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# The Moral and Legal Basis for Sanctions

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**The Moral and Legal Basis for Sanctions,**  
by Anthony D'Amato, FN1 19 Fletcher Forum 19-30 (Summer/Fall1995)

**Abstract:** In order to analyze the moral and legal basis for sanctions in international relations, we have to begin at a stage where there is no centralized government in place. We first need to get a picture of the range of possible sanctions. Next, we need to see what role sanctions play in the international system. Finally, we turn to the intertwined moral and legal considerations that make well-designed sanctions efficacious in today's world. The fundamental objective of sanctions in interstate relations is to make it expensive for a target state to refrain from doing what the sanctioning state wants it to do.

**Tags:** International Relations, Herman's Ladder, Sanctions in International Relations

[pg19] When a police officer uses necessary (nonexcessive) force to subdue and a person who is in the process of committing a wrongful and illegal act, we have no moral reason to question the use of force. However, if we translate this example to international relations, there is no identifiable "police officer" because there is no world government. Thus, in order to analyze the moral and legal basis for sanctions in international relations, we have to begin at a stage where there is no centralized government in place. We first need to get a picture of the range of possible sanctions. Next, we need to see what role sanctions play in the international system. Finally, we turn to the intertwined moral and legal considerations that make well-designed sanctions efficacious in today's world.

The fundamental objective of sanctions in interstate relations is to make it expensive for a target state to refrain from doing what the sanctioning state wants it to do. This simple definition suggests two categories that can help us set a framework for discussion. The first concerns the range of sanctions—from mild to forceful—that the sanctioning state (S) can impose. The second concerns the desired acts of the target state which can either be acts that S would like T to take but has no legal right to demand, or actions that T ought to take because they are (allegedly) required by international law. The two categories relate to each other through the channels of morality and international law.

### **I. Range of Sanctions**

In 1963, Robert von Mehren, a practicing attorney in New York, and I (working on my Ph.D. dissertation at Columbia) were hired by the Hudson Institute to prepare a report on what international law dictates about uses of force short of war. We found that there is a considerable range of activities that constitute such "forceful measures" that states use in their international relations. We also found that the idea of "force" does not have sharp boundaries. For example, does "force" include threats of force? Does it include internal mobilization of troops without even mentioning any possible target state? Our [pg20] final report may have answered some questions, but it certainly raised more questions than it answered.FN2

The report found its way into the hands of Herman Kahn, who was at the time a senior analyst at the Institute. He organized our ideas and many of his own into a paradigm which he called an "escalation ladder." Today, when I ask my students how state S can influence state T, they immediately think of extremely forceful measures, such as dropping bombs on T. Herman's Ladder suggests an enormous range of things S can do that T will find unpleasant or painful.

Once I introduce Herman's Ladder to my students, their thinking about sanctions is forever changed.

Kahn's original escalation ladder had thirty-seven rungs leading at the top to all-out thermonuclear war. Kahn was concerned with describing the steps that can lead to nuclear confrontation; readers interested in this use should consult his article.<sup>FN3</sup> However, at least six of the steps of the ladder can be usefully restated as options for sanctions. The following is my brief restatement of this portion of Herman's Ladder, using his examples:

*Gestures.* S may recall an ambassador for lengthy consultation, delay negotiations on other issues, denounce a treaty, secure UN. resolutions against T, replace one of its key officials with one who is known to be "hard" Or "tough," start a publicity campaign against T, and similar gestures.

*Declarations.* S may enact legislation, or its president may issue a proclamation, demonstrating the state's resolve. The Monroe Doctrine is an example of such a declaration. *Show of Force.* S may move its airplanes or ships around, mobilize its reserves, mass its troops in a certain area, engage in "provocative" military exercises, evict T's diplomatic representatives, and test fire missiles. It might even "leak" some military combat scenarios.

*Significant Mobilization.* S may cancel its military leaves, call up special forces, and increase the military budget.

*"Legal" Harassment.* S may embargo the shipment of goods to T or its allies, actuate a "peaceful" blockade or quarantine of T's ports, interfere with T's shipping by claiming that public health or safety measures require it, freeze or confiscate T's bank deposits or other property of T or its nationals, or even arrest (on trumped-up charges) some of T's nationals who are within S's borders.

