ECONOMIC SANCTIONS IN IHL: SUGGESTED PRINCIPLES

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Armed conflicts are always harmful for civilians and hence all attempts should be made to avoid them. However, considering that armed conflicts do occur; economic sanctions provide States with a viable alternative. This Article illustrates the need for limitations on the use of economic sanctions. It describes the characteristics of economic sanctions and the existing International Humanitarian Law (IHL) limitations and also suggests that economic sanctions should be further regulated offering three main principles to guide these limitations: the principle of severity, according to which the most severe economic sanctions should be prohibited; the principle of effectiveness, according to which economic sanctions should be allowed only if the State imposing the sanctions can plausibly demonstrate that the sanctions are effective; and the principle of conditionality, according to which the imposing State should declare specific achievable goals for the sanctions, and lift the sanctions immediately when these goals are achieved.

INTRODUCTION

Economic sanctions, limits on trade, blockades, and other non-armed limitations have always been part of military conflicts. However, their regulation by International Humanitarian Law (IHL) has always been minimal. This Article suggests that recent developments in modern armed conflicts, as well as in modern IHL, necessitate a revision of this position, namely that economic sanctions should be regulated.

If new norms relating to the use of economic sanctions are to be adopted, they should not be based on simply copying the traditional IHL norms regarding armed conflicts. Rather, IHL principles should be adapted to fit the special nature of economic sanctions.

This Article is a response to the recent Israeli use of sanctions against the Hamas government and inhabitants of the Gaza Strip. However, the analysis is not limited to that specific instance and attempts to draw universal conclusions. In addition, it offers general principles of law which control this complicated and almost neglected field of

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warfare. This Article discusses only economic sanctions as part of the law applicable during international or non-international armed conflicts;[1] it does not deal with the question of economic sanctions in general, and its relationship to international law.[2]

The question of creating new norms in IHL is in itself complex. IHL possesses several controversial mechanisms for creating new norms, such as customary international law, especially in its modern expansive use, by which it constantly expands its realm and reinterprets norms. I do not state a position on the question of the mechanisms by which new norms are incorporated into international law; the suggestions made here can be implemented either by creating new norms or by reinterpreting old ones.

I. WHAT ARE ECONOMIC SANCTIONS? AND WHY SHOULD WE REGULATE THEM?

No universally agreed-upon definition of economic sanctions exists. For the purpose of this Article I use the definition suggested by Michael Reisman:[3]

> Economic sanctions may take many forms and may be applied unilaterally or multilaterally, but like all uses of the economic instrument, they involve the purposive threat or actual granting or withholding of economic indulgences, opportunities, and benefits

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[1] In the remainder of this Article I do not make a distinction between international and non-international armed conflicts and the relevance of the suggested principles of regulating economic sanctions. Although there are many differences between the legal regimes of international and non-international armed conflicts, it seems that when suggesting principles for the application of International Humanitarian Law it is not useful to differentiate between these two situations. *See* Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, para. 97-127 (Oct. 2, 1995).

[2] Others have dealt extensively with this question in numerous works. *See generally* BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME (1988); GARY C. HUFBAUER & JEFFREY J. SCHOTT, ECONOMIC SANCTIONS IN SUPPORT OF FOREIGN POLICY GOALS (1983); GARY C. HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY (2nd ed. 1990); M.S. DAOUDI & M.S. DAJANI, ECONOMIC SANCTIONS: IDEALS AND EXPERIENCE (1983); The Secretary-General, *Report of the Secretary-General on the Work of the Organization, Supplement to an Agenda For Peace*: Position Paper on the Occasion of the Fiftieth Anniversary of the United Nations, U.N. Doc. A/50/60-S/1995/1 (Jan. 3, 1995).

[3] W. Michael Reisman, *When are Economic Sanctions Effective? Selected Theorems and Corollaries*, 2 ILSA J. INT'L & COMPARA. L. 587 (1995-1996). *See* Susan S. Gibson, *International Economic Sanctions: The Importance of Government Structures*, 13 EMORY INT'L L. REV. 161 (1999) (discussing of the difficulty of defining economic sanctions).

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> by one actor or group of actors in order to induce another actor or group of actors to change or adjust an internal or external policy.

This definition captures the fact that economic sanctions are both wide in scope and distinct from military sanctions, the classic area in which IHL regulates the conduct of States and other actors. Economic sanctions do not involve the use of armed force, or of weapons, as is the case with classic military action, and many economic sanctions, unlike military operations, usually do not directly achieve a military result.[4] Instead of conquering a town, and thereby preventing it from being used by the enemy as a base for operation, economic sanctions pressure the enemy to change its behavior based on a "cost-benefit analysis"; the targeted Party would supposedly change its behavior if it calculates that the costs produced by sanctions are greater than those it would incur by changing its behavior. As in military sanctions, this cost-benefit analysis presupposes that the targeting State is in a position to impose such sanctions. In other words, the use of economic sanctions necessarily entails some dominance of the targeting State over the targeted State, organization, or other entity. However, this dominance is manifested by economic strength rather than military power.

Recent literature has documented some of the possibly severe consequences caused by economic sanctions.[5] For example, the economic sanctions that were imposed on Iraq by the Security Council in the 1990s[6] were considered extremely comprehensive, since they prevented Iraq's importation and exportation of numerous products. Even medicines and food were allowed to enter Iraq only in a limited manner, under the "oil for food"[7] program. Reports of these comprehensive sanctions suggest that the ramifications on the civilian population were extremely severe.[8] It is important to note, however, that generally speaking, using economic sanctions allows avoiding such catastrophic outcomes.

Civilians affected by sanctions can limit their consumption, change their habits, and use alternative resources to cope. Economic sanctions may take many other—

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[4] Although, of course, some economic sanctions do involve direct effects, as for example the prohibition of the sale of some weapons imposed on Iran. *See infra* note 87.

[5] *See, e.g.,* Joy Gordon, *When Intent Makes all the Difference in the World: Economic Sanctions on Iraq and the Accusation of Genocide*, 5 YALE H.R. & DEV. L.J. 57 (2002).

[6] S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990).

[7] *See* the U.N. Office of the Iraq Programme, Oil-for-Food, *available at* http://www.un.org/Depts/oip/ (last visited March 23, 2009).

[8] *See, e.g.,* Mohamed M. Ali & Iqbal H. Shah, *Sanctions and Child Mortality in Iraq*, 355 (9218) THE LANCET 1851 (May 27, 2000) (claiming that child mortality rates increased because of the sanctions on Iraq).

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and less comprehensive —forms and rarely result in death, which is one of the most common results of any use of military force. Hence, States have an interest in using them, thus the importance of their legal regulation.

A. DIFFERENT CATEGORIES OF SANCTIONS

Economic sanctions are used in three kinds of situations.[9]

The *first* is the unilateral resort to economic sanctions by States in order to further a policy when no state of armed conflict exists between the targeting State (the state imposing the sanctions) and targeted State (that against which the sanctions are imposed).[10] In order to further a policy's goal, one State withholds some type of economic benefit from another.[11] In some cases the goal might be economic in nature—such as the opening of one or more trade markets. In other instances the goal can be the enforcement of a universal human rights policy,[12] as was the case when States used economic sanctions against South Africa. The U.S. is recognized to have been the most aggressive imposer of economic sanctions, both for the purposes of attaining economic benefits and in order to promote human rights policies.[13] From an international perspective the regimes controlling these actions are the law of treaties (when the economic sanction is in breach of a previous treaty between the two States); the law of state responsibility; and the law of counter-measures.

The *second* situation involves imposition of economic sanctions against individual States and other entities by the UN Security Council, acting in accordance with Article 41 of the UN Charter. The Security Council has used this power in several instances.[14]

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[9] Different categorizations appear in the scholarship, see, e.g., Gibson *supra* note 3. This tripartite division is the most relevant for this Article.

[10] Arguably, one could also imagine a situation where one State has the right to respond to an attack using force, but prefers to use economic sanctions instead, especially when the initial act of aggression did not entail immediate danger to the existence of the attacked State.

[11] *See* Barry E. Carter, *International Economic Sanctions: Improving the Haphazard of U.S. Legal Regime*, 75 CAL. L. REV. 1162 (1987) (surveying and criticizing the U.S.'s use of economic sanctions).

[12] *See* Christopher Wall, *Human Rights and Economic Sanctions; The New Imperialism*, 22 FORDHAM INT'L L. J. 577 (1998-1999); Janie A. Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437 (2005-2006).

[13] *See* GEORGE E. SHAMBAUGH, STATES, FIRMS AND POWER: SUCCESSFUL SANCTIONS IN UNITED STATES FOREIGN POLICY (New York, 1999) (surveying U.S. use of economic sanctions); *see also* Buhm Suk Baek, *Economic Sanctions against Human Rights Violations*, (Cornell Law School LL.M. papers series, paper no. 11, Apr. 14, 2008).

