

COMMENTARY

Ending the US Embargo of Cuba: International Law in Dispute

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Abstract

The announcement by Presidents Obama and Castro in December 2014 of a major step towards normalisation of inter-state relations was part of what is primarily a political process, but normalisation implies a return to peaceful inter-state relations based on respect for fundamental principles of international law. This commentary explores the role that those principles have played in helping shape the confrontation between the United States and Cuba since the revolution of 1959, which has been underpinned by an economic, commercial and financial embargo of Cuba by the United States. This commentary argues that, from being an integral part of the bilateral dispute, international law can, at key moments, shift to form part of a solution. The changing political landscape raises the prospects of the parties turning to international law as a means of restoring normal relations between them resulting in, amongst other changes, the demise of the embargo.

Keywords: Cuba; embargo; international law

Introduction

The embargo of Cuba,¹ formally imposed by President Kennedy in 1962,² is a central feature of the long-running breakdown in bilateral relations between Cuba and

¹Cubans often refer to it as ‘*el bloqueo*’ or ‘blockade’ rather than ‘*el embargo*’: see André Zaldívar Diéguez, *Bloqueo: El asedio económico más prolongado de la historia* (La Habana: Capitán San Luis, 2003). Under classical international law a blockade is the ‘blocking by men-of-war of the approach to the enemy coast ... for the purpose of preventing ingress or egress of vessels or aircraft of all nations’: John P. Grant and J. Craig Barker, *Parry & Grant Encyclopaedic Dictionary of International Law*, 3rd edn (Oxford: Oxford University Press, 2009), p. 65. While the US measures against Cuba do not amount to a blockade in a technical or formal sense, their cumulative effect is to put an economic stranglehold on the island, which not only prevents United States–Cuba intercourse but also effectively blocks commerce with other states, their citizens and companies. Cuba uses the term ‘embargo’ in recent reports to the UN: see the UN Secretary General’s Report, ‘Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America against Cuba’, UN Doc A/71/91 (2016), available at <http://undocs.org/A/71/91>, last access 16 June 2018.

²Proclamation 3347, ‘Embargo on All Trade with Cuba’, 3 Feb. 1962, in which the President, acting under the Foreign Assistance Act 1961, prohibited ‘the importation into the United States of all goods of Cuban origin and all goods imported from or through Cuba’.

the United States. Bilateral relationships are arguably the most important ones in international relations, for if one state falls out with another then wars or other destabilising ruptures of international peace often result. Multilateral agreements and organisations may help to maintain inter-state relations on the basis of mutual respect for sovereignty but they cannot guarantee that inter-state relations will not break down.³ Ultimately, international law cannot prevent a breakdown in bilateral relations but it can and should play an important role in re-establishing normal inter-state relations. Normal inter-state relations are premised on mutual respect for the fundamental primary rules of international law, including sovereign equality, self-determination, the non-use of force and non-intervention. When relations break down, usually with accusations of violations of those rules, the secondary rules of international law are available to the parties, and to those actors supporting a peaceful resolution, to end the rupture and remediate any wrongs. The dispute between the United States and Cuba provides the severest test for international law in that it is a bilateral relationship where the norm has been one of coercive confrontation rather than peaceful co-existence. However, this commentary argues that international law provides the only sustainable path out of what appears to be an intractable dispute.

The embargo is at the heart⁴ of the dispute between the two countries, an on-going anachronism that is viewed by one side as a lawful response to illegality or, indeed, as an exercise of its freedoms, and by the other side as a violation of its rights and a denial of its freedoms. Inevitably, the embargo serves wider political purposes, but both sides use its legalities to legitimate their actions and reactions. In legal terms, one side sees the embargo as a continuing enforcement of international law combined with a right not to trade, while the other side sees it as a prolonged violation of international law and a coercive form of intervention. While dispute resolution before a court would provide answers in domestic legal orders, at the international level the principal institutional 'judgment' on the Cuban embargo is provided by the UN General Assembly, which since 1992 has overwhelmingly and repeatedly reiterated the necessity of ending the economic, commercial and financial embargo by the United States against Cuba by reference to the principles of sovereign equality, non-intervention and non-interference in internal affairs, and freedom of international trade and navigation.⁵

The agreement towards normalisation between the United States and Cuba, made public in simultaneous announcements by Presidents Barack Obama and Raúl Castro on 17 December 2014, did not immediately lead to a change in attitude by the General Assembly. In October 2015, the General Assembly did not alter the language of its annual resolution sufficiently to avoid a negative vote by the United States, although the Assembly welcomed the resumption of diplomatic relations,

³Eric W. Cox, *Why Enduring Rivalries Do – or Don't – End* (Boulder, CO: First Forum Press, 2010); Charles A. Kupchan, *How Enemies Become Friends: The Sources of Stable Peace* (Princeton, NJ: Princeton University Press, 2010).