*Physical Harassment.* Bombs might be dropped on T by unauthorized or planes, its embassies may be stoned or raided, and its soldiers guarding the border may be shot. S may make limited use of paramilitary actions such as guerrilla warfare, piracy, sabotage, terror, ambushes, and border [pg21] raids. S can increase reconnaissance probing operations and engage in over flights of T's territory.

With the end of the Cold War, the discrediting of communism, the capitalist revolution, and sharply rising expectations of economic prosperity throughout the world, there will undoubtedly be a shift in much of the content of Herman's Ladder from military to economic options. To give one example of a new kind of sanction: we might see in years to come a TV commercial paid for by the United States government that depicts a whale peacefully swimming in the ocean. The scenario might be the following: a Japanese (or Norwegian) whaling vessel comes into the viewer's Sight and we see a harpoon streaking out toward the whale. The harpoon explodes upon impact; the whale convulses, and the waters turn red. The whale is pulled onto the ships deck where it is ripped open. The voiceover explains: "This is a Japanese fishing vessel operating in the peaceful waters of the Pacific Ocean under license from the Japanese government. The Japanese government tells us that this beautiful whale has been killed for the purpose of scientific research."<sup>FN4</sup> A picture is shown of a Japanese supermarket, and the camera pans to the meat section. The voiceover says: "These packages of whale meat are on sale as food in this Japanese supermarket. Scientific research? The next time you consider buying a Japanese automobile or an electronic product made in Japan, think about it. Think about the

whales swimming peacefully and minding their own business in the oceans of the world.FN5 Surely the continued broadcast of such a commercial could have a devastating effect upon Japan's (or Norway's) exports to the United States. Herman Kahn would probably have liked this example, because it is something that the United States can legally do, is entirely internal to the United States, and depends for its efficacy upon the free consumer decisions of individuals (not to buy Japanese products). Moreover, it does not easily invite retaliation in kind by the Japanese government (unless the United States were to engage in whaling).FN6 Of course, there would be ways of blunting such commercials to achieve the precise degree of desired effect, such as toning down the graphic depictions or funneling money through the CIA to a conservation group to air the same commercial. Someday we may see the emergence of marketing organizations that specialize in negative international public relations.

## [pg22] II. Desired Acts of the Target State

### A. *Discretionary Acts*

Inducing a target state to do something that is within its discretion to do—something, in other words, that is not required by international law—falls under the heading of run-of-the-mill diplomacy. You may want T to vote with you on a pending UN resolution; you may want T to sign an agreement giving you intellectual property protection; you may want T to use its influence on your behalf with a third state. The measures you might take to induce T to do these kinds of things would not normally be called "sanctions." The notion of sanctions is best reserved for the kinds of penalties imposed on someone who is violating a norm or rule of law. In an oft-quoted remark of Louis Henkin, "Almost all nations observe almost all principles of international law, and almost all of their obligations almost all of the time."FN7 So although "sanctions" are best thought of as applying to T only on those relatively rare occasions when T violates international law—the situations I will deal with in the rest of this essay—we should keep in mind that the daily stuff of foreign relations is made up of diplomatic inducements that do not involve allegations that a state is violating international law.FN8

### B. *Legally Obligatory Acts*

We turn to "sanctions" in the context of target states acting either in violation of international law or failing to act in the manner prescribed by international law. Failure to act as international law prescribes is less common than acting in violation of law, but it does occur. For example, if T fails to give normal or adequate police protection to foreign diplomats, and the diplomats are then injured by civilians, then T has failed to act in the manner prescribed by international law.FN9 In the rest of this essay, let us consider T's acts and T's failures to act as legally interchangeable.

