Alternatives to Economic Sanctions

Christine M. Chinkin
University of Michigan Law School, cchinkin@umich.edu

Available at: https://repository.law.umich.edu/book_chapters/481

Publication Information & Recommended Citation
ALTERNATIVES TO ECONOMIC SANCTIONS

Christine Chinkin

I INTRODUCTORY COMMENTS

Considering the merits of non-coercive alternatives to economic sanctions inevitably risks the charges of idealism and naivete. However a number of speakers in this conference have raised considerable doubts about the efficacy of sanctions: even on their own terms sanctions rarely work and the material costs to non-targeted states and the implications for human rights make their justification problematic, even when they can in some sense be said to have worked. It therefore makes sense at least to give consideration to some non-coercive alternatives, either in conjunction with sanctioning policies or separate from them. The other alternative is the use of force, which raises a host of other legal and moral considerations that are beyond the subject of this paper.

The question of sanctions, and alternatives to them, bring together three main areas of international law and the relationship between them:

1 the maintenance of international peace and security;
2 compliance with the international rule of law;
3 peaceful settlement of international disputes.

There are tensions between these areas. Compliance with an international rule of law suggests a vertical legal order while dispute settlement remains predicated

____________________

- Professor of International Law, London School of Economics and Political Science.

upon the consent of sovereign and equal states in a horizontal order. Further, measures imposed for the maintenance of international peace and security are not necessarily directed at resolving the underlying dispute and may even exacerbate it, thus giving rise to further non-compliance.

It is also necessary to address the purposes of sanctions. We cannot determine whether sanctions have been successful except against their function, nor weigh alternatives except against the ends we are trying to achieve. Further, their legal and moral justification rests upon the objectives sought. Of course sanctions have a number of purposes, some of which are expressed while others remain unexpressed. Under the UN Charter collective sanctions (‘measures not involving the use of armed force’) should only be imposed as part of the Security Council’s strategy to respond to a threat to international peace and security. In reality other motives often merge with, or displace, that primary objective. These include: to put an end to a state of affairs; to stop or induce change in behaviour; to achieve a particular objective; to ensure respect for and compliance with what the sanctioning body perceives as norms of international law; to limit potential damage (arms embargoes); to warn of further coercive measures to come; to serve as a rallying point in condemnation of certain behaviour; to assure domestic audiences that a response is being made to some behaviour presented as unacceptable (with the added advantage that the cost of this response is unlikely to be heavy for that domestic audience); to maintain the credibility of the sanctioning institution; to punish. These purposes and objectives may be mixed among protagonists and may vary at different times in the application of sanctions giving rise to lack of clarity in purpose and disagreement as to when the objective has been achieved.

If the major objective is punitive there may be no basis to seek alternatives, although there are important questions about their conformity with international law and their duration: how long is an appropriate ‘sentence’ in international law? If other purposes are paramount, especially those relating to behavioural change and compliance, useful insights might be gained from work in these areas. Theories of compliance and conformity with international law have moved beyond the punitive/positivist model to encompass other approaches. For example, Professor Kingsbury has pointed out that compliance is not a free-standing concept but rather that it derives its own meaning and utility from

---

1 UN Charter, articles 39 and 41. Unilateral sanctions (countermeasures) are also introduced for a range of purposes, and are subject to a separate legal regime.
different theories of law. Nor can there be a simple binary distinction between compliance and non-compliance as international practice is fluid, variable and contextual. Concepts of compliance depend upon understandings of the relations between law, behaviour, objectives and justice. It might also be useful to consider whether new perspectives can be gained for international relations from studies of sanctioning behaviour within domestic law, for example from criminology, behavioural sciences, including organizational behaviour, and evolving theories of alternative dispute resolution (ADR).

Compliance in the context of sanctions has two aspects: compliance (by all states) with the terms of the sanctions themselves and compliance (by the sanctioned state) with the underlying norms of law in question. With respect to the first, it may be that compliance is simply not appropriate for either the sanctioned state or others who must take major economic and political losses at the instance of the Security Council. To maximise the likelihood of compliance all states (or at least a sufficient number) must perceive the sanctions in Professor Franck’s terms as legitimate and fair. Regardless of their legal justification, if the imposition of sanctions is not so considered, compliance will be less forceful and may cease if sufficient states consider their duration to be excessive. Lack of transparency in Security Council decision-making and accountability for those decisions may undermine the perception of sanctions as legitimate and fair. With respect to the second, it is necessary that the sanctioned state shares the belief in the legitimacy of the norm to be enforced. Otherwise while there might be a pragmatic short-term expedient response, there is unlikely to be any long-term attitudinal change. Harold Koh has pointed to the role played by internal legitimation of norms and if this is not present sanctions are unlikely to be an effective instrument for change. International law is of course a universally applicable system – current globalisation trends both appear to strengthen this appeal to universality and undermine it through an assumption of the globalisation of values. If values are not in fact shared – and sanctions are imposed for violation of norms based upon those values – then there is unlikely to be compliance. Sanctions will then be perceived as tools of the power-

3 Ibid. at 346.
ful states to establish and enforce standards to which weaker states must con­form. The pre-eminent role of the United States both in imposing sanctions unilaterally and in championing collective sanctions through the Security Coun­cil feeds into this perception and threatens states' commitment to upholding the legal authority of the Security Council.