[14] For an overview of the Sanctions used until 2000 *see* U.N. Sanctions Secretariat, Dep. of Political Affairs, Informal Background paper: *A Brief Overview of Security Council Applied Sanctions* (Dec. 3-5 2000), *available at* http://www.un.org/Docs/sc/committees/sanctions/overview.pdf

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The most aggressive cases are the sanctions imposed on Iraq in the period between the end of the first Gulf War (1991) and the outbreak of the second Gulf War in 2003.[15] According to some scholars, the impact of these sanctions on Iraqi civilians was enormous and far greater than the effects of the Gulf War itself.[16] The relevant legal regime is the powers of the Security Council, arguably with some relevance to International Human Rights Law (IHRL).[17]

The underlying principle which is shared by these first two categories of economic sanctions is that they are employed as a political alternative to the use of force.[18] In most cases, States would avoid using force and prefer to achieve their goals by resorting to a more lenient means, such as economic sanctions.[19]

In the *third* situation States uses economic sanctions as part of an armed conflict. Here, in contrast to the situation prevailing in the first two categories, economic sanctions are used as a tactical tool; they are imposed not as an alternative to the application of military pressure, but as a supplement to the use of force. These

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[15] The basic sanctions were imposed according to S.C. Res 687, U.N. Doc. S/RES/687 (Apr. 3, 1991); they were affirmed in later decisions see, e.g., S.C. Res 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

[16] *See, e.g.*, Reem Bahdi, *Iraq, Sanctions and Security: A Critique*, 9 DUKE J. GEN. L. & POL'Y 237 (2002) and sources cited there; Gordon *supra* note 5; Peggy Kozal, *Is the Continued Use of Sanctions As Implemented against Iraq a Violation of International Human Rights, 28* DENV. J. INT'L L. & POL'Y 383 (2000).

[17] Erica Cosgrove, *The Sanctions Dilemma and the Case of Iraq: Human Rights and Humanitarian Challenges to the Use of Multilateral Economic Sanctions,* 9 WINDSOR REV. OF LEG. & SOC. ISS. 65 (1999).

[18] This does not refer to the question of the legality of the use of force in the event economic sanctions alone may suffice. While a State or the Security Council may have a legal right to respond by using force, it might be that the only *legal* option open to them is economic sanctions. However, there is no proof that States actually limit their actions of self defense to the use of force only in instances they determine economic sanctions would not be effective.

[19] *See, e.g.,* U.N. Charter art. 41, 42 (It is clear that the UN charter prefers the use of economic sanctions as an *alternative* to war).

> Article 41: The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.
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> Article 42: *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. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations. (My emphasis A.C.)

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sanctions are not intended to replace military operations but rather to support them. The legal regime under which these sanctions are implemented is supposedly that of IHL, perhaps as a complimentary matter and the additional rules of IHRL, which can apply in instances when no specific norm exists under IHL.[20] Examples of such uses of economic sanctions are the Turkish/PKK struggle in the 1990s;[21] and the Israeli-Palestinian conflict in the Gaza Strip area.[22]

B. Economic Sanctions as a Viable Option in a Conflict between States

Classic IHL—which mainly focuses on military actions between States—only moderately regulates economic sanctions,[23] and applies to military actions between States, or, in some cases, within a State.[24] Most of the provisions of the laws of armed conflict, setting aside for the moment the law of occupation, regulate the use of arms. This is a logical step if the major threat to humanitarian interests and the majority of damages which can be created during wars, do indeed emanate from the use of weapons and arms.

Modern armed conflicts, however, seem to be different in several respects from those to which the *raison d'être* of classic IHL applies. In all those respects, as is immediately shown, there is reason to believe that States turn to economic sanctions as a viable option in a conflict between States, and that the effects of these sanctions are broader and more severe.[25]

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[20] Of course that is the case only if one accepts the extra-territorial application of international human rights. Even those who accept international human rights usually do so only in connection to an international armed conflict, or when controlling a territory of another State. *See, e.g.,* Banković v. Belgium, 2001-XII Eur. Ct. H.R. 333. For a different opinion, supporting the application of human rights to all acts of State see Yuval Shany & Orna Ben-Naftali, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 Isr. L. Rev. 17 (2003-4).

[21] Umit Ozdag & Ersel Aydinli, *Winning a Low Intensity Conflict: Drawing Lessons from the Turkish Case, in* Democracies and Small Wars 101-21 (Efraim Inbar ed., 2003).

[22] *See, e.g.,* Sari Bashi & Kenneth Mann, *Disengaged Occupiers: The Legal Status of Gaza* (Position Paper, Gisha: Legal Center for Freedom of Movement, 2007), *available at* http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf [hereinafter Gisha Report]

[23] Except in the most severe examples. *See* text *infra* adjacent to note 26.

[24] Parts of International Humanitarian Law apply to conflicts within a State in certain cases, when the conflict is genuinely an armed conflict, and not a mere act of banditry. *See generally* Jean Pictet, Commentary to the First Geneva Convention for the Amelioration of the Wounded and the Sick in Armed Forces in the Field 49-50 (1958). *Tadić* case, *supra* note 1, para. 70. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, para. 562 (May 7, 1997).

[25] Note that the fact that economic sanctions are more severe does not necessarily mean that they should be regulated. The next part of this Article discusses this quandary. I do not claim that

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First, many liberal democracies try to avoid, whenever possible, large-scale military operations which chance the loss of the lives of soldiers[26] as is exemplified by States use of greater quantities of air power when possible. Thus, in the Serbia-Kosovo conflict NATO forces won the war against Serbia almost without undertaking any ground operations.[27] Likewise, during the Second Lebanon War, Israel made greater use of its air power and artillery than of its ground troops.[28] Air power cannot always replace the use of ground forces, but in general the ground forces are used as measure of last resort. Economic sanctions provide States with a means of pressuring other States or non-State actors without resorting to the use of military power, a measure that inevitably carries risks to the lives of their own soldiers.[29] It is thus plausible that economic sanctions are preferable to using military force or to not using any force at all.

Second, modern warfare often does not take the form of a conflict between two States or two regular armies; instead, many times at least one of the Parties involved is a non-State actor. Because non-State actors often operate from within the civilian population, many kinds of military actions are made prohibitive. This pushes the army to use leverages and indirect actions in order to achieve its goals.[30] Economic sanctions are some of the tactics most associated with this proposition.[31] Hence, in modern conflicts, many of which are non-international in nature, the use of economic sanctions has become even more frequent.

Third, the distinction between armed conflicts and non-armed conflicts is gradually blurring. There are many on-going conflicts which involve periods of armed conflicts, when the use of arms is widespread and systematic, and periods where the armed

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economic sanctions were not used in the past, or alternatively that military sanctions will somehow disappear. Rather that economic sanctions are used frequently and widely and as a substitute for military sanctions, or as a supplementary measure.

[26] W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT'L L. 381 (1997).

[27] *See* NATO's role in Kosovo, *available at* http://www.nato.int/kosovo/history.htm.

[28] *See The War in Numbers*, JANE'S DEFENSE WEEKLY, Aug. 23, 2006 (reporting that during the campaign it is estimated that the Israel Air Force flew more than 15,000 combat missions, its artillery fired about 100,000 shells; the navy fired approximately 2500 more).

[29] The tendency of Liberal Democracies to avoid military operations which endanger the lives of their soldiers, and the difference between liberal democracies and totalitarian States in this respect was exemplified in the last stages of the Second World War. *See* MAX HASTINGS, ARMAGEDDON: GERMANY 1944-1945 (2004).

[30] *See* The Commission to Investigate the Lebanon Campaign in 2006, The Second Lebanon War, Final Rep. [unclassified version] [in Hebrew], *available at* http://www.vaadatwino.org.il/pdf/דוח%20חלקי.pdf.

[31] Avi Kober, *Modern Democracies in Low Intensity Conflict: Some Postmodern Aspects*, *in* DEMOCRACIES AND SMALL WARS, *supra* note 21, at 3-20.

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aspect of the conflict is reduced.[32] Once again, many of these situations are actually domestic conflicts.[33] In these cases, claims of relevance of IHL, which were made in non-armed conflicts now become relevant to all conflict situations. Even if the use of economic sanctions is not more common, it is hard to say which economic sanction is part of an armed conflict, and which is not.

Fourth and last, in the modern globalized world State economies are extremely interdependent. Indeed, many States are entirely dependent on external supplies for their most basic needs. Halting these supplies therefore produces severe effects on the targeted State. This enhances the opportunity to use economic sanctions and their effects become more severe.

These reasons for the growing use of economic sanctions and the abundant literature on effects of these sanctions, lead us to question the implausible dichotomy: that whilst military actions are regulated, economic sanctions are almost not. One of the several possible reasons for regulating war, surely one dominant explanation, is its potential severity.[34] However, if the effects of economic sanctions are also likely to be severe, surely we must at least consider the possibility of regulating their use as well.

