

EMBARGO OR BLOCKADE? THE LEGAL AND MORAL DIMENSIONS OF THE U.S. ECONOMIC SANCTIONS ON CUBA

BERTA ESPERANZA HERNÁNDEZ-TRUYOL*

I. Introduction

Cuba is always an interesting topic of conversation, regardless of where one travels. It is unique because it is one of those themes about which there is never a lukewarm feeling. Emotions always run high – whether one engages the embargo, the personalities involved, the governing philosophy of the *isla* (island), or the veracity of the data on health, information or welfare. There is no such thing as a neutral feeling about the *Perla de las Antillas* (Pearl of the Antilles).

In the almost fifty years since Fidel Castro rose to power, conversations about the country's realities epitomize the country's paradoxes. Depending on political inclinations, people from the North and the South alike describe the island as either paradise or perdition; a magnificently successful or wholly failed experiment.

* Mabie, Levin & Mabie Professor of Law, University of Florida, Levin College of Law. Many thanks to Dean Al Garcia, Professor Siegfried Wiessner, and the students of the *Intercultural Human Rights Law Review* for their kind invitation to participate in this exciting conference on the Cuban Embargo. Thanks also to Nathalie Nozile for her research assistance and Karen Kays for her word processing help. This talk is drawn, in part, from my past publications including the following: Berta E. Hernández-Truyol, *Sanctions and Sovereignty: Analysis of the Embargo Under International Legal Norms*, Special Pullout Section, in N.Y. L.J. 215 (2/20/96): S4 (col. 1); JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS IN THE AMERICAS (with Stephen Powell) (NYU PRESS, New York, 2008); *Out in Left Field: Cuba's Post-Cold War Strikeout*, 18 FORDHAM INT'L L. J. 15-117 (1994); *Cuba and Good Governance, Symposium: Whither Goes Cuba? Prospects for Economic and Social Development*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 655-683 (2004); *Building Bridges V – Cubans Without Borders: Mujeres Unidas por Su Historia (Women United by Their History)*, 55 FLA. L. REV. 225-268 (2003); and *Human Rights through a Gendered Lens: Emergence, Evolution, Revolution*, in 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS 3-39 (Kelly D. Askin & Dorean M. Koenig eds., Transnational Publishers, Inc., New York, 1999).

Experts in all relevant fields – whether it be economics or law – utilize the same data (substantiated or not) and depending on their political leanings, either praise the successes or decry the failures of the system.

Supporters of the revolution and Castro loyalists (which now means, first Fidel and then Raúl) cite to successes in health, education, and welfare data that rival those of developed states and place Cuba in the list of high development states as evidence of the wonders of the regime.¹ They also point to constitutionally mandated race and sex equality that promotes – indeed demands – participation from all in not only the political process and productive arenas but also in the reproductive sphere which results in child care, health care, and education for all.² Finally, other gems commonly showcased to confirm the desirability of the regime include a thriving tourism industry that promises visitors access to some of the most beautiful beaches in the world and cutting-edge medical training that supporters note serves not only the people of Cuba but many around the world who benefit from Cuba's generosity in sharing its doctors as well as its medical training.³ This, they say, is paradise.

On the other hand, foes of the revolution have blamed Fidel, and now his brother, for severe shortages in food and electricity and the crumbling infrastructure which was most recently evidenced by the physical destruction that occurred in the island in 2008 as the result of being hit by two major hurricanes, Gustav and Ike, within a

¹ See e.g., United Nation's Children's Fund, *The State of the World's Children 2007* (2006), available at <http://www.unicef.org/sowc07/docs/sowc07.pdf> (Table 2 figures [pp 106-109] establish that only 5% of the children in Cuba have low birth weights while the figure for the U.S. is 8%. Table 3 [pp 110-113] shows that in Cuba 91% of the population uses improved drinking water and 98% has adequate sanitation facilities; table 5 [pp. 118-121] establishes a 100% literacy rate for both men and women; Table 8 [pp. 130-133] reveals a 100% antenatal care coverage and skilled attendant at delivery rate; Table 10 [pp. 138-141] shows the same rank as the U.S. A. for under age 5 mortality).

² CUBAN CONST. art. 41-44, available at www.cubannet.org/ref/dis/const92e.htm.

³ Sarah van Gelder, *Cuba's Cure*, YES! MAGAZINE, Summer 2007, available at <http://www.yesmagazine.org/article.asp?ID=1733>.

2009]

EMBARGO OR BLOCKADE?

55

few weeks.⁴ Cuba reported the damage caused by these hurricanes at approximately U.S. \$5 billion.⁵ Beyond that, while questioning or outright refuting the data that suggests successes in health and education, the revolution's antagonists also cite to the island's economic stagnation and widespread denial of civil and political rights – such as the right to vote, lack of respect for free speech, lack of an independent judiciary, the inability to travel freely – as evidence of Cuba's blanket demise of fundamental human rights which confirms its misguided and corrupt course. This, they say, is perdition.

In the middle of this debate squarely sits the elephant in the room: the almost fifty-year old U.S. economic policy towards Cuba – the embargo that is the topic of this essay. Indeed, not even on the naming of the economic policy can the camps agree. To those antagonistic to the revolution the policy is an embargo – an economic sanction constituting a legitimate government action that legally restricts the flow of goods, services and capital to the island in order to try to influence the Castro regime into changing its undemocratic ways. Such lawful restrictions simply signal justifiable disapproval of another country's policy with the goal of changing the state's behavior that is perceived as a threat to the sanction-imposing state's national security or economic well-being. To those supportive of the regime, however, the U.S. action is a "blockade," an illegitimate use of power to try to make the state march to a different tune – one not of its own sovereign imagination or desire.

From an internationalist's perspective, two sticky points of the U.S. policy stand out. One is its express extraterritorial reach aimed

⁴ *Summary on hurricane damage in Cuba and outlook on recovery*, HAVANA JOURNAL, Sept. 12, 2008, available at <http://havanajournal.com/politics/entry/summary-on-hurricane-damage-in-cuba-and-outlook-on-recovery/> (reporting that the hurricanes damaged over 320,000 homes, destroyed agricultural production and crops, displaced over two million persons, damaged the health care infrastructure, and damaged utilities.).

⁵ *Hurricane damage in Cuba reaches US \$5 billion*, CARIBBEAN360.COM, Sept. 17, 2008, <http://www.caribbean360.com/News/Caribbean/Stories/2008/09/17/NEWS0000006330.html> (last visited May 2, 2009).

at regulating the conduct of foreign subsidiaries of U.S. companies which, under international legal principles, are nationals of the state of incorporation and not U.S. nationals. The other is the tension of the sanctions with the idea of free trade central to the World Trade Organization (WTO), the General Agreement on Tariffs and Trade (GATT), and also embraced by the North American Free Trade Agreement governing U.S.-Canada-Mexico trade. Opponents claim that the extraterritorial reach of and the barriers to trade created by the embargo violate international law. Moreover, it has a disastrous impact on the people of Cuba including establishing a roadblock to feeding the hungry or treating the sick.⁶ On the other hand, proponents of the policy argue that it is a perfectly legitimate exercise of sovereignty by the world's only surviving superpower with the valid and laudable objective of strangulating an already failed economy and bringing democracy (and thus freedom) to the people of Cuba.⁷

Two other observations are noteworthy about the embargo. One is that the Cuban community in the U.S., a politically powerful and usually united force, is deeply divided on the embargo issue, especially with respect to the most recent regulations enlarging the limitations on remittances and family travel to Cuba. Second is that while the Cuban community generally has been embraced in the U.S. as a model minority – although that has more to do with the Cold War politics that praise capitalism and denounce communism than with any impetus of non-discrimination – many in the Midwest who want to trade their agricultural products have joined the international community's (including many states with a long history of alignment with the U.S.) condemnation of the U.S. action as an invalid exercise of extraterritorial jurisdiction and thus an impermissible infringement of states' sovereignty.

This essay will evaluate the embargo and its consequences in

⁶ Anthony F. Kirkpatrick, *Role of the USA in shortage of food and medicine in Cuba*, in *The Lancet*, Nov. 30, 1996, at pg 1489-1491, available at [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(96\)07376-X/abstract](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(96)07376-X/abstract).