To gain a perspective on the role of sanctions in international relations, we should begin within a nonproblematic context—their role within a single state. If the state is sufficiently advanced to have a central "sovereign" government, [pg23] then the state will have monopolized for itself the sanctioning function. The state will promulgate rules for its citizens and corporate

entities to obey—these are its statutes, legal precedents, administrative rules and regulations, and constitutional directives. The "sanctions" are simply the criminal and civil penalties, punishments, fines, disabilities, and confiscations administered through the state's judicial system. The state is a jealous possessor of the sanctioning power; it tells its citizens that "you can't take the law into your own hands." Indeed, so central to the idea of a "state" is its monopolization of the function enforcing the law that it rises almost to the level of a definition: a "state" is an entity that monopolizes the sanctioning function.

As a matter of terminology, however, we do not usually call the penalties imposed by a state upon its own citizens and corporations "sanctions." If the nations of the world were to transfer their allegiance and power to a central world government, then the term "sanctions" would probably fade away as well. We would simply talk about the World Government's authority and power to enforce the law against recalcitrant entities (the former "nations"), persons, and corporations.

Now let me suggest an unfamiliar way to look at international law. Start with the picture of a World Government, with "nations" obeying its laws. Now take away the World Government. The laws remain, nations continue to obey those laws, and even the concept of sanctions remains. Its like the grin remaining after the Cheshire Cat leaves the scene. The only real change is that there is no longer a monopolization of the sanctioning function. The sanctioning process becomes dispersed among the individual nations.

What I have just outlined could be attacked as a kind of Platonic idealism that law exists even in the absence of a central enforcement authority.FN10 I defend my position partly by invoking the insights of general systems theory. The collection of nations that we call an international system or community has as its primary goal the avoidance of war (or, more primitively stated, the avoidance of pain).A system is a kind of organic entity, its component parts interact in such a way as to promote and preserve systemic stability. War is an extremely destabilizing, disequilibrating phenomenon. From the dawn of nation states, complex rules rapidly arose in order to reduce friction between states and hence either reduce the risk of the outbreak of war or reduce the severity of war if it occurs. In this sense, international law is a natural, fundamental aspect of our empirical observation that the international system tries to avoid the disequilibrium that wars introduce.

My starting picture of international relations, therefore, is the opposite of that painted in the past by "realist" political scientists such as Hans Morgenthau. I do not agree with them that states exist in a jungle-type environment, a [pg24] Hobbesian war of all against all. I do not agree with them that international law pops up, from time to time, to deal with specific problems, but that it is fragile and easily trumped by nations that decide to resort to force. Instead, my view of international relations is more Lockean: that it is basically a system in peace, and that it strives with great ingenuity to avoid war. War signals a temporary breakdown of the system, and the system hastily attempts to repair the ruptures that caused the war and refine the rules so that states in the future can avoid going to war in circumstances of similar provocation.

The prominence given in history texts to wars is simply an artifact of historians looking for something interesting to write about. Between all the wars in history there have occurred vast

stretches of peace. But peace is boring—not the stuff that sells history books. To revise Professor Henkin's observation only slightly: almost all nations are and have been at peace with almost all other nations almost all of the time.

Systemic equilibrium is engendered by means of a vast system of rules and entitlement that we call "international law." Over time, these rules and entitlement have the effect of defining what a "state" is. This happens because new states come into being "inheriting" all the entitlement that international law gives to every state—e.g., inviolability of its boundaries; the right to send and receive ambassadors enjoying diplomatic immunity; the right to share in the global commons (the high seas, the atmosphere over the high seas, outer space); a territorial sea and contiguous zone and exclusive economic zone (if the new state borders on an ocean); the laws of neutrality that can protect the new state in the event its neighbors get into a war; and so forth.<sup>FN11</sup> The very delineation of these rights and entitlements reduces "friction" between states: For example, a state can send its fishing vessels out on the high seas and not have to send a military convoy to protect the vessel from predatory vessels from other countries. A new state, at the moment it comes into being, simply "knows" what it owns and what its rights are just from what international law prescribes.