II. ECONOMIC SANCTIONS IN IHL—EXISTING NORMS

Several IHL norms seem to prohibit certain economic sanctions. Naturally, most of these prohibitions are part of international law of occupation, under which the occupying

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[32] The classic conditions for declaring an internal conflict to be an armed conflict (and therefore IHL becomes applicable) are stated in *Tadić* and include: Prolonged time, severity of casualties, organization of the parties. *See Tadić*, *supra* note 1, para. 70. Modern conflicts become very hard to define according to these criteria—many constantly shift between armed and non-armed conflict—if these are really the only conditions.

[33] *See, e.g.,* the on-going conflict in Congo—which constantly shifts between short term cease fires and all out armed conflicts see Jeffrey Gettleman, *In Congo a Little Fighting Brings a Lot of Fear*, N.Y. TIMES, Nov. 3, 2008; the conflict in the region of Darfur in Sudan see generally International Commission of Inquiry on Darfur Report to the Secretary-General U.N. Doc. (Jan. 25, 2005) and *Darfur Conflict*, BBC News, *available at* http://news.bbc.co.uk/1/hi/world/africa/3496731.stm (last visited Mar. 19, 2009). A similar phenomenon is evident in the current conflict between Israel and Hamas in and around the Gaza strip. *See, e.g.*, *Gaza-Hamas Fact Sheet*, (US Embassy in Israel, Dec. 22, 2008), *available at* http://www.israelpolitik.org/wpcontent/uploads/2008/12/gaza_fact_sheet.pdf; *see also Gaza Truce May be Revived by Necessity*, N.Y. TIMES, December 19, 2008, *available at* http://www.nytimes.com/2008/12/20/world/middleeast/20mideast.html?_r=1&scp=2&sq=Ethan%20Bronner%20December%202008%20gaza&st=cse; *see also Israel and Hamas: Conflict in Gaza*, N.Y. TIMES, Jan. 4, 2009, *available at* http://www.nytimes.com/interactive/2009/01/04/world/20080104-conflict-graphic.html.

[34] *See, e.g.,* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).

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power has specific duties to care for the welfare of civilians in occupied territories.[35] Outside this distinct realm there are very few norms that relate to economic sanctions as such, and even then, only to the most severe methods of non-military sanctions. Hence, prohibiting the most severe effects of economic sanctions, even when the law of occupation does not apply, is the underlying principle of these norms.

Such examples are: prohibiting the starvation of a civilian population;[36] the duty of all Parties to care for orphaned children under the age of fifteen;[37] the specific duty of the Parties to allow the passage of medical and hospital supplies; religious accouterments and essential foodstuffs and clothing intended for children under the age of fifteen.[38] However, this duty is not unlimited: Article 23 of the Fourth Geneva Convention specifies that the passage of the abovementioned goods may be limited if the relevant party is not satisfied the goods will reach their destination and that its provisions will inevitably assist the enemy in its military effort.[39] Despite many efforts to widen the scope of this obligation, its contents are not specifically defined.[40]

There are some other similar prohibitions, but they all point to the same conclusion: Economic sanctions are prohibited only in the most severe situations, and even then in

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[35] *See* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (2004) (discussing the duties of the occupying power towards civilians in occupied territories). Some of the relevant norms are The Hague Regulations and GCIV, obligating the occupying power to supply occupied territories with essentials. The Israeli Supreme Court has famously declared that Regulation 43 to the Hague Regulation requires the Occupying power to actively promote the welfare of civilians, including building of roads, hospitals, etc. *See*; *e.g.*, HCJ 393/82 Ja'amait Ascan v. IDF Commander in Judea and Samaria [1982] IsrSC 37(4) 785; for criticism of this decision *see* DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 68-72 (2002).

[36] API, art. 54(1).

[37] GCIV, art. 24.

[38] *Id.* art. 23.

[39] *Id*:

> ... The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:
> (a) That the consignments may be diverted from their destination;
> (b) That the control may not be effective; or
> (c) That a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods...

[40] *See, e.g.*, JEAN-MARIE HENCKAERTS & LOUISE DOSWALD BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005) [hereinafter ICRC Study]. Rule 55: "The Parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control."

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a limited manner.[41] The above mentioned prohibitions (except those imposed on an occupying power) seem to have been created in a piecemeal manner. Actions which caused very severe effects on civilian populations were prohibited; however the overall strategy was to leave this area of regulation untouched.

With that said, the subject of blockades appears to be an exception to this,[42] and an attempt was made to create a principled solution. *The San Remo principles of the law of the sea* (1994)[43] a document the status of which as a source of international law is still debated, declared that the principle of proportionality is applicable to blockades

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[41] There is, of course, a possibility that even these prohibitions are not applicable to non-international armed conflicts.

[42] This Article treats blockades as a form of economic sanctions. The legal rules relating to blockades (as detailed *infra* note 43) appear to meet the criteria for economic sanctions set out in Section I *supra*—withholding of economic goods, rather than direct military attacks on military targets.

[43] MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY (2006) [hereinafter the San Remo Manual]; *see also* Louise Doswald-Beck, *The San Remo Manual on International Law Applicable to the International Law of the Sea*, 89 AM. J. INT'L L. 192 (1995) (discussing generally the Sam Remo Manual); *see especially* San Remo Manual, arts. 93-104:

> Blockade
> 93. A blockade shall be declared and notified to all belligerents and neutral States.
> 94. The declaration shall specify the commencement, duration, location, and extent of the blockade and the period within which vessels of neutral States may leave the blockaded coastline.
> 95. A blockade must be effective. The question whether a blockade is effective is a question of fact.
> 96. The force maintaining the blockade may be stationed at a distance determined by military requirements.
> 97. A blockade may be enforced and maintained by a combination of legitimate methods and means of warfare provided this combination does not result in acts inconsistent with the rules set out in this document.
> 98. Merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. Merchant vessels which, after prior warning, clearly resist capture may be attacked.
> 99. A blockade must not bar access to the ports and coasts of neutral States.
> 100. A blockade must be applied impartially to the vessels of all States.
> 101. The cessation, temporary lifting, re-establishment, extension or other alteration of a blockade must be declared and notified as in paragraphs 93 and 94.
> 102. The declaration or establishment of a blockade is prohibited if:
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> (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or.
> (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.

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as well.[44] In other words, blockades should not be allowed if the damage they cause is greater than the gains they achieve. The applicability of the proportionality principle to economic sanctions is discussed in Section IV (D).

Human right norms—which may be applicable in armed conflict alongside IHL—should be added to these aforementioned limitations.[45] The *first* is the right to life,[46] which if interpreted expansively includes rights to many essential civilian needs. The *second* is the right to food, enshrined in the International Covenant of Economic Social and Cultural Rights.[47]

The application of IHRL to "classic" armed conflicts confronts several steep barriers, perhaps even insurmountable ones. First is the question of jurisdiction; many States interpret their human rights obligations to apply solely inside their own borders, or at least only to areas which they control.[48] Second, a hierarchy exists between IHL

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103. If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:

(a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and
(b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.

104. The blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted.

[44] Sam Remo Manual, *supra* note 43.

[45] As too the general discussion of parallel application of IHL and Human Rights in armed conflicts see Ben Naftali & Shany, *supra* note 20; *Legal Consequences of the Construction of a Wall*, paras. 105-13.

[46] ICCPR, art. 6 14(1), 14(3).

[47] International Covenant on Economic, Social and Cultural Rights, art. 11, Dec, 16, 1966, 993 UNTS 3.

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

[48] *See* Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflicts and Military Occupation*, 99 AM J. INT'L L. 119 (2005) (discussing the U.S. position); *see Banković* case, *supra* note 20 (surveying the European position); *see generally* Ben -Naftali & Shany, *supra* note 20 (discussing in general the Israeli position).

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and international human rights regimes, even if we accept the proposition of parallel application.[49]

Modern armed conflicts are much more prone to be considered under IHRL than classic armed conflicts. Classic armed conflicts take place between States, where the attacking State has very little, if any, obligations to the nationals of the other State, apart from those specifically mentioned in IHL. Nevertheless, when the conflict is between two Parties within the same State, or when the attacking State has some measure of control over the attacked persons—it seems reasonable to assume that IHRL apply in parallel to IHL.

Even if human rights norms are applied, these norms do not provide an exact legal stance regarding economic sanctions. Human right norms, obligations, and prohibitions—termed in expansive and general language—were not drafted specifically with economic sanctions in mind, and hence are not attuned to the specific context of economic sanctions. Moreover, they are subject to differing interpretations and to different derogations. These norms are therefore not specific enough to be considered a comprehensive legal regulation of economic sanctions.