⁷ See Helen Osieja, *Economic Sanctions as an Instrument of U.S. Foreign Policy*, 58 (Aug. 2005) (Ph.D. dissertation, American University of London).

three parts. First, it briefly sets out the Human Rights framework within which this work scrutinizes the embargo. Following it presents a brief history of Cuba-U.S. relations including the creation and progression of the economic sanctions the U.S. has imposed on the neighboring island. Next, the essay evaluates the legality of the sanctions and concludes with a critical analysis of the impact of the sanctions.

II. The Human Rights Framework

The contemporary notion of international human rights⁸ is a relatively new concept that emerged, in its present framework, after the devastation caused by Second World War. However, the origins of human rights' law can be traced to much earlier times, including Greek stoicism. It has roots in natural law philosophy.⁹ Locke observed "certain rights self-evidently pertain to individuals as human beings . . . that, chief among them are the rights to life, liberty . . . and property."¹⁰ However, what is now "known as human rights to life, liberty, and equality were unformulated until the last decades of the eighteenth century."¹¹

Human Rights are those trappings essential to the individual's existence. Such rights "are fundamental, inviolable, interdependent,

⁸ See Berta Esperanza Hernández-Truyol, *Human Rights through a Gendered Lens*, in 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS 3-39 (Kelly D. Askin & Doreen M. Koenig eds., Transnational Publishers, Inc., New York, 1999) [hereinafter *Gendered Lens*], at 6: There are arguments that human rights are not universal but rather that they are culturally contingent. While it is important to note the universality/relativism debate, it is beyond the scope of this work to delve into such debate. Moreover, there is a framework that critiques the use of "rights" language. See also, Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE (Brown & Halley, eds., Duke University Press 2002).

⁹ *Gendered Lens*, at 6.

¹⁰ *Id.* (quoting Burns H. Weston, *Human Rights*, in ENCYCLOPEDIA BRITANNICA at 20 (15th ed., 1985), reprinted in INTERNATIONAL LAW ANTHOLOGY at 22 (Anthony D'Amato ed., 1994).

¹¹ *Id.* discussion at 11.

indivisible, and inalienable;¹² they are central to our self; moral, social, religious, legal, and political rights that concern respect and dignity associated with personhood, with a human beings' identity."¹³ The origins of human rights are traced to "religion, natural law, and contemporary moral values."¹⁴

Following the First World War, the League of Nations was born with the purpose of maintaining international peace.¹⁵ This was a time when the rival states recognized an overarching need to protect the rights of different ethnic, racial, and religious minority groups – often groups created by the shifting of national boundaries as a result of the war. Thus, even before the development of the modern human rights framework and its non-discrimination ideals, states entered into treaties with the goal of protecting minority rights.¹⁶ However, those treaties often were honored in the breach. Human rights violations within each state's borders continued and ultimately the gravest of abuses led to World War II.

After the Second World War, in 1945 the victors and others who joined them assembled in San Francisco, participated in the United Nations Conference on International Organization, and established the United Nations. Those nations signed the United Nations Charter ("the Charter"). The Member States "resolved to combine [their] efforts"¹⁷

to save succeeding generations from the scourge of war . . .
and to reaffirm faith in fundamental human rights, in the
dignity and worth of the human person, in the equal rights
of men and women . . . and to promote social progress and
better standards of life in larger freedom . . . and for these

¹² *Id.* at 5.

¹³ *Id.*

¹⁴ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 cmt. b (1987).

¹⁵ *Id.* at cmt. d.

¹⁶ *See e.g.*, *Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J. (Ser. A./B.) No. 64, at 26 (Apr. 6, 1935) (seeking to protect the religious, linguistic, and educational rights of the Greek minority in Albania), *available at* http://www.worldcourts.com/pcij/eng/decisions/1935.04.06_albania/.

¹⁷ U.N. Charter preamble.

2009]

EMBARGO OR BLOCKADE?

59

ends . . . to employ international machinery for the promotion of the economic and social advancement of all peoples¹⁸

The Charter embraces the natural rights notion that certain rights and freedoms of persons are fundamental and that States can neither give them nor take them away.¹⁹ As such, one of the Charter's purposes is to "encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . ." ²⁰

Soon after the formation of the United Nations, on December 10, 1948, the General Assembly (GA) adopted and proclaimed the Universal Declaration of Human Rights ("the Declaration").²¹ After its adoption, the GA asked the Member States to make the text of the Declaration known and "to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories."²²

The Declaration is a comprehensive document embracing, like the Charter, a natural law approach, and detailing civil and political rights as well as economic, social and cultural rights. The Declaration's preamble plainly states that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."²³ Member States commit to "the promotion of universal respect for and observance of human rights and fundamental freedoms."²⁴ The enumerated rights include many

¹⁸ *Id.*

¹⁹ *See e.g.*, U.N. Charter art. 62, para. 2. (noting that the Economic and Social Council may make recommendations to promote "respect for . . . human rights and fundamental freedoms for all"); *see also Gendered Lens, supra* note 8, at 15.

²⁰ U.N. Charter art. 1, para. 3.

²¹ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 10, 1948), *available at* <http://un.org/Overview/rights.html>.

²² *Id.*

²³ *Id.* at preamble.

²⁴ *Id.*

rights and freedoms directly pertinent to a conversation about Cuba. The Declaration includes the rights to equality,²⁵ non-discrimination,²⁶ “life, liberty and the security of person,”²⁷ freedom of religion,²⁸ freedom of opinion and expression,²⁹ peaceful assembly and association,³⁰ freedom of movement and residence within the borders of each State, as well as the freedom “to leave any country, including his own, and to return to his country.”³¹ The Declaration also prohibits slavery³² and torture,³³ and provides for a plethora of procedural rights³⁴ including the right to a fair trial. It forbids interference with privacy³⁵ and confirms the right to own property.³⁶ Significantly, it sets out the right to participate in government³⁷ as well as the rights to health³⁸ and education.

As with the Charter, there are ongoing debates about whether the Declaration is binding on the Member States. Notwithstanding such discussions, based on international legal principles, many academics have concluded that the Declaration is a legally binding instrument in part, if not in whole. Scholars observe that domestic and international legal developments support the status of the declaration as a “statement of customary international law”³⁹ even if when first drafted it was hortatory.

The drafters of the Declaration envisioned it as a blueprint for the drafting and conclusion of one covenant that would embrace, in a

²⁵ *Id.* at art. 1.

²⁶ *Id.* at art. 2.

²⁷ *Id.* at art. 3.

²⁸ *Id.* at art. 18.

²⁹ *Id.* at art. 19.

³⁰ *Id.* at art. 20.

³¹ *Id.* at art. 13.

³² *Id.* at art. 4.

³³ *Id.* at art. 5.

³⁴ *Id.* at arts. 7-11.

³⁵ *Id.* at art. 12.

³⁶ *Id.* at art. 17.

³⁷ *Id.* at art. 21.

³⁸ *Id.* at art. 25.

³⁹ *See Gendered Lens*, *supra* note 8, at 19.

legally binding and unitary way, the rights articulated in the Declaration. These would include the so-called “first generation” civil and political rights (such as the right to vote, travel, personhood, privacy, freedom of thought, peaceful assembly, association and religion) as well as the so-called “second generation” economic, social and cultural rights (such as health, education, work, social security, food, clothing, housing, and adequate standard of living). However, the dream of one covenant was foiled by the geopolitical interests of States. The so-called “First” World – the industrial states – sought to give primacy to the negative civil and political rights⁴⁰— those rights that created in individuals the right to be free from governmental interference and require no positive action by the State. On the other hand, the then-Second World (the communist/socialist states) and Third-World (the developing states most of which were just emerging from the shackles of colonialism) were primarily concerned with social and economic well-being and thus wanted to give primacy to the economic, social and cultural rights of their citizenry – rights which would create State obligations to act in a positive manner in order to give effect to the rights.