### **III. Legal and Moral Basis for Sanctions**

#### *A. The Enforcement of Primary Rules*

Every social grouping needs some basic rules to help avoid friction. These rules work for a while. But soon it becomes evident that what is needed is a way to enforce the rules so that an antisocial person, a free rider, does not take advantage of them. A handy illustration goes back to 1920 in the United States when automobiles were beginning to appear in significant numbers. In various towns and cities, where roads intersected, traffic jams soon began occurring with some frequency, as the drivers had no way of telling who had the "right of way" at a crossroads. So the cities began installing automatic traffic signals—a red light for stop, a green light for go. By complying with these signals, traffic jams [pg25] were avoided and all drivers benefited. Compliance was voluntary, a matter of road etiquette. But after some time, a few drivers began taking advantage of the signals by "running" the red light. A sanctioning process was needed to stop free riders. Cities thereupon began enacting legislation making the traffic signals legally compulsory, and setting up a system of fines and penalties for drivers who failed to obey them.

In the early days of the formation of rules of international law,<sup>FN12</sup> compliance with the rules was voluntary. The need to avoid friction—to avoid unnecessarily antagonizing one's neighbor—was usually enough to induce a state to obey the rules. This, coupled with the perception that most of the rules were in a particular state's self-interest anyway, meant that the seeds of international law were planted on fertile soil. But soon a state a particular rule to be against its perceived interests—perhaps its interests had changed so that a formerly welcome rule now seemed to have outlived its usefulness. Like the driver who decides this time to run the red light, a state might have simply flouted the rule, thus disadvantaging its neighboring states. If the early international system was to avoid descending rapidly into disequilibrium, it needed a sanctioning procedure to safeguard its rules. But there was no central enforcement authority—no World Government. Hence the states had no alternative but to enforce the rules themselves.

Therefore international law developed, simultaneously, a set of primary rules governing the conduct of states, and a set of secondary rules governing the enforcement of the primary rules. The secondary rules, which are far less detailed than the primary rules, can be summarized by the term "proportionality." Systemic equilibrium is best maintained if enforcement measures are proportional to the severity of the violation of the primary rules. If enforcement measures go too far—if they amount to "excessive force"—then they tip the scale in the other direction and invite retaliatory force. Since states know too well that force-and-retaliation can escalate rapidly into war, and since war is the most destabilizing force in the international system, enforcement measures have been elegantly gradated from the beginning of recorded history. Diplomatic "threats" and "gestures" have been carefully refined through time.

There is no such subtlety in the examples Herman Kahn used in his Ladder. Of course, Kahn was not an international lawyer. If he had been, he would have seen that "denouncing a treaty" does not belong in the first rung. Denouncing a treaty is a highly destabilizing act because it can undermine the entire network of treaties. During the worst days of the Cold War, neither the United States nor the Soviet Union even brought up the idea of denouncing a treaty. The two nations may have gone to the brink of nuclear war during the Cuban Missile Crisis—the United States imposed a "quarantine" (a term used to soften the fact [pg26] that it was really a blockade)—but no one mentioned denouncing treaties. Throughout the Cold War, both the United States and the Soviet Union scrupulously observed all treaties that were in force between the two superpowers.

If "denouncing a treaty" belongs on a higher rung of Herman's Ladder, freezing a target state's bank accounts belongs on a lower rung. The now classic case occurred in 1978 when Iran held hostage fifty American diplomatic personnel stationed at the American Embassy in Teheran. Iran's action was the first of its kind in recorded history; it was a crystal clear violation of a primary rule of international law, the rule of diplomatic inununity.FN13 The first response the United States considered taking would have been exactly proportionate to the injury: retaliation by jailing Iranian consular and diplomatic officials who were present in the United States.FN14 But it was quickly realized that the Ayatollah Khomeini's government may not have cared very much about Iran's ambassadors, who in its eyes were "tainted" by their previous association with the deposed Shah of Iran. Indeed, Iran's decision to violate international law and jail the American diplomatic personnel may have included a resolve to "sacrifice" Iran's own diplomats for what surely would be the anticipated move by the United States. Instead, the United States surprised Iran by freezing approximately thirteen billion dollars of Iranian deposits in American banks and in various European banks under the influence or control of the United States.FN15 This sum proved to be considerably more than the value that even an otherworldly Iranian government placed on fifty human lives; eventually the Americans were sent back unharmed, and in return the accounts were unfrozen.FN16