A. THE UNEASY RELATIONSHIP BETWEEN SANCTIONS AND COLLECTIVE PUNISHMENT

There is unmarked territory, never fully explored, that lies between the concept of economic sanctions and the prohibition on collective punishment. Collective punishment is prohibited by several specific IHL treaty norms. The Fourth Geneva Convention prohibits the use of collective punishment against civilians.[50] Additional Protocol I suggests that all manners of collective punishment are prohibited.[51] The ICRC Study lists the prohibition on collective punishment as one of the *customary* rules of IHL in both international and non-international armed conflicts.[52] Because economic sanctions are usually not directed against the persons creating the threat, or deserving the sanction,[53] claims are made that economic sanctions constitute collective

[49] *See generally* Noam Lubell, *Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate*, 40 ISR. L. REV 648 (2007) (providing a general survey of this issue).

[50] GCIV, art. 33.

[51] API, art. 75 2(d).

[52] ICRC Study, *supra* note 40, at 374 (Rule 103).

[53] Targeted persons are not necessarily citizens of the country against which the sanctions are directed. *See* Cindy G. Buys, *US Economic Sanctions: The Fairness of Targeting Persons from Third Countries,* 17 B.U. INT'L L. J. 241 (1999).

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punishment, and are therefore prohibited *per se*.[54]

At the outset it is important to point out the jurisdictional issue—collective punishment is prohibited only if persons find themselves "in the power of a party to the conflict."[55] This term is generally interpreted to include some measure of control by the State imposing the sanctions and supposedly a territorial presence of the protected persons in an area controlled by that State.[56] Hence, when economic sanctions are directed against people which are not controlled by the State, those sanctions might not be covered by this prohibition.

However, even if the jurisdictional question is overcome, the overlap between these terms remains unclear. The crux of the matter is: what exactly is included in the prohibition on collective punishment? This question has become increasingly important, particularly since Article 75 of Additional Protocol I,[57] which significantly enlarged the protection even for non-protected persons.[58]

There are several possible interpretations:

A very narrow interpretation, which seems to be rejected by the authoritative interpretation of the IHL instruments,[59] is that the prohibition on collective punishment relates only to criminal sanctions—a prohibition of instituting criminal sanctions on a collective of people (one town, a specific street, etc.,) without proving the criminal responsibility of each individual.

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[54] *See, e.g.*, Amnesty Int'l, *Trapped—Collective Punishment in Gaza*, Aug. 27, 2008, *available at* http://www.amnesty.org/en/news-and-updates/feature-stories/trapped-collective-punishment-gaza-20080827.

[55] *See supra* note 48.

[56] PICTET, *supra* note 24, para. 46; YVES SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION para. 2910 (1987).

[57] API, art. 75 which might represent Customary International Law. *See* ICRC Study, *supra* note 40, at 299.

[58] API, art. 75:

> 1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, color, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honor, convictions and religious practices of all such persons.
> 2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
>
> ...
>
> (d) Collective punishments;...

[59] SANDOZ ET AL., *supra* note 56, para. 3055.

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An alternative interpretation of the term would mean that "punishment" relates to a wider variety of sanctions applied by armed forces in times of conflict including administrative measures and other non-criminal limitations. This interpretation is supported by the ICRC Study.[60] In accordance with this expansive interpretation, various NGOs suggested that every time a good or right was limited by the Israeli government during the Gaza Strip conflict the prohibition against collective punishment was violated.[61]

This last interpretation might be extreme as it suggests that any good provided prior to the "punishing" decision must never cease to be supplied as a punishment for any actions by any individuals. If this is the meaning of collective punishment, then there is no room for economic sanctions under IHL since the essence of economic sanctions is the deprivation of goods that were previously provided. This interpretation makes little sense in the case of an international armed conflict. Let us assume the existence of two States with an ongoing trade relationship. State A provides State B with all its beef. An armed conflict erupts between these two States—does State A have an obligation to continue to supply State B with beef for its civilians (Assume State A does not claim that beef is required for the proper function of the State B army.) Can this be understood to mean that State A has an independent obligation to provide civilians with whatever goods they received prior to the armed conflict?

This idea seems illogical. An obligation to provide must be supported by an independent prohibition or requirement (e.g., the requirement to provide children under fifteen years old with medicine as mentioned previously)[62] and not by the previous conduct of the State. *First,* the assumption should still be that support of one State toward another should be premised on some kind of legal obligation. *Second,* the ultimate result of imposing such an obligation is a limitation of assistance by one State toward another and of international trade since States would be less inclined to provide other States with products, lest they be obliged to maintain the traffic even in war. *Third,* even if State A is obliged to provide the product, it might demand prices that are prohibitive. Is this acceptable or forbidden? In addition it is nonsensical that State A may end its trade with State C——with which it is at peace—but not with B—with which it is at war.

A similar analysis can be conducted with regard to a non-State actor, or with regard to an internal State conflict. If a State supplied some good or service which it

[60] ICRC Study *supra* note 40, at 374.
[61] *See supra* note 45.
[62] GCIV, art. 23.

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is not obligated to provide under any international or national law, it is not a collective punishment to withhold this good or service because of the prohibition on collective punishment.[63] A similar claim can be made about the requirement to allow the transit of goods, medicines, etc. If there is no plausible proof of any duty to allow the transit of all goods through the State's territories, there cannot be a general limit on their authority to block the transit of goods.

Therefore, what should be the relationship between collective punishment and economic sanctions? Is any retaliation forbidden?

The concept of collective punishment is clearly connected to the concept of the loss of protection. Historically, the notorious cases in which collective punishment was used are General Sherman's actions during the American Civil War[64] and the German response to anti-German activities in occupied countries during World War II.[65] In these instances, the collective punishments were clear violations of IHL which included murder and total destruction and were intended to punish the civilian population and deter it from future cooperation with the military. The prohibition on collective punishment in these cases means that the protected persons cannot lose their status, or an essential part of their protection, simply because others have committed some act which may or may not be a violation of IHL.[66]

This logic is still the basis for the prohibition on collective punishment. The correct interpretation of the prohibition on collective punishment is that it strengthens regulations of the Geneva Conventions and not another additional prohibition. There is no support of the assumption that the prohibition on collective punishment adds obligations other than those specified in the articles of the conventions. Hence, the

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[63] Of course under a different law of international law, for example—if the withholding of the good or service is done in a way which discriminates according to ethnicity—it may be prohibited.

[64] WILLIAM T. SHERMAN, Memoirs of General W.T. Sherman, ch. XXI (Library of America, 2nd ed. 1990) (1889) a transcript of the memoirs is *available at* http://www.sonshi.com/sherman.html.

[65] *See, e.g.*, the Lidice Massacre of June, 1942, for a description of this event see http://www.lidice-memorial.cz/history_en.aspx.

[66] Of course, even specific prohibitions may be subject to limitations because of actions of others see, e.g., GCIV, art. 23:

> Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores[....]
>
> The obligation of a High Contracting Party to allow the free passage of the consignments[...] is subject to the condition that the Party is satisfied that there are no reasons for fearing:
>
> (a) that the consignments may be diverted from their destination.
> (b) that the control may not be effective...

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prohibition on collective punishment is relevant only when there is a specific violation of a prohibition specified elsewhere in the Geneva Conventions.[67] If there is such a prohibition, no court judgment or administrative order can harm the rights of the population, even as a response to a prior illegal act by any individual.

In summary, regardless of the exact interpretation of the prohibition on collective punishment this prohibition does not bar the use of economic sanctions as a whole. Hence the question of the demarcation between the legal and illegal use of economic sanctions still remains without answer.

III. THE NEED FOR A SOLUTION

Should economic sanctions be regulated? Isn't it reasonable to assume that IHL is required only to regulate acts of actual military power? Why should we even consider limiting economic sanctions?

Answers to these questions may be presented from two perspectives, which respectively embody two major theories of international law.[68] The first is to determine whether it is appropriate to apply the principle of distinction or any other principle to economic sanctions. This question is based on the concept that international law is the moral and just position of the international community.[69] The second perspective requires determining whether States would agree to accept upon themselves the limitations entailed in applying the principle of distinction or any other principle to economic sanctions; it is based on the notion that international law is an embodiment of expressed agreements by States, based on interests and utility.[70]

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[67] I do not intend to discuss the general problems with the widening and the extended use of IHL standards, which contribute to the ambiguous law in these areas.

For a discussion of these issues see Amichai Cohen, *The Proportionality Principle and War in Lebanon, available at* http://ssrn.com/abstract=983436; Amichai Cohen, *Rules and Standards in the Application of International Humanitarian Law*, 41(1&2) ISR. L. REV. 41 (2008).

[68] These are not meant to be the most important theories in international law, but they represent two extremes. If these two theories support a position, is easier to assume that all theories "in between" also support them.

[69] There is a wide support for this position in various academic writings, especially with regards to human rights and humanitarian law instruments. Actually, the Martens clause which appears in several international humanitarian law treaties, specifically mentions that the rules included in these treaties is based on the common conception of morality. *See* Theodor Meron, *The Hague Peace Conferences: The Martens Clause, Principles of Humanity and Dictates of Public Conscience,* 94 AM. J. INT'L L. 78 (2000).