Because of such divergent world views, the goal of a unitary, all encompassing covenant failed and, instead, the articulation of rights found in the Declaration was bifurcated into two treaties each reflecting the divided world view as to which set of rights ought to be given pre-eminence: the International Covenant on Civil and Political Rights⁴¹ (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights⁴² (“ICESCR”). Significant for this work, the tension that emerged with respect to giving hierarchical preference to first or second generation rights that resulted in the bifurcation still exists today and is palpable in the Cuba-U.S. frictions. The U.S. then gave and now still gives primacy to civil and political rights. Cuba, on the other hand, takes the position originally taken by the Communist States and the

⁴⁰ *Id.* at 26.

⁴¹ International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171.

⁴² International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3.

Developing World, and ranks the social, economic, and cultural rights higher than civil and political rights.

Three final comments are necessary before concluding this brief presentation of the human rights framework. One is that the development and adoption of the human rights framework have had two major consequences in the international field. The first consequence, as was plainly articulated in the Nuremberg Judgment,⁴³ there now exists individual responsibility for international wrongs. This had the dramatic consequence of transforming individuals from being mere objects of international law to being subjects of international law. The second consequence is that rights, at least *jus cogens* rights⁴⁴ which are those rights viewed “by the international community of States as a whole” as fundamental principles or peremptory norms from which there can be no derogation, are supra-sovereign. These norms include, for example, prohibitions against genocide, slavery, and torture.⁴⁵

The second comment is that I eschew even the possibility of a hierarchy of importance rights (with the exception of *jus cogens* norms) with respect to the civil and political rights versus social, economic and cultural rights. Rather, I fully embrace the indivisibility/interdependence of rights paradigm which is established in and by the Declaration as well as the covenants themselves. Indeed, the Preamble to the ICCPR expressly recognizes that “the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his [/her] civil and political rights, as well as his [/her] economic, social

⁴³ Judgment of Nuremberg Tribunal, International Military Tribunal, Nuremberg (1946), 41 AM. J. INT. L. 172 (1947).

⁴⁴ Vienna Convention on the Law of Treaties art. 53, Jan. 27, 1980, 1155 U.N.T.S. 331.

⁴⁵ See e.g., Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment, (July 21, 2000); Suresh v. Canada (Minister of Citizenship and Immigration), 2002 S.C.C. 1 (Jan. 11, 2002); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES. § 702 (1987).

and cultural rights.” In parallel fashion, the Preambular language of the ICESCR provides that “the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his [/her] economic, social and cultural rights, as well as his [/her] civil and political rights.”

Last, I do not want the reader to conclude that because I utilize a human rights based analytical framework to scrutinize and challenge the legal and moral validity of the embargo, such a framework, in its traditional formulation, is unproblematic. To the contrary, I, as well as others, have engaged in substantial critiques of the traditional model as founded on a well-intended but limited vision as it is imbued with Western/Northern, male, Christian, propertied (Class), ability and heteropatriarchal biases. Thus, the analysis that follows envisions an inclusive, pluralistic, culturally sensitive and egalitarian (on grounds of race, sex, gender, sexuality, ethnicity, ability, language and social origin) paradigm.

III. History of the Cuban Embargo

A. The Origins⁴⁶

Cuba had been in the U.S. sphere of influence since its independence from Spain until Castro’s taking of power in 1959. At the beginning of Castro’s rule the U.S. welcomed what looked like a government that would establish a Democratic state. Castro had promised Constitutional rule, democratic elections and social reforms. However, a quick change of course by the revolutionary group who, among other things, established military tribunals for political opponents and put hundreds in jail, resulted in chilly relations commencing shortly after the revolution.

In 1960, President Eisenhower broke off relations with Cuba when the Cuban government nationalized enterprises and property located in the island that was owned by U.S. citizens.⁴⁷ It is

⁴⁶ BERTA HERNÁNDEZ-TRUYOL & STEPHEN J. POWELL, JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS 267-270 (2009).

⁴⁷ See Kern Alexander & Jon Mills, *Resolving Property Claims in a Post-Socialist Cuba*, 27 GEO. J. INT’L L. 137 (1995) (discussing the festering problems

noteworthy that these nationalizations were not a first action but rather a reaction by Castro to a July 6, 1960, congressional amendment to the Sugar Act of 1948 that permitted U.S. President Eisenhower unilaterally to reduce the quota of sugar imported from Cuba. The same day that Congress granted President Eisenhower this discretionary power, he exercised it.⁴⁸

The same day that President Eisenhower reduced the sugar quota, the Cuban Council of Ministers responded by adopting Law No. 851, which characterized the U.S. action as an “act of aggression.”⁴⁹ The law gave the Cuban President and Prime Minister the power to nationalize, by forced expropriation, property or enterprises in which American nationals had an interest—a power that Castro, too, immediately exercised, much like Eisenhower had done in the United States with respect to the sugar quota.

The U.S. reaction to the nationalizations was two-fold. One, it broke off relations with Cuba. Two, it sought to destabilize the Castro regime. To achieve this second goal, in 1960 the United States imposed an economic embargo on exports to Cuba and in 1962 imposed an embargo on imports. These actions were possible under the Trading with the Enemy Act of 1917⁵⁰ (TWEA), which allowed the President to act during peacetime and wartime emergencies. In 1977, the TWEA was amended, prospectively, to apply only in wartime.⁵¹ However, the amendments grandparents in any emergency declared prior to the enactment of the amendment could be extended year by year. This move thus allowed the

regarding Cuba’s expropriation of properties owned by the United States that led to the severance of diplomatic relations between the two).

⁴⁸ Sugar Act of 1948, Pub. L. No. 86-593, 70 Stat. 330 (1960) (regulation which granted President Eisenhower the discretionary power to unilaterally reduce the quota of sugar imported to Cuba).

⁴⁹ Cuban Law No. 851, Executive Power Resolution No. I, Official Gazette No. 16 (Special Issue), August 6, 1960; *see also* ELIHU LAUTERPACHT & C. J. GREENWOOD, 66 I.L.R. 452 (1989).

⁵⁰ Trading with the Enemy Act of 1917, 12 U.S.C. § 95a (1917).

⁵¹ Trading With The Enemy Act, Pub. L. No. 95-223, §§ 101(a), 102, and 103(b), 91 Stat. 1625, 1626 (1977). §§ 101(a), 102, and 103(b), 91 Stat. 1625, 1626 (codified at 50 U.S.C. App. § 5(b)).

grandparenting in of the U.S. embargo against Cuba.⁵² Every year since the passing of the amendment, U.S. Presidents have extended the embargo in the national interest.

In 1992, thirty years after the initial embargo, the Cuban Democracy Act⁵³ (“CDA” or “Torricelli Law”) marked a Congressional tightening of U.S. economic policy toward Cuba. The most controversial of the CDA’s provisions is the restoration of an aspect of the 1962 embargo that had been repealed in 1975 prohibiting foreign subsidiaries of U.S. corporations from doing business with Cuba. The extraterritorial reach of the CDA’s provisions, including the prohibition concerning the acts of foreign subsidiaries of U.S. Corporations, is at the heart of the virtually universal challenge to their legality under accepted international norms.⁵⁴

The international community has opposed the embargo in general, and this provision in particular, on the basis of impermissible interference with state sovereignty. Annually, since 1992 when the CDA was only pending in Congress, the European Community (as the European Union (EU) was then known) has objected in the U.N. General Assembly to the prohibition of foreign-owned subsidiaries, incorporated and domiciled outside the United States, from trading with Cuba.⁵⁵ The basis of the objection is that, under international law, the nationality of a corporate entity is the state of its incorporation. By including wholly owned subsidiaries of U.S. corporations in the jurisdictional reach of the CDA, the United States is seeking to exercise jurisdiction over corporate entities that, pursuant to international law, are foreign, that is, non-U.S. corporations.

⁵² *Id.*; see also, *Tagle v. Regan*, 643 F.2d 1058, 1059-60 (5th Cir. 1981).

⁵³ Cuban Democracy Act, 22 U.S.C. §§ 6001-6010 (1992).

⁵⁴ 22 U.S.C. §6002.

⁵⁵ G.A. Res. 47/19, U.N. Doc. A/RES/47/1 (Nov. 24, 1992) (passing by a vote of 59-3-71 and only states voting against were the United States, Israel, and Romania, with such traditional U.S. allies as Canada and France voting in favor of the resolution); see also 1992 U.N.Y.B. 234 (Yobert K. Shamapande ed., Martinus Nijhoff Publishers 1993).