⁴Patrick J. Haney and Walt Vanderbush, *The Cuban Embargo: The Domestic Politics of an American Foreign Policy* (Pittsburgh, PA: Pittsburgh University Press, 2005); Nigel D. White, *The Cuban Embargo under International Law: El Bloqueo* (London: Routledge, 2015).

⁵For example, UN Doc A/RES/69/5 (2014) adopted by 188 votes to two (United States, Israel) with three abstentions (Marshall Islands, Federated States of Micronesia and Palau).

and the willingness of the US President to work towards lifting the embargo.⁶ However, in October 2016 the annual resolution was adopted by 191 to 0 with two abstentions (United States and Israel).⁷ The move from negative vote to abstention by the United States was a further sign of movement towards normalisation and the possible ending of the embargo, at least until the election of Donald J. Trump to the US Presidency in November 2016,⁸ and the policy changes announced by him on 16 June 2017. This commentary includes an assessment of those changes in terms of their impact on the movement towards normalisation.

Although not a form of dispute settlement, declaratory resolutions of the General Assembly should not be seen as irrelevant. In a broad sense the Assembly's declaratory resolutions have been seminal in charting the changing nature of international law since the Universal Declaration of Human Rights in 1948. Indeed, the General Assembly's resolutions on self-determination, aggression, non-intervention and permanent sovereignty over natural resources have provided a backdrop to the United States–Cuba dispute. However, the Assembly's condemnatory resolutions on the Cuban embargo cannot be seen as a form of dispute settlement, though they might add to the weight of legal opinion (*opinio juris*) on the illegality of such embargoes, as well as to the weight of world opinion against the US embargo itself. The chances of the United States–Cuba dispute being resolved by the International Court of Justice are remote as both parties have to consent to the Court's jurisdiction,⁹ although the UN General Assembly could ask the Court for an advisory opinion on the legality of the embargo.¹⁰ Judicial settlement is not the norm in seemingly intractable disputes that go deeper than issues of title to contested territories or maritime areas.¹¹

International Law as an Integral Part of the Dispute

International law is not a set of clear and precise rules, which provide black and white answers, as the following analysis of the history of the embargo will demonstrate. In the dispute stage international law appears to be a tool in the armoury of the protagonists, but even at this stage behind the scenes diplomacy, often hidden, reveals a more nuanced understanding of international law. Under this conception, international law has a politically acceptable abstract nature that allows for conflicting interpretations, and also invites the possibility of achieving agreement. In this legal context the parameters of the dispute between the United States and Cuba

⁶UN Doc A/RES/70/5 (2015), adopted by 191 votes to two (United States and Israel).

⁷UN Doc A/RES/71/5 (2016).

⁸On 1 November 2017, the United States reverted to casting a negative vote in the General Assembly in UN Doc A/RES/72/4, adopted by 191 votes to two (United States and Israel). President Trump's inauguration was on 20 January 2017.

⁹Article 36 of the Statute of the International Court of Justice 1945.

¹⁰Under Article 65 of the Statute of the International Court of Justice 1945; for example, used by the General Assembly to request an advisory opinion on the legality of the construction of a wall by Israel in the Occupied Palestinian Territories: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), ICJ Rep, p. 136.

¹¹Christine Gray, 'The Use and Abuse of the International Court of Justice in the Enforcement of International Law', in Kalliopi Koufa (ed.), *International Law Enforcement: New Tendencies* (Athens: Sakkoulas, 2010), p. 195.

will be explored by outlining the legal arguments of both sides and the historical and political contexts within which they were made. The argument will then be made that it is only when the political context is favourable to settlement of the dispute that a common understanding of international law can be achieved. This means that at the settlement phase international law changes from being part of the dispute to being a method of ending it.