Internalisation of norms is especially problematic in the context of human rights. Sanctions have been increasingly imposed for humanitarian violations with ad­verse consequences for human rights. Further, violations of human rights are rarely straight-forward but bring together complex issues of political and cultural self-determination, economic restructuring and long histories of various forms of intervention which all compromise commitment to universal standards. Methods such as the world travelling notion advanced by Isabelle Gunning,6 or the cross cultural dialogue advocated by Abdullah An-Naim,7 that rest on mutual communication in an attempt to achieve understandings of the root prob­lems may in the long term be more effective than sanctions. Strategies for adv­ancing the objectives of integrating human rights throughout the work and agencies of the United Nations, co-ordination between the human rights bodies and other UN agencies, and the allocation of adequate resources for human rights monitoring and implementation all require increased attention.

Leaving the issue of legitimacy, the imposition of sanctions too often assumes a positivist approach to the violation of a rule (or rules) of international law and a belief that the punishment of wrongdoing actors will induce changed be­haviour. The greater use of international sanctions coincides with an especially punitive trend in domestic policies, most notably in the United States, that is seen in the growing prison population, longer custodial sentences, greater use of the death penalty and punishments designed to humiliate. The assumption that punishment and humiliation induce compliance is open to question. First, research suggests that it is not punishment that leads to compliance but the likelihood of sanctions being imposed. If a wrongdoing state knows that it can rely upon support within the Security Council, or that proposed sanctions against

it will be vetoed, it is more likely to continue its behaviour. This both weakens the normative order and fosters a climate of non-compliance. If, on the other hand, it is recognised that certain acts will have inevitable consequences then forbearance is more likely. Some of the rhetoric of 'zero tolerance' could be valuable here. This also relates back to the moral imperative of sanctions. The expectation that wrongdoers will be treated alike lies at the heart of the legitimacy of any criminal justice system. This is severely compromised in the international system where some wrongdoers act with impunity.

There is perhaps a feeling that the current international legal order is threatened by lawlessness, that chaos is threatening and that sanctions must be imposed to reassert authority and order in the terms of the disciplining agency. But punitive measures alone rarely work and law-breaking behaviour continues. It is perhaps comparable to disciplining a child for repeated naughty behaviour – a not infrequent response from adults that indicates frustration and anger, but does not invariably lead to change. It is also worth remembering that:

Those international lawyers who represent the current period in world history as one of order threatened by chaos … represent only one perspective: that of those who had a stake in the old world order. This story … does not describe the experience of many groups.  

For those who do not have such a stake – states that see themselves as disadvantaged by the existing order, marginalised groups, rebels challenging the internal authority of the state – sanctions will have little or no effect.

Changing perspectives to explore other theories of behavioural change for their relevance to international affairs could be attempted. One example is Braithwaite's work on restorative justice, with its emphasis on methods of reintegration. Despite the obvious dangers of transplanting domestic theories into the international arena, some thought to the underlying philosophies could be given. Technical assistance programmes of the human rights bodies, or approaches such as those of the International Labour Organization discussed in this book could be viewed in this light.

---


9 J. Braithwaite, Crime, Shame and Reintegration (Cambridge, New York, etc., 1989).
Other theories of compliance are those based upon rational choice, that those subject to sanctions will make rational responses based upon economic realities, and the institutional management model developed by Chayes and Chayes in the influential book *The New Sovereignty*. Such models require identification of the linkages that motivate economic choices and the leverage that can be used on actors. However they depend upon the assumption that targeted actors will perceive their self-interest in objective rational terms and remove from the equation the apparently irrational behaviour and messy attributes of international disputes such as nationalism, historical attachment to land etc. Nevertheless the work on compliance elsewhere in international law, such as procedures introduced under environmental treaties, should be examined by the Security Council. Environmental compliance procedures have been worked out to operate within an institutional framework and aim at providing both inducements for compliance and sanctions for non-compliance, thus combining the ‘carrot and stick’ approaches. There is a danger of the Security Council becoming compartmentalised and isolated from changing directions in other areas of international law to the detriment to its own capacity to seek innovative approaches.