Every year since the enactment of the CDA, the General Assembly has adopted resolutions entitled “Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba.” The UNGA resolutions provide that the General Assembly is “[c]oncerned about the promulgation and application by Member States of laws and regulations whose extraterritorial effects affect the sovereignty of other States and the legitimate interests of entities or persons under their jurisdiction, as well as the freedom of trade and navigation.”⁵⁶ The resolutions call upon “States to refrain from promulgating and applying laws and measures of the kind” and urge the repeal of such laws.⁵⁷

On March 12, 1996, approximately four years after the enactment of the CDA, President Bill Clinton signed into law the Cuban Liberty and Democratic Solidarity Act (Libertad),⁵⁸ commonly known as the Helms-Burton Act. This Act codified into law the economic sanctions against Cuba that had been imposed by executive orders issued by previous presidents under the TWEA. It not only strengthened the embargo, but it also established a cause of action for U.S. nationals, including former Cuban nationals who are now U.S. citizens, who lost property or assets in the nationalization.⁵⁹ The Act also prohibits trafficking in confiscated property and allows the denial of visas for entry into the United States to anyone who traffics in nationalized property.⁶⁰ It states as its clear goal the bringing down of the Communist regime.⁶¹

Most recently in the U.S.-Cuba conundrum, the Bush Administration established the Commission for Assistance to a Free Cuba (“the Commission”) in order to identify several ways in which the United States may hasten the fall of the Castro regime.⁶² The

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ The Cuban Liberty and Democratic Solidarity (Helms-Burton Act) Act of 1996, 22 U.S.C. § 6021-6091 (1996).

⁵⁹ *Id.* at § 6081.

⁶⁰ *Id.* at §§ 6081 and 6091.

⁶¹ *Id.* at § 6021.

⁶² U.S. Dep’t of State, The Commission for Assistance to a Free Cuba,

2009]

EMBARGO OR BLOCKADE?

67

Commission was spearheaded by former Secretary of State Colin Powell, Tom Ridge, then Secretary of Homeland Security, and Condoleezza Rice, then Assistant to the President for National Security Affairs, among others.⁶³ The Commission proposed many amendments to the Cuban Assets Control Regulations (“CACR”)⁶⁴ and on May 6, 2004, the CACR was amended to reflect the proposed changes.⁶⁵ The amendments focused primarily on further restricting travel and remittances to Cuba.

The Commission’s report to President Bush proposed many ways for the United States to help the Cuban people transition from a Castro Government to a democratically elected government. The following six “inter-related tasks” were deemed to be essential to this goal: “to empower Cuban civil society; to break the Cuban dictatorship’s information blockade; to deny resources to the Cuban dictatorship; to illuminate the reality of Castro’s Cuba; to encourage international efforts to support Cuban civil society and challenge the Castro regime; and to undermine the regime’s succession strategy.”⁶⁶

In the report, the Commission highlighted many reasons for the strict recommendations. For instance, with respect to travel, the Commission found that many academic institutions abused the specific licenses granted for educational travel by organizing “study-tour programs” to Cuba and engaging in largely tourist activities with little interactions with the Cuban people.⁶⁷ Consequently, the new

<http://www.cafc.gov/mission/index.htm> (last accessed May 2, 1999) (“The Commission for Assistance to a Free Cuba was established as a Cabinet-level Commission on October 10, 2003 to explore ways the U.S. could help hasten and ease a democratic transition in Cuba”).

⁶³ U.S. Dep’t of State, Report to the Pres., *Commission for Assistance to a Free Cuba* (2004), available at <http://www.state.gov/documents/organization/32334.pdf> [hereinafter *Commission Report*].

⁶⁴ Cuban Assets Control Regulations, 31 C.F.R. § 515 (2004).

⁶⁵ Revocation of OFAC Specific Licenses to Engage in Travel-Related Transactions Incident to Visiting Close Relatives in Cuba, Notice, 69 Fed. Reg. 115 (June 16, 2004) (to be codified at 31 C.F.R. 515) [hereinafter *OFAC*].

⁶⁶ See *Commission Report*, *supra* note 63, at 15 (The impetus behind the more draconian regulatory framework was, as was the defined goal of the Helms-Burton law, to render Castro’s fall imminent).

⁶⁷ *Id.* at 30.

recommendations advocated limiting educational travel only to full-semester programs, or to programs of shorter duration only when the program specifically promotes United States policies.⁶⁸

Similarly, with respect to remittances the Commission estimated the yearly total of the money sent to Cuba at \$400 to \$800 million with some estimating the figure to be up to \$1 billion.⁶⁹ The Commission found that the Cuban government generated \$1 billion a year in funds and goods sent to Cuba.⁷⁰ Thus, the Commission sought to curtail what it termed is a “revenue stream” to the Castro regime by dramatically reducing the remittance amounts and limiting the persons who are eligible to receive remittances to those designated as “immediate family.”⁷¹ Moreover, the Commission found that the Cuban government retained between seventy-five to eighty percent of the remittances sent to Cuba due in large part to their monopoly of Cuba’s “*Tiendas para la Recuperación de Divisas*,” otherwise known as “dollar stores.”⁷² Consequently, the remittances that were being sent with the goal of helping family members effectively were serving to the benefit of the government.

The Commission made an additional observation in support of its recommendation to restrict travel. The Commission estimated that in 2003, under the previous regulations which allowed Cubans to “commute” between the United States and Cuba,⁷³ the Cuban government generated \$96.3 million from family visits from the United States to Cuba.⁷⁴ Prior to the Commission’s proposed amendments, Cubans in the United States with a general license could visit their close relatives (then defined to include second cousins) once every twelve months. In addition, those who “share a common dwelling as a family” were allowed to accompany the

⁶⁸ *Id.* at 32.

⁶⁹ *Id.*

⁷⁰ *See Commission Report, supra* note 63, at 34.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 37.

traveler on his/her visit to Cuba.⁷⁵

Finally, the Commission also recommended that the U.S. government enforce Title IV of the Helms-Burton Act. This action would result in denying visas to those found to have engaged in the “trafficking” of confiscated property of United States citizens or residents.⁷⁶

Following the Commission’s recommendations, the 2004 amendments substantially restricted family and educational travels to Cuba as well as greatly limited remittances. The following are some of the major changes that were implemented with respect to travel. Under the Bush era regulations, instead of a general license, travelers under the United States jurisdiction would be issued specific licenses that authorized transactions related to immediate family visits to Cuba.⁷⁷ Moreover, travel was, for the most part, restricted to people with “immediate family” who are Cuban nationals.⁷⁸ “Immediate family” was narrowly defined as “a spouse, child, grandchild, parent, grandparent, or sibling of that person or that persons’ spouse, as well as any spouse, widow or widower of any of the foregoing.”⁷⁹

The new regulations also provided that visitors may not stay for a period longer than fourteen (14) days and could only visit every three years. The three year period runs from the time the visitor last left Cuba and no additional visits would be permitted even if an intervening health or other emergency arose.⁸⁰

Beyond regulating who can travel, under what conditions, and with what frequency, the regulations imposed other travel-related restrictions. For example, the regulations limited the amount of money travelers to Cuba could spend per day up to \$50 per day, dramatically reduced from the \$164 per day travelers previously

⁷⁵ See *OFAC*, *supra* note 65.

⁷⁶ See *Commission Report*, *supra* note 63, at 42-44; *see also* 22 U.S.C. § 6021.