### *B. The Morality of Sanctions*

Comprehensive sanctions are increasingly used against states for their internal transgression of international norms. The extended trade sanctions against Rhodesia and South Africa, which over time took their toll (perhaps more psychological than economic), signified the

international community's revulsion against the system of apartheid that was practiced internally in those states. The current arms embargo against Bosnia and the trade sanctions against Serbia-Montenegro are reactions by the international community against civil war in former Yugoslavia. There has been a sea change in just sixty years. Back in the 1930s, Josef Stalin presided over the murder of twenty million Soviet citizens—the biggest genocide in history. The international community observed that the purge was a purely internal affair in the Soviet Union. Today, in [pg27] contrast, the pervasiveness of "human rights" means that the international community is willing to take action against a state for what it does to its own citizens within its own borders.

This sea change has introduced a new morality to the process of international sanctions. The previous morality, as I suggested earlier, was to maintain systemic stability. This was "moral" simply because wars are immoral; indeed, war is the worst transgression of morality, especially because wars in this century have targeted innocent civilians. But wars are external affairs. What a state does to its own citizens within its own borders is not physically destabilizing to the international system—an observation which accounts for the international passivity regarding the Stalinist purge and other horrible twentieth century genocides.

There is no doubt that in recent years the mobilization of public sentiment behind sanctions gives enormous impetus to their utilization. Indeed, if we lacked this public sentiment, it would be hard to explain why governments have started to care about what other governments do internally. Left to themselves, governments would probably have reacted with the same indifference to apartheid in southern Africa and mass rape in former Yugoslavia as they reacted to Stalin's purges in the 1930s and Hitler's death camps during the Second World War.

Countries with the strongest democratic traditions and the most television sets are the leaders in urging the international community to apply sanctions against states that are engaged in human rights violations. There has never been anything like the empathic power of television to rally the moral sentiments of mankind on behalf of oppressed foreigners in foreign lands.

Although the United Nations is not shy about accepting credit when international sanctions are utilized against a state, I am not sure that it has played a leadership role. The United Nations, like the World Court, is a throwback to the pre-human rights era. Its members are states, not people. When state representatives get together, the one thing they tend to agree about is not minding each other's business. The underlying rule seems to be, "If you don't interfere in my internal affairs, I won't interfere in yours." This is, after all, what we can expect ambassadors of states to say to each other. (The less inclusive the organization, the more this observation seems true; consider the hands-off record of the Organization of American States or the Organization of African Unity with respect to the internal affairs of their own member states.) The result is an institutional antipathy to applying sanctions against a state for gross violations of human rights if those violations are confined to the state's own citizens within the state's own territory. While this institutional bias can be overcome if world public sentiment is sufficiently outraged, it nevertheless exists as a kind of braking mechanism against the actualization of human rights in today's world. For this reason, I am opposed to the current proposals for increasing the membership of the Security Council. It seems to me that adding states can result in lowering the common denominator of morality.

Although sanctions in recent years have been applied for the most part against states that have engaged in conduct that shocks the conscience, we should not assume that morality is always on the side of the sanctioning state and against the target state. The relation of morality to law is a contingent and not a necessary relation. Law can be utilized in the service of a pseudomorality or a false morality, as it was in Nazi Germany and in the apartheid regime of South Africa.

Surely we have to be vigilant against the possibility that the international impetus to apply sanctions to states that violate international law turns into a popular conviction that sanctions are mechanisms for enforcing the moral standards of mankind. But vigilance regarding sanctions is not the same thing as opposing sanctions. So long as we are having a historical "good run" in the application of sanctions against human-rights violators, the international community should "go with the flow." The more that moral sentiments are folded into the idea of enforcing international law through sanctions, the harder it may become to utilize sanctions for evil purposes.

### **Conclusion**

The most important thing about sanctions is not what they are but how they are perceived. A sanction can be any kind of unpleasantness (physical or mental) imposed upon another person or another state. If you are perceived as the initiator or "aggressor" in imposing the unpleasantness, then it is not a "sanction." In order for it to be a "sanction," you have to be perceived as imposing the unpleasantness as an appropriate response to an unpleasantness that was unfairly imposed upon you.<sup>FN17</sup> Domestic legal systems make this distinction perfectly clear: while private persons may initiate unpleasantness, the police (and other officials) are in charge of imposing sanctions. In international relations, the distinction is not as clear, but it is there. There would be no international order, no international law, without it.