[70] *See, e.g.,* JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

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However, even before these issues can be discussed, two preliminary questions must be answered: should economic sanctions be regulated and what limitations should be placed on the regulations. These questions are of course intertwined. Nevertheless, the following two parts discusses them sequentially.

A. A MORAL ASSESSMENT OF LIMITATIONS ON ECONOMIC SANCTIONS

As mentioned at the beginning of the present article, the literature supplies two associated reasons for restricting economic sanctions. First, these sanctions are not inherently "limited." They can cause considerable suffering, sometimes more severe than can be caused from the use of military power.[71] Second, economic sanctions essentially target persons who do not deserve to suffer—the civilian population.[72]

These claims make sense in the classical war context. If the effects of use of military power can somehow be limited, the use of sanctions, which can create even more suffering, cannot be justified without any limitations. Does it matter if the supply of electricity to the hospital was cut off because the power station was bombed or because oil was blocked from entering and unavailable to enable its operation? The claim that the regulations of war prolong wars and hence cause more suffering in the long run was rejected regarding regulations on the use of force,[73] and hence should also not be accepted with regard to economic sanctions.

Modern wars, especially asymmetrical conflicts involving non-State actors or guerilla groups, target civilians by definition. The non-State actor uses prohibitions against attacks on civilians to strengthen its position. Perhaps the claim that applying the principle of distinction to economic sanctions encourages the non-State actor to act from within the civilian population does make sense, since the aggressor knows that the attacking party can take only limited action.[74]

This claim would also seem to apply to limitations on military actions. If military actions against civilians are regulated by IHL there is no reason why in principle there

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[71] Gordon, *supra* note 5.

[72] Anna Segall, *Economic Sanctions: Legal and Policy Constraints*, 836 INT. REV. RED CROSS 763 (1999).

[73] FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 13-14 (2001).

[74] I do not mean to claim that only non-State actors act from within civilian population, or that all non-State actors do so. However, in asymmetrical conflicts there is always the incentive for the weaker Party to act from within a civilian population because of its ineffectiveness in the open field. Symmetrical conflicts are usually between two opponents of similar strength, thus lacking a built-in strength bias. Therefore this incentive is usually not found.

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should not be limits on the use of economic sanctions. The core moral claim of IHL is based on the fact that some actions should always be limited, regardless of the nature and character of the enemy. The immorality of harm is not affected by the means employed. Differences between kinds of sanctions should be taken into account when specific limitations are concerned, as will be discussed later in this Article.

B. A REALIST PERSPECTIVE

Assuming that States do not act out of sheer commitment to moral principles, would rational States agree to accept these limitations?[75] While some States arguably act in a philanthropic manner, the reasons for their actions converge with the earlier discussion of the moral basis of the legal norms controlling economic sanctions. This section will discuss the opposite proposition: States act in a manner that they believe promotes their self-interest.

The first problem is to understand why States would even consider limiting the use of economic sanctions if those are in their interests. One reason for States to agree to limits on any military actions is the fear of reprisal. States are likely to agree to place limitations in advance on certain actions, if they are certain that the other Party would place similar limits on it.[76]

Nevertheless, as noted earlier, modern armed conflicts which lie at the crux of the interest of this Article, are asymmetrical in nature; they are waged between States and non-State actors. At first glance, if there is no State interest to create an international norm controlling classical wars, then *a fortiori* there is no interest for any state to do so in actions against a non-State actor. Why would a State limit its ability to act by limiting the type of actions it can participate in, against those it considers to be an illegitimate Party, and moreover, with respect to whom the claim of reciprocity has no relevance?[77] These arguments have indeed been raised vis-à-vis regulation of military

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[75] GOLDSMITH & POSNER *supra* note 70, at ch. 7.

[76] This is the realist justification for most of IHL rules see James D. Morrow, *The Laws of War, Common Conjectures, and Legal Systems in International Politics*, 31 J. LEG. STUD. 41 (2002); Eric A. Posner, *Terrorism and the Laws of War*, 5 CHIC. J. INT'L L. 423 (2005).

[77] Once again, I do not claim that all non-State actors never respect IHL rules. There are examples of informal agreements between States and non-State actors which limit the armed conflict and have been respected. *See, e.g.*, Adir Waldman, *Clashing Behavior, Converging Interests: A Legal Convention Regulating a Military Conflict*, 27 YALE J. INT'L L. 249 (2002) (analyzing the informal understandings between Israel and Hezbollah to limit the consequences of the conflict in Lebanon). Additionally, non-State actors can even accept the entire gamut of IHL by submitting a declaration according to Article 96 of API. What I claim is that in those cases where terrorist organizations,

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acts against non-State actors, and generally speaking, realist scholars assume that States have very little interest in accepting IHL in asymmetrical armed conflicts.[78]

In order to understand the need of States to accept limitations on the use of economic sanctions let us look at the "economics" of economic sanctions. Economic sanctions are desirable if their effects provide greater gains than their costs. If a war between two States is underway, and the gains sought from the sanctions are to end all armed resistance, the economic sanctions might prove to be extremely costly. Trade would have to be completely halted, and the targeted State would have to be brought to the brink of economic starvation, or its equivalent, in order for the sanctions to have an effect. In some, perhaps most cases, these costs would become prohibitive. States themselves would not use economic sanctions of such magnitude unless it is clear that the struggle is existential.

Modern armed conflicts are on the one hand prolonged, spanning over decades, and on the other hand, of a more limited nature. War is not necessarily directed at completely "wiping out" the enemy, but rather at achieving a set of separate military objectives that might lead to the conflict's ultimate solution. Thus, gains can be specifically defined in a limited nature and the costs are limited as well. Instead of completely depriving the adversary from all economic benefits, the State may target specific economic provisions, like electricity, specific kinds of natural resources and the like.[79]

While such use of economic sanctions then becomes reasonable, it might be tempting to abuse this tool. One possible explanation as to why States would accept limitations is the need to control future inter-State actors from overusing economic sanctions. States are rarely unified actors; within one single State several actors often operate.[80] A rational leader is likely to limit his or her options, in order to limit options of the opposition, which he or she considers irrational, a threat, or lacking any moral claims. The search would then be for those specific actions that irrational actors within a State would tend to take, and to limit those actions.

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non-State actors, guerilla groups, etc., do not respect IHL, a State has less of an interest to limit its actions against those organizations.

[78] Posner, *supra* note 76.

[79] There is extensive political science on this subject see, e.g., HANS DELBRUCK, 4 A HISTORY OF THE ART OF WAR 293-315 (Eng. ed. 1985); MARTIN VAN CREVELD, THE TRANSFORMATION OF WAR 20-25 (1991); Avi Kober, *Low Intensity Conflicts: Why the Gap between Theory and Practice,* 18(1) DEF. & SECURITY ANALYSIS 17, 31, n.10 (2002).

[80] ANN-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

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It seems that economic sanctions provide one such example as they lack a commitment to combat and hence do not risk the lives of the soldiers involved. Therefore they are regarded by politicians as a miraculous solution that involves no risks and only gains. Economic sanctions have the appearance of a panacea and a substitute to the more risky policy of committing actual forces. The truth, of course, is that economic sanctions do not always attain the desired result, especially because they are used when they are not needed, and hence impose unnecessary suffering upon civilians.[81]

In internal struggles, rational governments are likely to limit economic sanctions since after the conflict ends the State needs to fulfill its obligations in the territory affected by it. Scholars draw on the example of economic sanctions against Cuba to claim that economic sanctions are not effective and are used as an economically-irrational response to internal political pressure.[82] While these actions were not part of a war, they show the irrational behavior of States toward economic sanctions.

IV. THE NEED FOR A PRINCIPLED SOLUTION

There are two possible ways to regulate economic sanctions. One is to take the route of limited prohibitions described earlier, which may, of course, be extended in a piecemeal manner to respond to specific problems as they arise, e.g., the need to protect an electric grid or water supplies. Nonetheless, it is better to suggest an overview of principles to control this area of law and then to derive applications from these principled notions.

A. MISUNDERSTANDINGS AND INAPPROPRIATE PRINCIPLES—DISTINCTION AND PROPORTIONALITY

Some scholars suggest that the principles of distinction and proportionality are applicable to economic sanctions too. The San Remo manual appears to have accepted the proportionality principle with regards to blockades.[83]

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[81] Of course, the fact that some politicians overemphasize the benefits of economic sanctions does not make their use irrational. It only means that their use must be limited in order to be rational. My suggestions hereinafter intend to achieve exactly that.

[82] There is a strong claim that economic sanctions on Cuba are kept only because they are supported by the strong Cuban community in Florida—a key state in American politics—and not because of any effectiveness of the sanctions. *See, e.g.,* Josep M. Colomer, *Who Could End the Embargo? A Game Theoretic Perspective* 14 TRANST'L L. & CONTEMP. PROBS. 163, 172 (2004).

[83] *See* the text adjacent to *supra* note 43.