⁷⁷ See *OFAC*, *supra* note 65, at 33769.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

could spend.⁸¹ Travelers were allowed to spend an additional \$50 for transportation-related expenses within Cuba, if such travels exceeded the initial \$50 per day limit.⁸² In addition, the regulations prohibited the so-called “fully-hosted travel” where travel expenses were paid by a third-party not subject to the United States jurisdiction’s limitations.⁸³ The regulations even restricted travelers to carrying one piece of luggage that did not exceed a forty-four pound maximum unless the Bureau of Industry and Security of the Department of Commerce pre-authorized a higher amount.⁸⁴

In addition to the travel restrictions, the 2004 regulations amended the rules concerning any remittances to be sent to Cuba. The old regulations permitted \$300 quarterly allowances to be sent to any Cuban national from anyone who is under U.S. jurisdiction and is at least eighteen years of age. The amendments authorized remittances to be sent only to members of the sender’s “immediate family” per recipient household, regardless of the size of the household.⁸⁵ Moreover, the regulations prohibited the sending of remittances to certain government officials and members of the Cuban Communist Party.⁸⁶ The new regulations also reduced the total amount of money of quarterly remittances a visitor is allowed to take to Cuba from \$3,000 to \$300.⁸⁷ All these limitations were aimed at toppling the government by limiting an income stream with the goal of making Cuba shift to a democratic form of government.

Significantly the Obama administration in an April 13, 2009 press release on “Promoting Democracy and Human Rights in Cuba” announced the lifting of both travel restrictions, and remittance restrictions. Specifically, the President ordered the lifting of “restrictions on travel-related transactions for visits to a person’s family member who is a national of Cuba.” Such travel is to be

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 33769.

⁸⁵ *Id.* at 33773.

⁸⁶ *Id.* at 33770.

⁸⁷ *Id.*

authorized by a general license. Cuban-Americans can visit family “within three degrees of family relationship” and allows “individuals who share a common dwelling as a family with an authorized traveler to accompany them. The new procedures remove limitations on frequency and length of visits.”⁸⁸

Similarly the new regulations remove restrictions on remittances to family member within the same degrees of family relationship. However, the prohibition continues on remittances “to currently prohibited members of the Government of Cuba or currently prohibited members of the Cuban Communist Party.” Limits on frequency and amounts of remittances have been removed and travelers may “carry up to \$3,000.00 in remittances.”⁸⁹

While these measures do not affect the more general embargo, it is noteworthy that the regulations authorize U.S. telecommunication firms “to enter into agreements to establish fiber optic cables and satellite telecommunication facilities.”⁹⁰ Moreover, telecommunication service providers can obtain licenses to enter into roaming service agreements with Cuba providers;⁹¹ satellite radio and television service providers can obtain licenses to “engage in transactions necessary to provide services to customers in Cuba;”⁹² and persons subject to U.S. jurisdiction can obtain licenses “to activate and pay U.S. and third-country service providers “for telecommunication, satellite radio and TV services to persons in Cuba except certain senior government and communist officials.”⁹³ The new approach also permits; so long as consistent with national security, “the export and reexport . . . of donated . . . devices such as mobile phone systems, computers and software”⁹⁴

⁸⁸ Memorandum from President Barack Obama on Promoting Democracy and Human Rights in Cuba, § a (April 13, 2009), *available at* <http://www.capitolhillcubans.com/2009/04/obama-memorandum-promoting-democracy.html>.

⁸⁹ *Id.* at § b.

⁹⁰ *Id.* at § c.

⁹¹ *Id.* at § d.

⁹² *Id.* at § e.

⁹³ *Id.* at § f.

⁹⁴ *Id.* at § g.

Finally, the new policy “expand[s] the scope of humanitarian donations eligible for export through license exceptions.⁹⁵ This restores “clothing, hygiene items, seeds, veterinary medicines and supplies, fishing equipment and supplies, and soap-making equipment” to the existing list.

The United States is not the only country that has enacted an economic embargo against Cuba although it is the only one currently in effect. The 1962 Proclamation of the Meeting of Ministers of Foreign Affairs of the OAS, at Punta del Este, Uruguay, allowed for the United States and other countries to impose an economic embargo against Cuba.⁹⁶ However, in 1975, in the 16th meeting of the Consultation of Ministers of Foreign Affairs of the OAS, the group adopted a resolution to permit individual members to reestablish relations with Cuba pursuant to national interests and policy.⁹⁷ Since that resolution was passed, virtually every OAS member has established relations with Cuba—both diplomatic and economic. Moreover, in August 1996, an OAS Committee declared that the Helms-Burton Act was illegal as it sought to exercise jurisdiction in a manner contrary to international norms.

B. Legality of Sanctions

1. Helms-Burton Act and Customary International Law⁹⁸

The controversial provisions of the Helms-Burton Act include Title III, which allows U.S. nationals to seek compensation in U.S. courts for property losses from Castro’s expropriations, and Title IV’s denial of U.S. entry to foreign nationals who “traffic” in such

⁹⁵ *Id.* at § h.

⁹⁶ Proclamation No. 3447, 27 Fed. Reg. 1085 (Feb. 3, 1962) (noting that “the present government of Cuba is incompatible with the principles and objectives of the Inter-American system”).

⁹⁷ Freedom of Action of the States Parties to the Inter-American Treaty of Reciprocal Assistance to Normalize or Conduct Their Relations with the Republic of Cuba at the Level and in the Form that Each State Deems Advisable, O.A.S. Resolution, July 29, 1975, O.A.S. Doc. OEA/Ser. G.C.P./Doc. 9/75, 14 I.L.M. 1354 (1975).

⁹⁸ HERNÁNDEZ-TRUYOL & POWELL, *supra* note 46, at 269.

expropriated property of a U.S. citizen.⁹⁹ In this case, the legality of a unilateral economic sanction turns on the nature of the legal system—civil or common law—used to analyze the embargo. Common law systems hold that it is appropriate to apply national law to activities that occur outside state territory if there is a substantial relationship between the law and the foreign activity. Civil law doctrine, on the other hand, would never find appropriate application of national circuit laws outside the national territory without some national interest nexus.¹⁰⁰

Customary international law supports the “objective territorial principle” as articulated in the *United States v. Baker*¹⁰¹ case. A State has jurisdiction to prescribe with respect to foreign activity that has substantially negative effects within its territory.¹⁰² An American Bar Association (ABA) Recommendation on the subject also provides that the substantial effects test is part of the territorial principle.¹⁰³ Significantly, the Recommendation does not challenge basing sanctions on extra-territorial action, only on applying those sanctions to a company that is, in fact, a national of another state through its incorporation elsewhere, even if it is a wholly owned subsidiary of a U.S. company.

2. WTO Legality of U.S. Sanctions against Cuba¹⁰⁴

Title IV’s effects on the ability of European corporations doing business in Cuba—most of them subsidiaries of U.S. firms—thereafter to trade with the United States, led the European

⁹⁹ 22 U.S.C. § 6021.

¹⁰⁰ See generally GARY BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (4th ed. 2007).

¹⁰¹ *U.S. v. Baker*, 609 F. 2d 134 at 138 (5th Cir. 1980).

¹⁰² See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §402 (2008) (providing that “a state has jurisdiction to prescribe law with respect to . . . (c) conduct outside in its territory that has or is intended to have substantial effect within its territory . . .”).

¹⁰³ Timothy L. Dickinson, *Resolution and Report on Extraterritorial Economic Sanctions*, 1998 A.B.A. SEC. OF INT’L LAW AND PRACTICE 10.

¹⁰⁴ HERNÁNDEZ-TRUYOL & POWELL, *supra* note 46, at 269-270.

Commission to challenge Helms-Burton as violative of the non-discrimination provisions of the GATT's Four Pillars.¹⁰⁵ The United States announced that its actions were justified under GATT Article XXI as national security measures and that, because that Article left national security measures to the sole discretion of each Member, a WTO dispute settlement panel would have nothing to decide.¹⁰⁶

Article XXI(b)(iii) provides that "nothing in this Agreement shall be construed . . . to prevent [a WTO Member] from taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations (emphasis added)." Legal experts disagree whether this standard is self-judging. On the one hand, some claim that the drafters could not have intended to leave to the complete discretion of Members any action taken under Article XXI. In support of this interpretation they refer to the term "emergency in international relations" which ostensibly describes an extreme and unusual occurrence that is plainly subject to evaluation by dispute panels.¹⁰⁷ In the case of the U.S. embargo on Cuba, unless the U.S. declares war against Cuba, the U.S. has to establish an emergency in international relations. Under this theory, the emergency must be interpreted as having a close relationship to war. Another reason to suggest that no emergency in international relations exists with respect to the embargo is the consistent vote by the U.N. General Assembly against the U.S. embargo of Cuba. From such a perspective, Cuba's shooting down of an aircraft flown by Cuban exiles in 1996 can not be translated either to a declaration of or an act of war.¹⁰⁸ Rather, as a matter of law—although clearly not as a matter of politics—that occurrence is a relatively minor incident that cannot be considered an international wrong by Cuba. To be sure,

¹⁰⁵ HERNÁNDEZ-TRUYOL & POWELL, *supra* note 46, at 26-48.