As we look ahead, I suspect that although the distinction between aggression and sanctions will always remain, sanctions will become less "visible." In my view, sanctions will increasingly become economic and not military, and economic sanctions can be as invisible to the public as the adjustment of an entry on a banker's ledger that "freezes" a nation's bank account or even transfers its ownership to another nation.

The present bilateral trade relationship between the United States and China (in the spring of 1995) affords an illustration of the increasing invisibility [pg29] of sanctions. I speak now in very general terms—my purpose is to provide a conceptual example and not necessarily to reflect all the nuances of the present situation. Roughly speaking, the United States wants two major things from China: the cessation of Chinese pirating of American intellectual properties (movies, books, recordings, television shows), and an improvement in the human rights of the Chinese people. These are not reciprocal desires (the Chinese are not arguing that their intellectual property is being pirated by Americans, and they are not arguing that the American people should enjoy a higher standard of human rights). Thus the situation is not easily resolvable by treaty (i.e., we both agree to end pirating and improve human rights in our

respective countries). Rather, it is a fertile field for the application of sanctions by the United States against China. Forceful (military) sanctions are out of the question. But the United States can raise tariff barriers against the importation of Chinese goods. Hence, this is where the sanctions, if any, will be applied.

But there are inherent limitations to this kind of sanction. First, if you raise tariffs too high, you cut off all trade between the countries. This can rapidly lead to an end to communication between the two countries and a consequent escalation of the Chinese policies that we dislike. Second, raising tariffs, in an interconnected "global" market, can lead to other nations' brokering the Chinese goods (importing them and then exporting them to the United States).FN18 Third, there is a degree of tariff reciprocity between the two countries: although China at present exports more goods to the United States than it imports from the United States, American corporations are anxious to increase exports to the vast Chinese market.

Accordingly, a rather subtle adjustment of tariff barriers is needed—the U.S. government has to play the tariff game against the Chinese with the delicacy of a master musician fingering a violin. Only a portion of the threats and counter threats, posturing and gesturing, going on between the two countries becomes visible enough to be reported in the media. Moreover, the situation is characterized by the classic diplomatic dance—the country "on its own" does something (or part of something) that the second country is demanding, but does not say that it has done so in reaction to the second country's threats, while the second country, in turn, is diplomatically prudent enough not to claim that its threats had anything to do with the first country's decision. In this respect, the "sanctions" process becomes even less visible to the public.

But if the audience does not see what is happening, the players understand it very well. I have no doubt that the officials who are involved in this matter' on both the Chinese and American sides are keeping meticulous score on the "sanctions" issue as it continues to unfold. The best that we can do, as persons who are interested in understanding international relations, is to understand [pg30] that, no matter how invisible or delicate the game being played, it is still the same old game. The game, as always, involves an aggressor and a sanctioner, even though the players may change sides when different issues come up. Although we spectators are not privileged to see the game itself as it is played, we can see the evidence of the players' moves if we know what we are looking for, and we can keep our own scorecard.

### Footnotes

FN1 Copyright © 1995 Anthony D'Amato. Anthony D'Amato is Leighton Professor of Law at Northwestern University School

FN2 The report is an internal Hudson Institute document. However, a section of it has been reprinted as Chapter 2 of my book, *International Law: Process and Prospect* (Dobbs Ferry, NY: Transnational Publisher, Inc., 1987).

FN3 Herman Kahn, "Escalation and Strategic Context," in David M. Abshire & Richard V. Allen (eds.), *National Security: Political, Military, and Economic Strategies in the Decade Ahead* (New York: Praeger, 1963), 475, 478-513.

