

<sup>2</sup> GA Res. 2625 (XXV) (24 Oct. 1970).

<sup>3</sup> Declaration on Principles of International Law concerning Friendly Relations, 1 (adopted by GA Res. 2625).

Political mood does not go unnoticed by the legal community, and the (il-)legality of economic sanctions again became an issue for international law at the end of the 1990s. In the face of what UN officers called “genocidal” results in Iraq, some observers began to argue that the sovereign right of states to use economic sanctions has limits corresponding to those faced by sovereigns using military sanctions: the limits imposed by humanitarian law. And, if other sanctions regimes are considered, the international law of human rights provides further protection to the populations of target states.

Along with a slight revival of the questions asked earlier as to whether economic sanctions were “uses of force”, two new questions began to be asked: can economic sanctions to protest or to end human rights abuses be considered “interventions” in *domestic affairs*? and, on the other hand, can economic sanctions be allowed under the principles of humanitarian law when, at least long-term comprehensive multilateral economic sanctions, can be just as damaging to civilian life as warfare can be?

### **Sanctions as Intervention?**

The first question goes to the issue of whether a government’s actions with regard to its own people can give other governments a legitimate interest in reacting or whether everything that a government does with regard to its own citizens is strictly “domestic”. Remember that the prohibition on intervention only would apply if a state is meddling in internal affairs – if the affairs are not domestic/internal, there is no intervention, but rather expressions of international concern. Based on a view of international relations as aiming to benefit individuals, this is one of the main arguments from the proponents of humanitarian intervention. Serious violations of human rights such as occurred in Kosovo, Rwanda, Sierra Leone, or Sudan exceed the realm of the “national” because each of us is a member of the human race, and thereby each of us has an interest in the upholding of laws protecting the integrity and well-being of persons.

The arguments surrounding the humanitarian intervention by NATO in Yugoslavia echoed earlier arguments surrounding the economic sanctions regime for Rhodesia: the 1968 words of Myres S. McDougal and W. Michael Reisman to defend the Security Council’s imposition of economic sanctions on Southern Rhodesia highlight the blurring of the domestic and the international:

“The final argument of the critics of the Security Council decision is that, even if the acts of the white Rhodesians are unlawful, they are insulated from international concern by virtue of the fact that they occur only within Rhodesia and affect no one else. This bald contention that the actions of the white Rhodesians occur only within the territorial bounds of Rhodesia is factually incorrect. In the contemporary intensely interdependent world, peoples interact not merely through the modalities of collaborative or combative operations but also through shared subjectivities – not merely through the physical movements of goods and services or exercises with armaments, but also through

communications in which they simply take each other into account. The peoples in one territorial community may realistically regard themselves as being affected by activities in another territorial community, though no goods or people cross any boundaries. *Much more important than the physical movements are the communications which peoples make to each other.*”

The recognition that there is an interplay of interests through the exchange of ideas and the expression of values – unavoidably leads to a conclusion that where a government is seriously or systematically violating the human rights of its citizens, there is very little room for a principle of complete (non-forcible as well as forcible) non-intervention to stand in the way of legitimate action by others in the international community.

### **Does Humanitarian Law Apply to Economic Sanctions?**

The second question raised was whether economic sanctions must be applied within the constraints of international humanitarian law. Based on the experience in Iraq, even economic sanctions that are clearly aimed at upholding international community norms (and thus not “interventions”) were the functional equivalent of war. Thus, many argued that, like war, economic sanctioning must adhere to minimal standards. The norms of humanitarian law primarily aim to minimize suffering during war. Thus, any program of economic sanctions, like any military operation, must permit adequate supplies of foodstuffs and medicines to reach civilian populations and ought to refrain from applying measures designed to inflict cruel punishments on even those directly responsible for the conflict. Accordingly, the economic sanctions programs implemented since the 1990s have, in fact, included provisions authorizing “humanitarian” exceptions to import prohibitions are permitted for food, medicine, and other essential goods.

A second, and related principle of humanitarian law is that of proportionality. The uses of force against an enemy are to be only enough to achieve a military objective, as more force is likely to cause unnecessary suffering. In applying economic sanctions, similarly, a gradual tightening of sanctions is seen as an appropriate method of attempting to gain compliance with the original demand.

The third fundamental principle of humanitarian law is the distinction between those responsible for a conflict (or otherwise directly involved hostilities) and those who are not. Thus, humanitarian law requires armies to discriminate between civilians and non-civilians, calling for special precautions to be taken to ensure the protection of non-combatants. In the context of economic sanctions, such a principle is transposed through the development of sanctions specifically designed to inflict economic damage only on those responsible for policy-making, while allowing others to continue their economic activities unaffected.

The Working Groups on “Smart”, or targeted, sanctions propose instruments to cause economic damage to only the leaders of uncooperative regimes: asset freezing and travel restrictions being the main ones. Although smart sanctioning requires a detailed

knowledge of both the individuals holding power in the target regime and the structure of the regime and its sources of power, and also relies on rapid and coordinated implementation of a sanctioning program, a well-crafted smart sanction should be able to maximize the chances of achieving policy change while minimizing the collateral damage to the regime's subjects.