II SOME NON-COERCIVE ALTERNATIVES TO SANCTIONS

Bearing in mind some of these questions of behavioural change, inclusion and participation, some alternative approaches will be briefly mentioned. None of the processes are new; rather existing processes have been adapted and moulded to changing circumstances. It is noticeable that the more frequent imposition of sanctions since 1990 has been accompanied by growing attention to devising flexible regimes for peaceful dispute settlement, which involve the participation of the alleged wrongdoer in seeking a solution to the situation. There has also been some limited greater recourse to adjudicatory methods, for example to the contentious jurisdiction of the ICJ and the reference of two disputes to the International Tribunal for the Law of the Sea.

The desirability of pre-emptive action was raised in *An Agenda for Peace* 1992 and its 1995 *Supplement* and has been reiterated by the current Secretary-General in his 2000 Report. Preventive deployment requires taking a long-term

---

view through data collection and collation to provide an early warning of situations with the potential for crisis. There is also the need for proper analysis of the data, integrated preventive strategy and the political will of the Security Council to act responsibly upon the basis of the information received. Despite the evident sense of this, states remain unwilling to take pre-emptive measures to reduce the likelihood of a subsequent threat to international peace and security, that in terms of expended resources, would be cost-effective. An example is Kosovo where events in 1989 and then in Bosnia served as warnings of the humanitarian violations that were to come. The West’s need for Milosevic to be a party to the Dayton Agreement in 1995 and the subsequent lifting of sanctions against Yugoslavia all fed into the continuation of the humanitarian abuses that eventually culminated in NATO’s actions in 1999 and the international presence in Kosovo for the foreseeable future.

A holistic view of preventive action is needed that looks at the symptoms of insecurity, including further work on the understanding of what constitutes a threat to international security. It is a truism that ‘the hidden agenda’ for peace and security is that more attention and effort must be given to pressing economic, social and environmental problems. To this end the Security Council must both seek and be open to receipt of information from such bodies as ECOSOC, the Specialised Agencies and human rights institutions and then feed such information into its decision-making. A welcome innovative step was the attendance of the Secretary-General’s Special Adviser on Children in Armed Conflict before the Security Council to give a graphic account of his work. So too has been the interaction between the Security Council and regional organizations. In turn, other agencies, including the financial institutions, must take account of the security (understanding security in this extended sense) aspects of their agendas.

An example of such a preventive measure is the establishment of the High Commissioner for National Minorities within the OSCE. The position is a manifestation of the commitment of the OSCE to the peaceful settlement of disputes in post Cold War Europe. It sees the threat to security in Europe in wide terms. The mandate of the High Commissioner is to serve as ‘an instru-

ment of conflict prevention at the earliest stages.' The High Commissioner operates independently of all parties, carries out on-site investigations and offers preventive diplomacy in an attempt to promote dialogue, confidence and cooperation. He acts as a "trip wire" to alert members to areas where threats to security cannot be contained. The OSCE has also agreed a Court of Conciliation and Arbitration. Although it can be justifiably noted that these innovations have not prevented grave conflict in Europe (and that the Court has not yet been used) they should not be discounted. Other institutions, notably the International Court of Justice, have suffered long periods of under-utilisation but nevertheless have survived to make a substantial contribution.

Preventive measures merge into processes for the peaceful settlement of disputes that are emphasised in the UN Charter, and through the concept of peacemaking, in an Agenda for Peace. The methods listed in Article 33 conform with what in domestic law have become known as ADR processes. Advocates of ADR find much common ground with the Chayes and Chayes model of international law compliance, pointing to the benefits of co-operative problem solving in which those involved explore options for settlement. Such processes represent a progression as UN Charter, chapter 6 merges into the coercive measures of chapter 7. However they should not be seen in a linear development with disputants moving from one process to another as the previous one fails. Rather they are all instruments in an armoury upon which disputants can draw separately, or in conjunction with each other, as the circumstances warrant.

In domestic arenas a great deal of work and training goes into enhancing the effectiveness of ADR methods. This includes work on seeking the appropriate process for particular types of dispute; determining the role and methods of third party facilitators; equipping third party intermediaries with skills to assist the parties in resolving their own disputes and seeking options for mutual gain. In international disputes this is all much more haphazard. International statesman, diplomats and those employed as third party facilitators may be naturally born and gifted mediators. They also may not be. Some people in these positions may have little understanding of the dynamics of ADR processes and how their potential can be harnessed. Training in the process and skills acquisition is becoming regarded as essential in domestic mediation but is apparently dispensable in international disputes. Training of potential third party facilitators and debriefing on previous attempts at dispute settlement and crisis containment should become routine so that lessons can be learned and experiences shared. A data bank of good practice developed from the work of regional and global
institutions, diplomatic staff and individuals who have acted as mediators or facilitators in international disputes should be maintained, publicised and used.