The starting point in understanding the relevance of international law to bilateral disputes is to examine the history within which relations between Cuba and the United States have been shaped. That history is a struggle about sovereignty, independence, intervention, self-determination and, more recently, human rights, illustrating the relevance of fundamental principles of international law, although there is disagreement between the parties as to their content, meaning and application. Furthermore, international law has developed and changed over the period of the dispute.

Certainly, Cuba's struggle to achieve external self-determination from Spain during the latter's long and brutal colonial occupation of the island from 1511 to 1898 was not in pursuance of a right recognised by international law at that time. The still-cited judgment in the *Island of Palmas* arbitration of 1928, concerning a dispute between the United States and the Netherlands about what had exactly been ceded by Spain to the United States in 1898, remains authority for the legality of colonial occupation and cession, although the language of the judgment was one of 'sovereignty'.¹² In effect, international law, from the sixteenth century until well into the twentieth century, recognised that colonial states could exercise sovereignty over colonised territories and could transfer such territory to another 'civilised' state, and that sovereignty proved to be hard for colonised peoples to wrest back.¹³ International law recognised Spain's title to Cuba by way of discovery, occupation and possession, and its right to cede that territory to the United States in 1898.¹⁴

Spain's defeat by the United States in the war of 1898 resulted in Spain ceding territories to the United States in the Treaty of Paris,¹⁵ which led to an initial period of occupation of Cuba by the United States until 1902.¹⁶ The United States saw this period as a means of facilitating a transition from Spanish rule towards formal Cuban independence. Indeed, US troops had fought alongside Cuban rebels to defeat the Spanish and so, from the perspective of the United States, this was portrayed as a liberation of Cuba and not an occupation – or at least not one with any neo-colonial or imperial intent. From the Cuban point of view, however, rather than a brief transition to full independence, this period is viewed as a time when victory for the Cuban rebels was taken from them by an intervention and

¹²*Island of Palmas Case* (Netherlands v. US), *Reports of International Arbitral Awards*, 2 (1928), pp. 829–71.

¹³Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Oxford: Oxford University Press, 2005), p. 199.

¹⁴On modes of acquisition of title to territory see Robert Jennings, *The Acquisition of Territory under International Law* (Manchester: Manchester University Press, 1963).

¹⁵Treaty of Peace between the United States and Spain, 10 Dec. 1898.

¹⁶Louis A. Pérez, 'The Pursuit of Pacification: Banditry and the United States' Occupation of Cuba, 1889–1902', *Journal of Latin American Studies*, 18 (1986), pp. 313–32.

occupation that was designed to create a state that was dependent upon the United States both economically and politically.¹⁷ The United States reserved the right to re-intervene, making its withdrawal conditional upon the inclusion of this right in the Cuban constitution in the form of the Platt Amendment of 1901, and it used the same method to secure a perpetual lease on the naval base at Guantánamo Bay,¹⁸ actions that clearly undermined Cuban sovereignty.¹⁹ In effect, Cuban sovereignty was not absolute but limited or 'mediated',²⁰ a relationship of dependency on the United States was created, and a series of rigged elections allowed for no credible alternatives and, as a result, rebellion grew. When a reformist revolutionary government did manage to seize power in 1933 it existed barely a few months before a US-engineered coup led by Fulgencio Batista overthrew it.²¹

The revolution that successfully overthrew General Batista's dictatorship on 1 January 1959 is commonly represented as Cuba throwing off the yoke of the United States' crony capitalism only to submit to the oppressive yoke of Soviet communism. However, even after the failed attempt to base Soviet nuclear-capable missiles in Cuba in 1962,²² the Cuban revolutionary government led by Fidel Castro did not adopt Soviet-style communism until the late 1960s/early 1970s, although it grew closer to the Soviet Union economically at an earlier stage, with Moscow buying most of Cuba's sugar from 1963.²³ It was in many ways a practical decision by the revolutionary government on the basis that the way to secure Cuban independence was to have an alliance with the Soviet Union, as the only country capable of withstanding US pressure.²⁴ Certainly, the relationship with the Soviet Union was not a straightforward one, and the Cuban government's ability to survive the end of the alliance is indicative of its independent will,²⁵ as were many of its foreign policies exemplified in, for example, Africa by its intervention on behalf of the Angolan government in 1975.²⁶

Cuban self-determination was part of a broader movement towards recognising a right of external self-determination for colonies and former colonies and dependencies across the globe. By 1970 the UN General Assembly's Declaration of Friendly Relations reflected international consensus on the basic principles of international law including self-determination, which was said to be embodied in a government representing the whole people without

¹⁷Richard Gott, *Cuba: A New History* (New Haven, CT: Yale University Press, 2004), p. 98.