FN4 I do not make this particular charge lightly. See Anthony D'Amato & Sudhir Chopra, "Whales: Their Emerging Right to Life," 85 *AJIL* 21 (1991):

FN5 If a conservation group in the United States were to attempt to show such a commercial on television, the television studio would undoubtedly reject it on the grounds that it is too upsetting to its viewing audience. But the United States government could force the networks to show it on pain of losing their broadcast license. I assume that the government would pay to the network the going rate for airing a commercial.

FN6 However, Japan might retaliate by broadcasting depictions of American officials deciding to drop atomic bombs on Hiroshima and Nagasaki. As historian Barton Bernstein recalls, the Japanese people "seemed like yellow subhumans to many rank-and-file American citizens and many of their leaders." Barton J. Bernstein, "The Atomic Bombings Reconsidered," 74 *Foreign Affairs* (1995) 135,140. If this phrase were quoted on Japanese television as a voice-over with a mushroom cloud on the screen, the impact upon the average Japanese viewer does not require much imagination to assess.

FN7 Louis Henkin, *How Nations Behave* (2d ed., New York: Praeger, 1979), 47.

FN8 I should mention that if, in attempting to get state B to perform a discretionary act, A itself violates international law (for example, by arresting B's ambassador), then A can itself become a target of sanctions imposed by B.

FN9 *Neer Claim* (U.S. v. Mexico), 4 R. Int'l Arb. Awards 60 (1926) (lack of adequate police protection of aliens deemed a "denial of justice"). In the *Roberts Claim* (U.S. v. Mexico), 4 R. Int'l Arb. Awards 77,80 (1926), the Commissioner found that both Mexico's unreasonably long detention of Roberts prior to trial without charge, and its subjection of Roberts to cruel and unusual punishment while in prison, fell well below the minimum international standards, and that Mexico was liable in damages. In the *Kennedy Claim* (U.S. v. Mexico), 4 Int'l Arb. Awards 194, 195-99 (1927), Kennedy, a U.S. citizen and assistant manager of a mining company located in Mexico, sued the Mexican government for failure to adequately punish a mine employee known to have assaulted Kennedy in a labor confrontation. The General Claims Commission held that the two month prison sentence imposed upon Kennedy's aggressor was so out of keeping with the seriousness of the crime, which left Kennedy permanently crippled, that it constituted a denial of justice.

FN 10 H.L.A. Hart, for example, said that because international law lacks a central enforcement authority, it is a primitive kind of law. H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). I believe the exact opposite: that law is more "primitive" the more it needs a central enforcement authority! For a critique of Hart on this point, see Anthony D'Amato, "The Neo-Positivist Concept of International Law," 59 *AJIL* 321 (1965): 321-25.

FN11 See Anthony D'Amato, International Law 'Law?' " in D'Amato (editor) *International Law Anthology* (Cincinnati: Anderson Publishing, Co., 1994), 37-48.

FN12 Historically, rules of international law began forming wherever there were groupings of states—such as in ancient Babylonia, in northern Africa, in Basque Spain, in fifteenth-century Europe, or among the Italian city-states of the Renaissance. The scant historical evidence we have appears to indicate that international rules of remarkably similar content appeared in every such grouping, no matter how isolated they were from the others in space or time.

FN13 Despite the Cold War, the World Court, consisting of judges from all over the world, unanimously held that Iran had violated international law. See *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran), (1980), 3.

FN14 See *New York Times*, 13 December 1979, AI, col. 5.

FN15 See Nickel, "Battling for Iran's Frozen Billions," *Fortune Magazine*, 15 December 1980, 117.

FN16 Iran wound up losing much of the interest earned on its assets during the freeze. Considering prevailing interest rates and compounding them for the time period of the freeze, I calculate earned interest to have amounted to some two billion dollars. In the final settlement when the hostages were returned, a single payment of \$800 million was made to Iraq in settlement of its claim for interest.

FN17 The word "imposed" should not be taken too literally; recall that the unpleasantness can be physical or mental. Thus, the system of apartheid in South Africa was perceived by the rest of the world as an imposition of unpleasantness upon the entire world, even though the physical effects were felt only within South Africa.

FN18 West Germany surreptitiously made a fortune doing this kind of brokering between the United States and East Germany during the Cold War, when the latter two countries had no direct trade relations.