Institutionalisation (global and regional) of preventive and dispute resolution mechanisms can enhance legitimacy, expertise and resources, but the demands of the institution may impede the flow of the necessary interaction. The good offices role of the UN Secretary-General has both a preventive and dispute resolution function. While seeing it as one of the most important functions of the UN in its bringing together of investigative and mediatory techniques under the auspices of the UN, Professor Franck has noted the limitations caused by the separate political decisions of the Security Council.\(^\text{13}\) These restrict the Secretary-General’s freedom of manoeuvre and the inherent independence and flexibility of the process. Affording the third party leverage can increase the likelihood of success but raising that leverage to the level of threats of force if the settlement is not accepted (as at Rambouillet) also undermines the separate nature of the process. More attention to the ever more sophisticated analyses of ADR processes needs to be undertaken by international lawyers to identify the factors conducive to success.

Another aspect of ADR is the need to ensure maximum participation by those involved in a negotiatory process. Broad participation may however raise other tensions. For example there is the dilemma of international negotiations with an alleged violator of international law, such as a person indicted by a war crimes tribunal. Just as the ethical downside of sanctions has been addressed in this conference so too must that of non-coercive alternatives. Such negotiations, while expedient, may pave the way for further violations of international law. Further, the focus upon states in international disputes may leave out many layers of the issue. Negotiations that do not include all participants, including appropriate non-state actors, may discount important information, knowledge and relevant factors and assume a level of state control over those actors that does not exist. Any agreement reached without their participation may be practically unworkable, but state elites may be unwilling to legitimate the claims of such actors by consenting to their participation. Other issues relate to the representativeness and accountability of such non-state actors. In any given situation these questions will need addressing.

\(^{13}\) T. Franck, \textit{Fairness in International Law and Institutions} (Oxford, 1995).
Similarly, the Security Council continues to perceive the state as a unitary and monolithic entity. Sanctions are directed against the state (or occasionally at a faction within the state) with the assumption that this is the way to change the behaviour of those in control. Liberal theorists however argue that this is too simplistic and prefer to present the state as disaggregated, as comprising many different sources of power and influence from professional networks to civil society that in turn operate across state boundaries in the various manifestations of international civil society. “The autonomy of the state in the face of international military and capital structures and of connections between transnational and local interests has long been put in question ... the integrated study of a wide variety of norms and actors is long overdue.” This is equally applicable to the imposition of sanctions and to alternatives to them. Strategies should be sought that draw upon the networks that are being created and the methods that are being devised on the ground.

Attempts to locate dispute resolution closer to the arenas of dispute so as to include local perspectives and initiatives may also be beneficial. One example is that of the African Women’s Committee on Peace. This Committee is to be involved at all levels in the work of the institutions and mechanisms of the OAU for conflict prevention, management and resolution. The proposal envisages an autonomous committee comprising 16 women – 6 government representatives, 5 members from NGOs and 5 selected in their personal capacity – to coordinate with peace movements at national, regional and local levels. It is intended to ensure women's participation in all African peace initiatives, including those involving fact-finding, negotiation and mediation. It will also promote women at high decision and policy-making levels to provide information on localised issues. This vision recognises the importance of regional organizations, local knowledge and commitment. It also extends participation to ensure the inclusion of women’s voices that are most frequently excluded. It surely makes sense to bring crucial decision-making back to the zones of conflict where there is the highest stake in their settlement and a practical understanding of the obstacles. It is not suggested that any of these alternatives provide the answers, nor that they should exclude other methods, including sanctions. What is suggested is that they are worth exploring to extend the range of options for dealing with threats to international peace and security.

14 B. Kingsbury, supra, n. 2 at 371.
This conference has demonstrated the distinctive features of sanctions and examined their place in national and international legal orders. It has demonstrated that further work is needed on how these distinctive features fit into theories of compliance and behaviour change. This raises numerous other questions, some of which have been alluded to throughout the conference and which also require further research and analysis: *inter alia* are sanctions efficient; are sanctioning institutions efficient; what is meant by efficiency, and is efficiency the appropriate measure of sanctions; how do decision-making processes in the Security Council impact upon sanctioning regimes; what is the balance between internal and external factors in ensuring the effectiveness of sanctions; how do international institutions tap into those domestic factors? In considering such questions the place of non-coercive alternatives should also be scrutinised.