¹⁰⁶ *U.S. Government Continues to Seek Compromise with Europe on Cuba Affair (Helms-Burton Act) But, If It Fails, It Will Refuse WTO Panel Competence*, REUTER AGENCY EUROPE, Feb. 22, 1997.

¹⁰⁷ Kees Jan Kuilwijk, *Castro's Cuba and the U.S. Helms-Burton Act: An Interpretation of the GATT Security Exemption*, 31 J.W.T. 49, 52-53 (1997).

¹⁰⁸ *See generally, Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997).

the other side – in the EU-U.S. dispute the position taken by the U.S. – contends that, because Article XXI is on its face self-judging, there can be no interpretive role for a dispute panel and assumption of jurisdiction over such a measure thus serves no purpose.¹⁰⁹

There has been no resolution of the debate on these theories of the appropriate interpretation of GATT Article XXI. The United States and Europe settled the dispute that would have provided the answer by the U.S. agreeing that the President would waive application of Title IV, as the U.S. Congress had authorized him to do. It is noteworthy that one of President Bush's Commission's recommendations was to put an end to such waiver.

*IV. A Critique – The Effects of the Embargo from a Social Justice Perspective*¹¹⁰

It is common knowledge that trade sanctions hurt workers and industries, not the officials who authored the policies that are the target of the sanctions. The countries most likely to face sanctions are those run by undemocratic governments least likely to let the pain of their population sway them. These observations hold true in the case of the U.S. embargo on Cuba.

While in nearly fifty years of the embargo the purported goal of achieving democracy in Cuba has not been met, the embargo has had deleterious effects on Cuba and the Cuban people. First, a look at some factual data in light of trade relation confirms the reality and extent of the harms suffered. In 1958, the United States accounted for 67% of Cuba's exports and 70% of its imports,¹¹¹ placing it

¹⁰⁹ Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. PA. J. INT'L ECON. L. 263, 268 (1998); see also Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 DUKE L.J. 1277, 1281 (2003).

¹¹⁰ HERNÁNDEZ-TRUYOL & POWELL, *supra* note 46, at 270-272.

¹¹¹ James Stamp & Jonathan Coleman, *The Economic Impact of U.S. Sanctions with Respect to Cuba*, USITC Pub. 3398, Inv. No. 332-413 (Feb. 2001), 1-7, available at <http://www.usitc.gov/publications/pub3398.pdf> (citing U.N. Economic Commission for Latin America, *Economic Survival of Latin America 1963* (New York: U.N. Dep't of Public Info., 1965), 273).

seventh on both export and import markets of the United States.¹¹² In 1999, by contrast, official U.S. exports to Cuba totaled a paltry \$4.7 million, which was comprised mainly of donations of medical aid, pharmaceuticals, and other forms of charitable aid.¹¹³ In the year 2000, Cuba ranked 184th of 189 importers of U.S. agricultural products.¹¹⁴ The relaxation of sanctions against food and medicines beginning in 2000 found Cuba rising to 138th in 2001 and to 26th in 2004 for U.S. export markets.¹¹⁵ By 2006, Cuba's ranking had fallen slightly to become the 33rd largest market for U.S. agricultural exports (exports totaling \$328 million).¹¹⁶ The U.S. International Trade Commission estimates an ongoing annual loss to all U.S. exporters of approximately \$1.2 billion for their inability to trade with Cuba.¹¹⁷

The Cuban government estimates that the total direct economic impact caused by the embargo is \$86 billion, which includes loss of export earnings, additional costs for import, and a suppression of the growth of the Cuban economy.¹¹⁸ However, various economic researchers and the U.S. State Department discount the effect of the embargo and suggest that the Cuban problem is one of lack of hard foreign currency which renders Cuba unable to purchase goods it needs in the open market.¹¹⁹

¹¹² *Id.* (citing "Direction of Trade Statistics--Database and Browser," IMF, <http://www.imf.org/external/pubs/cat/longres.cfm?sk=20954.0>).

¹¹³ *Id.* at 1-11 (citing data compiled by U.S. Dep'ts of Commerce and the Treasury).

¹¹⁴ U.S. Dep't of Agric., Foreign Agric. Serv., [http://www.fas.usda.gov/USTrade/USTEXFATUS.asp?QI=\(last visited Jun 13, 2007\)](http://www.fas.usda.gov/USTrade/USTEXFATUS.asp?QI=(last%20visited%20Jun%2013%202007)) (compiled from Agricultural Export Commodity Aggregations).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Stamp & Coleman, *supra* note 111, at 2-19.

¹¹⁸ Felipe Pérez Roque, Minister of Foreign Affairs, Cuba, *Statement to the U.N. General Assembly: Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba*, (Nov. 8, 2006), available at http://europa.cubaminrex.cu/English/Speeches/FPR/2006/FPR_081106.htm.

¹¹⁹ Stamp & Coleman, *supra* note 111, at 2-17 (citing Jaime Suchlicki, Institute for Cuba and Cuban American Studies, University of Miami, "The U.S.

2009]

EMBARGO OR BLOCKADE?

77

That there has been an economic impact of the embargo is evident to anyone who visits Cuba. For example, there is a minuscule number of modern automobiles on the roads of Cuba. Most are American vehicles from the late 1950s—prior to the embargo (and the revolution). To be sure, because the law prohibits ships from entering U.S. ports for six months after making deliveries to Cuba, the policy effectively denies Cuba access to the U.S. automobile market.¹²⁰

However, the impacts of economic sanctions are greater than lack of access to goods. In the case of Cuba, some argue that the U.S. embargo has had a deleterious impact on nutrition and health with a lack of availability of medicine and equipment, as well as decreased water quality.¹²¹ Indeed, the American Association for World Health (AAWH), in a 1997 report, concluded that

the U.S. embargo of Cuba has dramatically harmed the health and nutrition of large numbers of ordinary Cuban citizens. . . . [I]t is our expert medical opinion that the U.S. embargo has caused a significant rise in suffering—and even deaths—in Cuba. . . . A humanitarian catastrophe has been averted only because the Cuban government has maintained a high level of budgetary support for a health care system designed to deliver primary and preventive health care to all of its citizens.¹²²

Thus, AAWH concludes that the embargo, limiting availability of food, medicine, and medical supplies, has a deleterious effect on

Embargo of Cuba,” Occasional Paper Series (June 2000), 14); *see also* U.S. Dep’t of State, Bureau of Inter-American Affairs, *Zenith and Eclipse: A Comparative Look at Socio-Economic Conditions in Pre-Castro and Present Day Cuba* (Feb. 9, 1998, rev. June 2002), available at <http://www.state.gov/p/wha/ci/14776.htm>.

¹²⁰ Manuel Roig-Franzia, *In Rural Cuba, a Slow Road to Progress Outside Havana, Scarcity of Cars Makes Horse-Drawn Buggies the Way to Go*, THE WASHINGTON POST, Sept. 28, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/27/AR2006092701878.html>.

¹²¹ Am. Assn. for World Health Report, *Denial of Food and Medicine: The Impact of the U.S. Embargo on the Health and Nutrition in Cuba--An Executive Summary* (March 1997), available at <http://www.cubasolidarity.net/aawh.html>.

¹²² *Id.*

Cuban society. Significantly, religious leaders, including the late Pope John Paul II, opposed the embargo and called for its end.¹²³ The gravamen of the objection is the humanitarian and economic hardships that the embargo causes.