There is much to be said for the adaptation of humanitarian principles to the needs of persons affected by economic sanctions, especially when the sanctions are comprehensive and multilateral. But for the protection of individuals' well-being, there remains a question of whether humanitarian principles alone would suffice as the measure of the limits of economic sanctions use. The question is an important one, for the context of sanctions use is not restricted to – indeed generally is not – one in which there is a military object. Humanitarian law, on the other hand, presupposes the existence of an active armed conflict. Thus, humanitarian law focuses its limitations on reducing suffering to a minimum *within* the war setting – that *some* harm is going to come to the non-combatants is likely to be the case *no matter what*, but the if level of harm can be reduced without foregoing the overall more important military goal, then behaviors should be adjusted to accommodate such a reduction.<sup>4</sup> Proportionality of harm is the key – not a prevention of it.

Whether trade sanctions in a non-war setting are legal, however, may require a stronger consideration of their collateral effects. The law of international human rights thus enters as a necessary counterpart to humanitarian law. In human rights law, there is no reason to take as necessarily unavoidable *any* level of harm. Individuals are protected by human rights principles on the basis of their humanity and no *state* goal can override the right of the individual with an *ex ante* legitimacy. While rights may need to be balanced with, for instance, other human rights or important societal rights, there is no prior existing norm to trump core human rights.

For trade sanctions use, then, the relevant difference between humanitarian and human rights law lies in the extent to which a sanction may be used at all: under the norms of humanitarian law, economic sanctions may be used in pursuance of a goal as long as they: discriminate between those responsible for the objectionable situation and those who are not (the military vs. civilian target); are a proportionate response to the problem; and reduce to a minimum the harm inflicted upon persons not responsible for the conditions triggering the sanctions. Under the norms of human rights law, no sanctions

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<sup>4</sup> See Louise Doswald-Beck and Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 293 *Int'l Rev. Red Cross* 94, 98-99 (1993) (stating that the concept of military necessity is a major characteristic of humanitarian law that finds no parallel in human rights law).

may be used that will violate the human rights of innocent individuals unless the superior human rights goals pursued will outweigh the violations for each victim. A combination of these areas of law circumscribes the permissible uses of economic sanctions in pursuance of non-trade goals, but would not prohibit their implementation.

Now, the limitations on economic sanctions so far discussed arose mainly out of the experience of UN Sanctions programs. Again, these were multilateral, comprehensive sanctions – programs that really did limit the amount of trade and economic activity.

When discussing unilateral trade sanctions, it is important to realize that the relevance of humanitarian concerns is drastically reduced. The reason for this is that for nearly all economic relations that are prohibited by the sender, the target has multiple alternative trade partners. There may be the odd exception (the United States' Cuba sanctions after the Soviet Union's assistance to Castro's government disappeared), but by and large, unilateral sanctions are going to be (1) much more narrowly focused than are comprehensive multilateral sanctions; and (2) less damaging to the target's economy as a whole, leaving certain producers and consumers at a disadvantage, but not threatening them with existential deprivations.

Basic human rights norms continue to limit the design and application of sanctions – prohibitions on discrimination based on race or gender, for instance - but there is generally a rather low likelihood of causing severe suffering on a widespread scale. Not that human rights protections should not be ensured, but they need not be over-emphasized in an analysis of a particular sanctions program's legality.

So, how does the trading system approach economic sanctions? To put it bluntly, the WTO does not permit their use unless there is a policy exception that can excuse them or unless the economic sanctions are part of a UN Security Council sanctioning effort for threats to peace. Public morals, life or health of persons – if “necessary” can be excuses, but general “human rights” concerns are not foreseen by the agreements.

Interestingly, when looking at this from the point of view of protecting human rights of target state citizens, the WTO has an inverted legal scheme: those multilateral, comprehensive sanctions episodes are given no limiting oversight (due to the exception for Security Council sanctions), while the more limited, unilateral sanctions of individual Members are permitted only under very restrictive circumstances (that is, when they fall under a general exception).

What about trade preferences made conditional upon human rights protection? Here the WTO agreements take a different approach. General national programs offering lower tariffs for development purposes *are* allowed, and what's more, the granting state may require the beneficiary to adhere to certain standards for eligibility. Just how much a

WTO Member can decide for itself whether or not to grant preferences is somewhat open – clear discrimination among similar potential recipients would probably be seen as a violation of trade obligations – but it is clear that the use of conditions in the first place is permissible.

Experience with these “Generalized Systems of Preferences” is not very complementary, however. The preferences are often only extended to certain products and, with increasingly lower tariffs, the margin of benefit is shrinking. Nevertheless, for those products and countries to which the benefits are offered, the GSP benefits do help support the trade. The question of conditions complicates matters because of the very politically-based decisions as to whose violations will actually disqualify them from receiving the benefits.

The WTO has tried to address this issue by requiring that conditional preferences be offered to all similarly situated governments. Whether this will succeed in reducing the arbitrariness remains to be seen.