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B. DISTINCTION

One of the classic tenets of IHL is that war is to be directed against combatants. This idea is manifested in the principle of distinction, arguably the most important principle of IHL. Some scholars suggest that this principle in and by itself precludes using most economic sanctions, because economic sanctions tend to be directed against civilians or against the population as a whole.[84] In this view, economic sanctions should be allowed only when they are specifically directed against military targets.[85]

Applying the principle of distinction to this context suffers from a classic flaw of assuming that this principle already applies to economic sanctions and does not show the proof of its application. The principle of distinction mentioned in international legal instruments is always referred to in a specific context and is a conclusion induced from many different legal norms. The rules which are at the base of the principle of distinction appear, for example, in Article 51 of API which, however, relates to military attacks and makes no mention of economic sanctions. Thus, the onus remains to show a reason to apply the principle of distinction to economic sanctions.

The desirability of limiting economic sanctions by the principle of distinction needs to be assessed, using the practice of those imposing these sanctions, their experiences, and theoretical considerations.

C. THE PRACTICE OF IMPOSING ECONOMIC SANCTIONS

The principle of distinction appears to have informed some of the Security Council's recent decisions; the practice that is sometimes termed "smart sanctions." The specific sanctions on Iran are an excellent example;[86] the Security Council applied sanctions to specific firms and individuals.[87] Without doubt, should the Security Council prove

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[84] *See, e.g.*, Patrick Clawson, *Sanctions as Punishment, Enforcement, and Prelude to Further Action*, 7 ETHICS & INT'L AFF. 17, 19-20 (1993).

[85] *See, e.g.*, sanctions imposed on Iran by the Security Council S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 27, 2006); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007) which target specific persons involved in the WMD industry, weapons, corporations etc.

[86] I use the Iranian sanctions not as a legal normative analysis of economic sanctions—because there is no armed conflict of any country with Iran (yet?). However, they are examples of the practice of targeted sanctions, which I claim has only limited effect.

[87] S.C. Res. 1737 and S.C. Res. 1747, *supra* note 85.

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it is capable of halting Iran's nuclear program through these sanctions; it would be a better solution than imposing full scale economic sanctions on Iran. However, at this stage there is no basis to assume that targeted or precise economic sanctions are the only ones allowed by international law. There is also no proof that these sanctions are effective.

Due to its nature—limiting any action directed against civilians—the principle of distinction would actually mean that any sanctions apart from specifically targeted ones would be forbidden. Hence, economic sanctions would almost always be forbidden. There are several reasons to reject this conclusion. *First,* from a formal legal perspective, the prohibition on economic sanctions is not supported by any legal text, agreement, or judicial decisions. Presently, there are no limitations. Thus, the discussion here is actually an attempt to define possible limits. There is no basis to take the opposite extreme view, which supports the prohibition of all economic sanctions. If States agree that the principle of distinction should prohibit all manners of economic sanctions, this must be stated explicitly; and as of present this has not been done.

Second, if economic sanctions were prohibited, States would more easily resort to military actions; this is obviously a dangerous condition. The effects of military actions, even on the civilian population, are much more severe than those of economic sanctions. Thus, the attempt is to regulate their use, not to avoid their use or to end all conflicts.

Third, rules need to be created and enforced. A total prohibition on economic sanctions is not likely to be followed because it is diametrically opposed to the interests of many States and would be very difficult to enforce.

Therefore, the principle of distinction in its most expansive form is not appropriate in matters of economic sanctions. Not all economic sanctions, except the specifically targeted ones, are by definition prohibited. They should nonetheless be limited, and those limitations are discussed in Section V of this Article.

D. PROPORTIONALITY

The IHL principle which controls most of the military activities in asymmetrical wars is proportionality. Considering both moral issues and the actual manner in which armies conduct wars, this principle better embodies the different factors that the targeting State needs to balance. The principle of proportionality requires the targeting Party to balance the damage its actions can cause to civilians against its expected military achievements. As a justification for action, the principle of proportionality requires that the attacking

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army assess the effectiveness of its strategies.[88] The moral principle embodied in the principle of proportionality is therefore utilitarian; damage to civilians is not forbidden *per se*. Causing incidental or collateral damage to civilians (damage to civilians from attacks that were not directed against them) is a violation of law only if in the balance of utility it is clearly greater than the military advantage achieved.[89] This principle also clearly signifies that the civilian population may not be knowingly harmed if there is no military advantage—or even in the event there is no direct military advantage.

I argue that proportionality cannot be applied to the use of economic sanctions.[90] In economic sanctions the balance between the damage to the civilian population and the advantage gained by the imposing State is impossible to evaluate, and hence the principle as such cannot be applied.[91] Unlike military operations, any attempt to construct the exact damage caused by the use of economic sanctions, and even more so the specific gains it will achieve, is also impossible. All such attempts will inevitably be hypothetical and impossible to support. It seems that if economic sanctions are allowed at all, and it seems to me that they should, an alternative workable principle should be adopted. Nevertheless, we might still utilize the underlying principle of the concept of proportionality, in order to apply it to economic sanctions. When discussing economic sanctions, IHL's adaptability to include a utilitarian analysis as a moral basis for the laws of war must be accounted for.

V. PRINCIPLED LIMITATIONS APPROPRIATE FOR ECONOMIC SANCTIONS—EFFECTIVENESS AND CONDITIONALITY

If the principles of distinction and proportionality are not applicable to economic sanctions, what principles should regulate the use of these sanctions? Those are discussed in the following section.

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[88] *See generally* JUDITH GARDAM, NECESSITY AND PROPORTIONALITY IN INTERNATIONAL LAW (2000).

[89] Note that causing incidental or collateral damage is not forbidden even if the attacking party knew for a fact that damage would occur, so long as such damage does not exceed the required one, and that the damage is not excessive compared to the military objective to be achieved see API, art. 51(5) (b).

[90] Note that the issue addressed is different and wider from the question of counter-measures. Economic sanctions could of course be counter-measures, and then subject to the limitations on counter-measures, which include the limitation of proportionality. *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, art. 51, U.N. GAOR. 56th Sess. Supp. No. 10, U.N. Doc. A/56/10 (2001). Economic sanctions, however, are not necessarily counter-measures, and hence are not completely regulated as such.

[91] There is of course wide literature evaluating if the principle of proportionality can actually be applied. *See, e.g.* Yuval Shany & Amichai Cohen, *A Development of Modest Proportions: The*

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The following suggestions relating to additional limitations to be considered in an asymmetrical armed conflict do not intend to supplant existing prohibitions which regulate the most severe effects of economic sanctions, but rather to supplement them. Thus, the principle of severity should continue to apply.

A. THE DUTY TO PROVIDE

Any principled discussion of economic sanctions should consider: When is there a duty to provide, or to allow passage of goods, food medical supplies, etc.? Therefore, the discussion on economic sanctions must examine whether a duty to act can be established, independent of the discussion of economic sanctions.

On the one hand, some consider that the duty to provide is very limited,[92] perhaps limited only to these specific prohibitions specifically stated earlier in the Article.[93] It is clear that in these cases there can be no limit on providing these goods, unless it has been specifically allowed in the conventions as detailed earlier.

On the other hand, others support widening the State's scope of obligations to include all of its actions, even those outside its territories. For example, Yuval Shany and Orna Ben-Naftali claim that modern IHRL controls acts of States even outside their own territories, and toward individuals who are not their citizens.[94]

While there does not appear to be one general human rights responsibility of all States for actions outside their territory,[95] States cannot avoid this general responsibility in all cases. I revert to an earlier point raised: Adversaries in modern armed conflicts

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Application of the Principle of Proportionality in the Targeted Killings Case, 5 J. INT'L CRIM. JUS. 310 (2007); *see also* Amichai Cohen *Proportionality in the Modern Law of War: An Unenforceable Norm or the Answer to Our Problems?* 20 PERSPECTIVES (AUG. 15, 2006), *available at* http://www.biu.ac.il/SOC/besa/perspectives20.html.

[92] *See, e.g.,* Justus Reid Weiner & Avi Bell, *International Law and the Fighting in Gaza*, 1, 23-25 (Jerusalem Center for Public Affairs – Global Law Forum, Dec. 1, 2008), *available at* http://www.globallawforum.org/UserFiles/File/lawbooknovember.pdf.

[93] *Supra* Section II.

[94] *See* Ben-Naftali & Shany, *supra* note 20.

[95] In addition to the jurisdictional issues stated earlier, it seems preposterous to think that States have taken upon themselves wide human rights obligations toward any effect of their actions, even where they did not have any actual control of the area. *See Banković* case, *supra* note 20 (supporting this opinion); *cf.* in this issue Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on* Bassiouni v. The Prime Minster of Israel, 42 ISR. L. REV. 101 (2009) (discussing an alternative opinion).