Interestingly, the new regulations implemented by the Bush administration were met with criticism from many in the Cuban community. While the new regulations purport to exert pressure on Castro, many believe that these regulations only hurt Cuban-Americans and their Cuba-based families. Some speculate that President Bush's supporters for the new regulations are U.S. citizens who no longer have relatives in Cuba.¹²⁴ For example, one of the supporters of the new restrictions included a seventy-five year old man who emigrated from Cuba in 1973. Opponents, however, were mostly recent immigrants who still had many relatives in Cuba.¹²⁵ Because the implementation of the amendments occurred shortly before the 2004 elections, many suspected that they would cause a split among Cuban voters in the South Florida area who ordinarily tend to vote Republican.

Four years after the implementation of the draconian regulations Cubans continue to voice their disaffection with the interference with their ability to send money to family or travel to Cuba. In *Vilaseca v. Paulson*,¹²⁶ a case filed in the United States District Court in Vermont against Henry Paulson in his official capacity as the Director of the U.S. treasury department, four citizens of Vermont who have pressing needs to return to Cuba because of illness, sickness, and death of family members, challenged the constitutionality of the regulations. The complaint alleges that the family travel regulations violate the Fifth Amendment of the United

¹²³ Larry Rohter, *Pope Condemns Embargo; Castro Attends Mass*, NEW YORK TIMES, Jan. 26, 1998, available at <http://salsa.babson.edu/Pages/Articles/98-01%20Cuba%20Pope%20Condemns%20Embarg>.

¹²⁴ Abby Goodnough & Terry Aguayo, *Limits on trips to Cuba cause split in Florida*, NEW YORK TIMES, June 24, 2004, available at <http://www.nytimes.com/2004/06/24/us/limits-on-trips-to-cuba-cause-split-in-florida.html?fta=y>.

¹²⁵ *Id.*

¹²⁶ *Vilaseca v. Paulson*, No. 2:08-CV-53 (D. Vt. filed March 20, 2008).

States Constitution¹²⁷ and they seek an injunction preventing the government from enforcing the regulation.¹²⁸

The American Civil Liberties Union (“ACLU”) affiliates in Vermont, Florida, and Massachusetts along with the Center for Constitutional Rights, filed an amicus curiae brief in support of the Plaintiffs’ complaint.¹²⁹ In its brief, the ACLU maintains that the regulations not only violate an individual’s right to preserve and maintain family as guaranteed by the First and Fifth amendments, they also violate plaintiffs’ equal protection rights under the United States Constitution.¹³⁰ They argued that the right to family is a constitutionally protected fundamental right, and that Cubans are being deprived of that right.¹³¹

The ACLU also argues that the regulations violate international law.¹³² Specifically, the argument posits that the regulations violate established human rights. First, they infringe on the right to family which is recognized as “the natural and fundamental group unit of society and is entitled to protection by society and the state.”¹³³ In addition, they violate the “right to freedom of movement”¹³⁴ and the “right to leave any country, including his[her] own.”¹³⁵ President

¹²⁷ U.S. Const. amend. V. (providing, in relevant part, that: “No person shall . . . be deprived of . . . liberty . . . without due process of law . . .”).

¹²⁸ Vilaseca Compl. No. 2:08-CV-53.

¹²⁹ See American Civil Liberties Union, Press Release, *ACLU of Massachusetts Backs Suit Challenging Bush Administration Travel Restrictions on Family Visits to Cuba* (May 16, 2008), available at http://www.aclu.org/natsec/travel/35675prs20080516.html?s_src=RSS.

¹³⁰ *Id.* at 4.

¹³¹ *Id.*

¹³² *Id.* at 5.

¹³³ Universal Declaration of Human Rights, *supra* note 21, at art. 16(3); see also ICCPR, *supra* note 41, at art. 23(1); see also ICESCR, *supra* note 42, at art. 10(1) (noting that the family “is the natural and fundamental group unit of society”).

¹³⁴ Universal Declaration of Human Rights, *supra* note 21, at art. 13(1); see also ICCPR, *supra* note 41, at art. 12(1) (noting that persons “lawfully within” a state’s territory has “the right to liberty of movement”).

¹³⁵ Universal Declaration of Human Rights, *supra* note 21, art. 13(2); see also ICCPR, *supra* note 41, art. 12(2) (“Everyone shall be free to leave any country”).

Obama's changed approach, although a small step, goes quite far in alleviating some of these concerns.

Thinking critically and deploying a social justice perspective, there is a cruel irony to the availability of remittances in Cuba. To be sure, remittances play a large economic welfare role throughout the region. A recent report observed that "[a]t more than \$50 billion a year, family remittances are central to economic growth, national expenditures, and balance of payments for many countries in Latin America and the Caribbean. Remittances now exceed portfolio investment, foreign aid, and government or private borrowing, and they have proven to be remarkably stable, often increasing when economies falter."¹³⁶ As discussed above,¹³⁷ remittances play a large role in the economy of Cuba. The U.S. State Department estimates that remittances range from \$600 million to \$1 billion per year, with the great bulk coming from families in the United States.¹³⁸ A 2004 report on Cuban economic development confirms this range, estimating that remittances to the island from U.S. residents totaled approximately \$900 million in 2003, which represented about 3% of the country's GDP which would have "determinative influence on the country's financial stability and on the level of consumption of households."¹³⁹ These figures contrast with a survey of individuals which placed the remittances in the \$460 million range.¹⁴⁰

¹³⁶ Peter Hakim, *Making the Most of Family Remittances: Second Report of the Inter-American Dialogue Task Force on Remittances*, INTER-AMERICAN DIALOGUE, available at <http://www.thedialogue.org/publications/2007/spring/familyremittances.pdf>.

¹³⁷ See *supra* notes 52-55 and accompanying text.

¹³⁸ U.S. Dep't of State, Background Note: Cuba, available at <http://www.state.gov/r/pa/ei/bgn/2886.htm> (last visited June 7, 2007).

¹³⁹ Jorge Pérez-Lopéz & Sergio Díaz-Briquets, *Remittances to Cuba: A Survey of Methods and Estimates*, A.S.C.E. Proceedings 15, 396, 396-397 (2005) (quoting Comisión Económica para América Latina y el Caribe, "Cuba: Evolución económica durante 2003 y Perspectivas para 2004," LC/MEX/L.622 (2004), 2, available at <http://lanic.utexas.edu/project/asce/pdfs/volume15/pdfs/diazbriquetsperezlopez.pdf>).

¹⁴⁰ *Id.* at 397 (citing Bendixen and Associates, *Remittances to Cuba from the United States*, May 25, 2005); see also Nancy San Martin, "Flow of Funds to Cuba Holds Steady," THE MIAMI HERALD, May 26, 2005 (citing Bendixen and

2009]

EMBARGO OR BLOCKADE?

81

Interestingly, notwithstanding the drastic reduction in remittances effected by the 2004 regulations, a study showed that a year after these were implemented the flow of funds to Cuba remained unchanged.¹⁴¹ However, although the more restrictive regulations may not have in reality decreased the flow of funds to Cuba, polls reveal that some Cubans believe they are receiving less money. The most likely explanation for this phenomenon is that the Cuban government is finding means to capture a greater percentage of the money that is being sent.¹⁴² Thus the purpose of the regulations, to keep money away from the government, is being foiled. To be sure, given the figures, one has to wait and see if President Obama's changes will have any effect at all, especially concerning their stated goal of "promoting human rights and democracy" in the island.

In light of the embargo, the existence and level of remittances is

Associates, "Remittances").

¹⁴¹ Nancy San Martin, *Flow of Funds to Cuba Holds Steady*, THE MIAMI HERALD, May 26, 2005, available at <http://www.cubanet.org/CNews/y05/jun05/01e5.htm>.

¹⁴² *Id.* According to the survey, approximately 440,000 Cuban Americans send \$150 on an average of seven times per year, translating to about \$1,050 a year. This provides cash of approximately \$460 million to Cuba. As noted above, other estimates place the flow of all remittances as high as \$1 billion. The heightened regulations allow only up to \$1,200 in cash remittances a year and only to immediate family members, so no longer can monies be sent to grandparents, cousins, or more distant relatives. One analyst estimates that the Cuban government takes up to 20% of the remittances, partly from a 10% fee imposed in 2004 by the government on exchanges of dollars. Thus, 20% of an estimated \$460 million in remittances amounts to \$92 million that the remittances provide the government. *Id.* (citing Bendixen and Associates, "Remittances"); see also Commission for Assistance to a Free Cuba (CAFC), *Report to the President* (May 2004), 34, available at <http://www.state.gov/documents/organization/32334.pdf> (noting that U.S. cash remittances to Cuba account for estimated \$400 to \$800 million per year with some estimates ranging as high as \$1 billion); Mark P. Sullivan, "Cuba: U.S. Restrictions on Travel and Remittances," Cong. Res. Serv. Rep. at CRS-9 (upd. Feb. 27, 2007), available at <http://fpc.state.gov/documents/organization/83002.pdf> (noting the restrictions on the remittances are regulated by the Cuban Assets Control Regulation, which, pursuant to June 16, 2004, amendments, limit the remittances to \$300 per quarter to nationals of Cuba who are members of the immediate family which is comprised of a spouse, child, grandchild, parent, grandparent, or sibling).

significant. The Cuban government benefits from the remittances by permitting Cubans to shop in state-operated “dollar stores” which sell food and other household necessities that are otherwise unavailable in Cuba. These stores’ sales are at high mark-ups—sometimes estimated at over 240% of face value.¹⁴³

In an action consistent with the embargo policy and goals, the Administration’s June 2004 tightening of restrictions on remittances also tightened allowed travel, potentially cutting off another source of funds to the island. It is estimated that in 2003 there were 125,000 family visits to Cuba which resulted in approximately \$96 million in hard currency for the Cuban government.¹⁴⁴ Thus, the tightened travel restrictions in both family and education categories work along with the embargo in limiting the funds that reach the island. However, this restriction, too, has been lifted by the new policy which has laudable goals. Therefore, over the few months following this policy change it will be interesting to see if it has any real, practical effects on life in Cuba.

Remittances can be reconciled with the official policy of the embargo – even the limited remittances under the new, more restrictive regulations – on the premise that the sending of remittances is a private, family affair.¹⁴⁵ Thus, while the embargo seeks to strangle the weak Cuban economy on a statist level, allowing private parties to make remittances to families can be viewed as a private family affair into which government should not intrude. Such perspective notwithstanding, one has to reconcile the changing regulations with respect to remittances. To be sure, the current decrease in levels of remittances allowed permit the United States to acknowledge the private nature of the actions while seeking to maintain a coherent foreign policy of not providing economic support to the government of Cuba. Nonetheless, “[r]emittances are helping to stabilize a society hurt by economic crisis and the

¹⁴³ Background Note: Cuba, *supra* note 138.

¹⁴⁴ See U.S. Dep’t of State, Commission for Assistance to a Free Cuba (CAFC), Report to the President (May 2004), 37, *available at* <http://www.state.gov/documents/organization/32334.pdf>.

¹⁴⁵ Making the Most of Family Remittances, *supra* note 136, at 3-4.

inequalities generated by a bureaucratic power structure.”¹⁴⁶ The impact on family members in Cuba, as with remittances sent to other parts of Latin America, is to help people, especially family members, out of poverty—helping them “cope with austerity and scarcity” as well as indirectly to strengthen the emerging market economy.¹⁴⁷ Most significant, however, is the reality (as the study cited above showed) that the flow of remittances, and consequently the flow of money to the government by whatever means it institutes to capture the hard currency, has not diminished.

V. Conclusion: The Human (Rights) and Moral Dimension

This essay has presented the history of economic sanctions against Cuba, analyzed the questionable legality of the sanctions, and detailed the effects of the sanctions. In conclusion, I want to problematize further the legality of the sanctions under international law. To be sure, the U.S. commitment to the WTO limits its ability to refuse to trade absent a legitimate, allowed concern. To use the national security claim *vis-à-vis* Cuba simply does not pass the laugh test; although the recent talks with Venezuela and the Russian fleet might cause a reconsideration of that position. Moreover, save for the regulations, which in any case are limited in light of the entirety of the Toricelli and Helms Burton laws, the WTO is a “later in time” statement of the law which should then govern.

The other aspect of legality involves the human rights idea.

¹⁴⁶ Manuel Orozco, *Challenges and Opportunities of Marketing Remittances to Cuba* (July 27, 2002), 15, in INTER-AMERICAN DIALOGUE, available at http://www.thedialogue.org/publications/country_studies/remittances/Cuba_remittances.pdf.

¹⁴⁷ *Id.*; see also Lorena Barberia, *Remittances To Cuba: An Evaluation of Cuban and US Government Policy Measures*, Rosemary Rogers Working Paper Series (2002), available at http://web.mit.edu/cis/www/migration/pubs/rwp/15_remittances.doc (noting that “[i]n absolute terms remittances are as important for Cuba’s economy as they are for other countries in the Caribbean, roughly equivalent to those received by the Dominican Republic and twice as high as those received by Haiti. Indeed, a 1998 survey of Latin America immigrants’ remittance behavior found that the percentage of Cuban-Americans sending remittances is higher than Mexican-Americans and lower than Dominican-Americans.”).

Here, the real impact on real people of the embargo borders on unconscionable. As the essay has described, the actions have taken a human toll; they affect health, hunger, education, nutrition quite directly. They also affect the right to travel and the right to family life of Cubans in the U.S. who can no longer visit their relatives with regularity nor spend time with them in either times of joy or times of need – although this has been changed dramatically by President Obama’s policy shift.

Economic sanctions are valuable tools for protecting human rights. The U.S. has used sanctions to discourage human rights violations. Examples include the U.S. ban of South African gold Krugerrands in 1985 to protest apartheid¹⁴⁸, the blockage of Nicaraguan imports to deter terrorist acts of the Sandinista regime,¹⁴⁹ the prohibition of foreign aid to Burma to oppose the government’s use of forced labor,¹⁵⁰ and the 1989 denial of MFN status against China to protest the killing of pro-democracy protestors in Tiananmen Square to name a few.¹⁵¹

The U.S. is not alone in this approach. In fact, human rights violations have resulted in states jointly taking economic sanctions through the UN Security Council. Examples include NATO states’ 1986 sanctions against Libya as a result of Moammar Ghadafi’s

¹⁴⁸ See Peterson Institute for International Economics, *Case Studies in Sanctions and Terrorism* (noting the specific the following cases, Case 62-2, U.N. v. South Africa (1962-1994: Apartheid; Namibia) and Case 85-1, U.S., Commonwealth v. South Africa (1985-91: Apartheid)) (2008), available at <http://www.iie.com/research/topics/sanctions/southafrica.cfm>.

¹⁴⁹ White House Statement, *Economic Sanctions Against Nicaragua*, May 1, 1985, available at http://findarticles.com/p/articles/mi_m1079/is_v85/ai_3835076.

¹⁵⁰ Leon T. Hadar, *U.S. Sanctions Against Burma: A Failure on All Fronts*, CATO INSTITUTE CENTER FOR TRADE POLICY STUDIES, Mar. 26, 1998, available at <http://www.freetrade.org/node/62>.

¹⁵¹ See e.g., Hachett, David, *China lobbyists worry over future MFN prospects*, FOOTWEAR NEWS, July 30, 1990; see also Shoff, Jim, *China MFN renewal hailed by importers*, FOOTWEAR NEWS, May 28, 1990; see also Andrew B. Brick, Bryan T. Johnson & Thomas Timmons, *Washington’s Agonizing Decision: To Extend or to Revoke China’s Most-Favored-Nation Trade Status*, ASIAN STUDIES BACKGROUNDER #104, May 8, 1990, available at <http://www.heritage.org/research/asiaandthepacific/asb104.cfm>.

2009]

EMBARGO OR BLOCKADE?

85

support for the terrorist killing of 279 passengers aboard a U.S. airline bombed over Lockerbie and 1990 Iraq sanctions for its invasion of Kuwait.

The Cuba sanctions, however, reflect another aspect of economic sanctions: their deleterious and harmful effects on civil society, the innocent citizenry of the targeted country. By depriving citizens of the benefits of trade, of travel, of family life; by creating circumstances in which people's health, nutrition, standard of living and overall welfare are negatively affected, sanctions have effected serious denials of human rights – a moral if not legal failure.