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are dependent one on the other.[96] Thus, obligations do not emanate from the conflict, they antecede it. In many cases some type of prior obligation to provide exists between the Parties, whether from human rights or other sources such as post-conflict obligations, IHL, the law of occupation, or the general law of treaties.

Accordingly, in modern armed conflicts the duty to provide is in fact much stronger then in classic wars, in which adversaries may have been completely detached one from the other. In many more conflicts the dominant Party to the conflict has legal obligations toward the civilian population of the weaker Party.[97]

While a duty to provide exists, it is not without any exceptions. Any widening of the duty to provide (or to allow the provision of) goods can be limited provided. The fact that a State is in armed conflict with another State, or with forces acting from another State, might justify derogation of human rights obligations. If this is the case when should these derogations be allowed? I suggest using the following three principles: severity, effectiveness and conditionality, as measures to determine if such derogations are acceptable.

B. THE PRINCIPLE OF SEVERITY

As mentioned earlier, the traditional method of limiting economic sanctions is the principle of severity. Economic sanctions are mainly limited if their effect is too harsh on civilian populations. I suggest this as a general principle of the law of economic sanctions. Economic sanctions should never cause damage which exceeds that caused by a military operation and which is too severe. The question "what is too severe" is of course debatable, the result being that instances of severe harm should be detailed, as is the case in some IHL instruments mentioned above.[98] In effect, I suggest that current IHL already embodies most of the prohibitions resulting from this principle. While some other specific instances may be added, and perhaps other removed, the principle of severity reflects the current provisions which are part of IHL.

The principle of severity differs from that of proportionality in two main aspects: *First*, it does not look at the benefits gained by the side attacking, only at the harm to those attacked. Second and more importantly, the principle of severity is not relative. It is absolute; there are some effects of war that are unacceptable to the international

[96] *See supra* text adjacent to note 47.
[97] *Id.*
[98] IHL instruments, *supra* Section II.

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community, almost regardless of the relative gains.[99] This, of course, only applies in a very limited set of cases, where the severe consequences of the actions are most grave. The most severe instances of potential effects of economic sanctions should be avoided. I therefore support the existing prohibitions on economic sanctions detailed earlier,[100] and which follow this principle. With that said, I believe that severity should not be the exclusive principle in regulating economic sanctions.

C. The Principle of Effectiveness

Effectiveness is an additional principle that is an appropriate measure to limit economic sanctions. Accordingly, economic sanctions would be allowed only if targeting States are able to show that these sanctions are likely to be effective, i.e., the targeting Party achieves some tangible goal during the conflict by using the sanctions. A tangible goal is a measurable goal and not the general demoralization of the enemy. Preventing the use of hospitals as launching sites for missiles is one example. The ensuing paragraphs discuss "why" this limitation is suggested and "how" States measure the effectiveness of their act.

Here too both the moral and the realist perspectives are applied. Morally, the appropriate behavior per IHL, as exemplified in the principle of proportionality, is utilitarian. Harm to civilians, if unavoidable from a military perspective,[101] is allowed if the military advantage is greater than the harm caused to the civilians. The principle of effectiveness is basically the translation of the proportionality principle to the area of economic sanctions, in which civilian harm is much harder to evaluate.

Thus, the effectiveness principle is acceptable according to a realist concept of international law. Due to internal or external pressures, States sometimes resort to policies that are ineffective. It therefore makes sense for States to impose upon themselves rational decision-making strategies.[102] The limitation a State is willing to

[99] The Legality of the Threat or Use of Nuclear Weapons is used as an example that no weapon is severe enough to be totally prohibited. Apart from the fact that is quite unclear what exactly this Advisory Opinion states, it is important to note that the use of nuclear weapons, which is not prohibited, is exactly the case that economic sanctions cannot be used. No State will use economic sanctions when its existence is at stake. In any other case, it is justified to prohibit any use of sanctions.

[100] *See supra* Section III.

[101] *See, e.g.*, API, art. 57.

[102] There is an abundance of literature detailing international law as a method for imposing policies on domestic counterparts. This Article does not expound upon this issue. *See generally* Andrew Moravcsik, *A New Statecraft? Supranational Entrepreneurs and International Cooperation,*

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take upon itself is the type which directs the use of economic sanctions to an effective end: a rational limitation which takes into account the effectiveness of the proposed sanctions.

To summarize this point, from both an idealist perspective and a realist perspective, any regulations of the use of economic sanctions would be limited by their effectiveness—both as a measure for indicating a moral reason for prohibiting the use of economic sanctions and as a rational limitation which States would be willing to impose upon themselves.

D. ASSESSMENT OF EFFECTIVENESS

A major question is how to assess effectiveness. This may only be done in hindsight, according to whether the measures worked or not. Moreover, economic sanctions may take years to fully affect the State or people they were imposed against. Thus, history and practice teach lessons about economic sanctions that can be applied even before the enactment of sanction.[103]

In his survey of this matter Reisman offers eight parameters for assessing the effectiveness of economic sanctions.[104] The most important is that sanctions are effective if the target State views the possibility of accepting the conditions as at least remotely possible; i.e., economic sanctions are enacted against States ruled by rational political elites. However, sanctions which are both prolonged and widely effect the civilian population can cause the mustering of international public opinion against them. At first glance, these parameters seem paradoxical. The more responsible the adversary is, the greater the likelihood that economic sanctions will be approved for use against it. This, however, is not a real paradox. Economic sanctions are, as we

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53(2) INT'L. ORG. 267 (1999) (claiming that international human rights laws were imposed in central and eastern European countries in order to block future changes in governments and a reversion to communism) Ann-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order, in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth Eds., 2000), 199, at 216 (claiming that bankers form a transnational governmental network which bypasses decisions of domestic governments)

[103] A wide volume of writing about the effectiveness of economic sanctions exists. Some of the most recent works are: Raul Caruso, *The Impact of International Economic Sanctions on Trade—An Empirical Analysis* (2003), *available at* SSRN: http://ssrn.com/abstract=895841; Jiawen Yang et al., *US Economic Sanctions Against China: Who Gets Hurt?*, 27(7) THE WORLD ECO. 1047 (2004); Abel Escriba-Folch & Peter Wright, *Dealing with Tyranny: International Sanctions and Autocrats' Duration,* IBEI working papers 2008, *available at* http://ssrn.com/abstract=1159677; Richard W. Parker, *The Cost Effectiveness of Economic Sanctions,* 32 LAW & POL'Y IN INT'L. BUS. 21 (2000-01).

[104] Reisman, *supra* note 3.

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said, an alternative to military ones. In this manner, facing a reasonable adversary, the use of economic sanctions instead of military force is encouraged as an alternative for resolving disputes without wars. However, without any chance for this system to attain the goal of resolving the dispute, there is no justification for its use.

Two factors are sometimes overlooked when assessing the effectiveness of economic sanctions.

First, what is important to the targeting State is not always important to the targeted State. That is, supplies which are crucial to one State may be marginal to another for economic, historical, geographical or cultural reasons. Because many States fail to consider this simple fact, western powers—who because of their economic dominance and tendency to avoid military action are the most frequent users of economic sanctions—tend to impose sanctions against the supply of goods which *they* consider strategic, rather than against those that the targeted States consider strategic. Obviously, targeted States benefit from this situation: They are able to convince the western media of the severity of the sanctions, which limit their access to supposedly essential needs, but because these sanctions do not affect their essential needs, they do not bring about the exigent change of behavior.[105]

The second factor which should not be overlooked is that decision-makers in the targeted State may adopt patterns of behavior that prevent sanctions from affecting them personally or politically. In dictatorships, for instance, ruling party officials continue to receive perks and the armed forces continue to receive supplies of food and other goods despite sanctions imposed on the State.[106] Thus the sanctions target the general populace, instead of the decision-makers, and in doing so make economic sanctions s ineffective.

E. The Principle of Conditionality

Conditionality is the third possible principle which may be used to limit economic sanctions. This means that the targeting State may impose economic sanctions only after it sets conditions which specifically relate to the sanction, and the opposing party has refused to comply with them. For example, a State may require that the opposing party refrain from using specific oil for military actions. If this condition is not met, the supply of oil may be halted, even though civilians would suffer.[107]

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[105] Reisman, *supra* note 3, at 591.

[106] *Id.* at 592.

[107] As mentioned in Section V(A), this is relevant only if the State has a duty to provide oil.

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Whatever the existing rules of IHL may be, future limitations on economic sanctions should include an element of reciprocity or conditionality, from both a moral and a realist perspective.

From a moral point of view, the limited nature of economic sanctions justifies imposing them on one Party who refuses to respect the claims of the other. One main difference between military actions and economic actions is the delayed consequences of economic sanctions. A military attack affects its objects almost immediately. A bullet, once shot, cannot be stopped in midair, and if accurately directed, will surely hit the target. In this sense, persons affected by the attack cannot freely choose how to respond to the specific attack already underway. This simple fact contrasts with our basic instincts of what is moral. Kantian morality requires that each person have a clear choice as to his or her actions in response to a specific act.[108] This choice is obviously not given to people under military attack. Their choice is made before the attack actually occurs. Hence, the importance of placing limitations on attacks before they actually take place is crucial.[109] When persons under attack do have a choice, for example when they surrender, we are bound by IHL to respect this choice.

Economic sanctions are different in this respect. Time usually elapses before the most severe effects of economic sanctions are evident. For instance, if the supply of water is blocked, the population would actually feel thirst only after some time, as the target population would likely have minimal reserves in order to assure survival during the short term.[110] This gap of time leaves room for the attacked Party to change its position. Hence, we would be more open to accept a system of norms that attributes importance to the behavior of the attacked Party.

From a realist point of view, it is rational to use conditionality as a leverage to force the other Party to respect some limitations on war.[111] Realist and economic accounts of international law stress that one important reason to respect international norms is their reciprocal nature.[112] The idea of reciprocity provides both Parties in the

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[108] It is not this Article's purpose to completely analyze Kant's approach and its compatibility with current IHL. *See, e.g.*, Briand Orend, *Kant on International Law and Armed Conflict*, 11 CAN. J. L. & JURIS. 329 (1998).

[109] *See, e.g.*, API, art. 57; ICRC Study, *supra* note 40, at 51.

[110] One could imagine cases where specific economic sanctions cause immediate damage see, e.g., stopping the flow of electricity which can immediately stop life preserving medical devices. However, this Article claims that military operations are more likely to have these immediate effects and it is less likely for economic sanctions to have them.

[111] Of course, if the State does not consider it an interest it does not have to impose these limitations.

[112] *See, e.g.*, GOLDSMITH & POSNER, *supra* note 70; Kenneth Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989); Andrew

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conflict an incentive to keep their end of the bargain. This is especially important in international law, where an effective judicial system is missing.

Note the difference between this claim and the use of counter-measures or other forms of reciprocity in existing IHL. Regarding military operations, modern IHL has significantly prohibited the use of any form of counter-measures or reciprocity.[113] Historically, IHL has not been so strict. Counter-measures were an integral part of the 19th century law of armed conflict. Elsewhere I suggest that the modern application of the principle of proportionality actually embodies remnants of this earlier concept.[114] Furthermore, historically IHL was applicable almost exclusively between States, based on the assumption that only States would respect the reciprocal commitments of IHL.

As mentioned above, modern armed conflicts are between States and non-State-actors. A decision that IHL applies only between States would mean that IHL would be rarely, if at all, applied. Apart from the evident moral problems, this possibility raises also some practical and realist objections. States prefer to place limits on their use of force during armed conflicts, even if the other side does not respect these limits.[115] This however does not mean that the basic problem States confront when fighting non-State actors is solved: How do we induce the other side to respect the law, if the other party is not a State and does not even consider itself bound by IHL legally, let alone practically?

This is why States look to cause their opponent to respect IHL through reciprocity. While the question of the full application of IHL during non-international armed conflicts[116] is too complex to discuss here, I merely suggest that the principle of conditionality is excessively limited to cause non-State actors to respect IHL.

As stated earlier, the principle of conditionality requires that the targeting State specify actions to which the targeted State must comply before sanctions are lifted.

Guzman, *International Law: A Compliance Based Model*, 90 CAL. L. REV. 1823 (2002); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008). For a somewhat different account see Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHIC. L. REV. 469 (2005).

[113] GCI, art. 46, which prohibits reprisals against wounded in land; GCII, art. 47, which prohibits the reprisals against wounded and survivors of shipwrecks at sea; GCIII, art. 13, prohibits reprisals against prisoners of war; GCIV, art. 33 prohibits reprisals against civilians in occupied territories. APII, art. 51(8) states that: "Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57."

[114] Cohen, *The Proportionality Principle and War in Lebanon, supra* note 67.

[115] Posner, *supra* note 76.

[116] Ozdag & Aydinli, *supra* note 21.

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Furthermore, the application of this principle should be subject to the principles of severity and effectiveness. The result would be that when a State recognizes that the targeted Party does not respect the rules, it may impose limited and effective sanctions, provided it explicitly states the necessary actions the targeted Party needs to commit to halt the use of this sanction. Due to the reasons previously cited this position seems to be morally and realistically defensible.

F. UNDERSTANDING ISRAEL'S ACTIONS IN GAZA

Can these principles set out earlier be applicable to real life situations? The one situation, discussed not only in this Article but in other articles in this volume as well, is the economic sanctions applied by Israel to the Gaza Strip. In particular, the closing of passages between Israel and the Gaza Strip for the transfer of goods, medical supplies, etc are disussed.[117]

The basic question in this case is whether the Gaza Strip is still occupied by Israel. If the Gaza Strip is still an occupied territory, Israel has very wide obligations toward the civilian population. As stated earlier, there appears to be no derogations allowed from these specific obligations. However, the Israeli Supreme Court decided that the Gaza Strip is no longer occupied territory.[118] This decision is both criticized and justified in other articles in this volume and elsewhere.[119] Withal, for present purposes I accept the ruling that the Gaza Strip is no longer occupied. Hence, Israel's obligations to the Gaza Strip are limited to the general obligations to provide (and allow the provision of), goods and not to those of the law of occupation.

The issue before the HCJ was the Israeli Government's decision to apply economic sanctions to the Gaza Strip, controlled by the Hamas.[120] The government decided to

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[117] The details in these sections are based on the decision of the Israeli Supreme Court in HCJ 9132/07 Gaber Al-Bassiouni v. The Prime Minister [Jan. 30, 2008] (unpublished) an official English translation, *available at* http://elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf.

[118] *Id.* para.12

[119] *See, e.g.,* Shany, *supra* note 95; Yuval Shany, *Faraway, So Close: The Legal Status of Gaza after Israel's Disengagement*, 8 Y.B. INT'L HUMAN. L. 369, 373 (2005); Mustafa Mari, *The Israeli Disengagement from the Gaza Strip: An End of the Occupation?*, 8 Y.B. INT'L HUMAN. L. 356, 366 (2005); Nicholas Stephanopoulos, *Israel's Legal Obligations to Gaza After the Pullout*, 31 YALE J. INT'L L. 524, 525-26 (2006); Susan Martin, John Warner, & Patricia Fagen, *Palestinian Refugees in Gaza*, 28 FORDHAM INT'L L. J. 1457, 1464 (2004-05).

[120] Press Release issued by the Prime Minister's Office, *Security Cabinet Declares Gaza Hostile Territory,* Sept. 19, 2007, http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm [hereinafter the Gaza Strip decision]; *see*

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limit the supply of oil and electricity to the Gaza Strip, the passage of persons in and out of the Gaza Strip and the transit of goods into the strip. The decision, however, limited the sanctions based on humanitarian needs, in order to avoid a "humanitarian crisis."[121]

The HCJ decided that the government is obliged to provide oil, electricity, and goods according to the "essential humanitarian need" test. The State declared, and the Court accepted, that the duty to provide is limited to those goods required for humanitarian needs.[122] This, of course, is a level not supported by any specific obligation in IHL, as human rights organizations were quick to note.[123]

I agree with the Court's analysis, which actually provides the first condition I offered earlier: the severity of the sanctions. Nevertheless, there are two other criteria absent from the Court's and State's analysis: effectiveness and reciprocity. I do not intend to state that these examinations should be conducted by the HCJ. Some of the questions regarding effectiveness and reciprocity are complicated and their analysis needs to be executed over a long period of time, by bodies or institutions possessing specific knowledge in the field, and their considerations should therefore be revisited periodically. The question of which institution is responsible is beyond the scope of this Article.

CONCLUSION

This Article illustrated in a general manner the need for limitations on the use of economic sanctions. Parts one and two describe the characteristics of economic sanctions and the existing limitations on them in IHL. Parts three to five suggest that economic sanctions should be further regulated, and suggest general principles to guide these limitations: the principle of severity, according to which the most severe economic sanctions should be prohibited; the principle of effectiveness, according to which economic sanctions should be allowed only if the State imposing the sanctions can plausibly demonstrate that the sanctions are effective and the principle of conditionality, according to which the imposing State should declare specific

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also Al-Bassiouni v. The Prime Minister, *supra* note 117, para. 2 (noting the decision of the Israeli Cabinet from Sept. 19, 2007).

[121] The Gaza Strip decision, *supra* note 120, para. 4 ("The sanctions will be enacted following a legal examination, while taking into account both the humanitarian aspects relevant to the Gaza Strip and the intention to avoid a humanitarian crisis.").

[122] *See Al-Bassiouni v. The Prime Minister, supra* note 117.

[123] Gisha Report, *supra* note 22.

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achievable goals for the sanctions and lift the sanctions immediately when these goals are achieved.

Armed conflicts are always bad for civilians, and hence all attempts should be made to avoid them. However, considering that armed conflicts do occur, adopting such principles would lessen the damage caused by war by providing States with a viable alternative to the use of arms.

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