¹⁸Agreement of the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, 23 Feb. 1903.

¹⁹Such an agreement would be seen as void under modern treaty law reflected in Article 52 of the Vienna Convention on the Law of Treaties 1969, as a treaty procured by coercion, but such a prohibition did not exist in 1903: Olivier Corten, 'Article 52', in Olivier Corten and Pierre Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford: Oxford University Press, 2011), p. 1204.

²⁰Marifeli Pérez-Stable, *The Cuban Revolution: Origins, Course and Legacy*, 2nd edn (Oxford: Oxford University Press, 1999), pp. 37–42.

²¹Jorge Ibarra, *Prologue to Revolution* (Boulder, CO: Lynne Rienner, 1998), p. 125.

²²Philip Brenner, 'Cuba and the Missile Crisis', *Journal of Latin American Studies*, 22 (1990), pp. 115–42.

²³Gott, *Cuba*, p. 235; Pérez-Stable, *The Cuban Revolution*, p. 120.

²⁴Yuri Pavlov, *Soviet–Cuban Alliance 1959–1991* (Boulder, CO: Lynne Rienner, 1996), p. 17.

²⁵*Ibid.*, p. 263.

²⁶Piero Gleijeses, *Conflicting Missions: Cuba, Africa, and the United States* (Chapel Hill, NC: University of North Carolina Press, 2002), p. 9.

distinction as to race, creed or colour,²⁷ a standard against which the Cuban government measured well, certainly in comparison to many other states, including Western democracies. Certainly there was dissent and there were outflows of Cubans risking the hazardous journey across the Florida Straits, for example during the Mariel boatlift in 1980, but that particular event was primarily caused by deep recession in Cuba,²⁸ leading to thousands of mainly economic migrants heading to the United States. Nonetheless, in the period from 1959 to 1979, there were large outflows of Cubans dissatisfied with the 'lurch towards socialism, let alone communism',²⁹ some of whom would be seen in international law as refugees fleeing because of a well-founded fear of persecution 'for reasons of race, religion, nationality, membership of a particular social group or political opinion'.³⁰

After the revolution of 1959, as well as participating in the attempted Bay of Pigs invasion of 1961, the United States engaged in the subversion of Cuba ('Operation Mongoose'), involving acts of intervention, other threats and uses of force, and assassinations. The United States refused to respect Cuban sovereignty and self-determination on the basis that the Cuban government represented a challenge to its policy of preventing any Communist regimes in its hemisphere, reflected in the United States' role in overthrowing left-leaning governments in Guatemala in 1954 and the Dominican Republic in 1965.³¹ However, behind this public hostility, negotiations between the two countries continued over the decades, with several concerted efforts to reach normalisation on the basis of sovereign equality, most recently in the period 2013–16. Within a week of the failed Bay of Pigs invasion in 1961, which led to the capture and detention of over 1,200 members of the Exile Brigade, Cuban President Osvaldo Dorticós indicated that his government wanted to 'find a solution to the tension which exists between the two countries and which will lead to a form of peaceful co-existence, diplomatic and even friendly relations, if the government of the United States so desires'.³² The negotiations for the return of the prisoners were suspended during the missile crisis of 1962, but were successfully concluded with the exchange of prisoners for food and medicine.³³ Thus, despite the desire of the US government for regime change in Cuba, government-to-government channels remained open and continuous dialogue was maintained, reflecting a basic recognition of Cuban sovereignty by the United States.

²⁷Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN Doc A/RES/2625 (1970).

²⁸William M. LeoGrande and Peter Kornbluh, *Back Channel to Cuba: The History of Negotiations between Washington and Havana* (Chapel Hill, NC: University of North Carolina Press, 2015), pp. 214–18.

²⁹Gott, *Cuba*, p. 212.

³⁰UNHCR, Convention Relating to the Status of Refugees 1951, Article 1A(2).

³¹In justifying armed intervention in the Dominican Republic in 1965, US President Johnson stated that the 'American nations cannot, must not, and will not permit the establishment of another Communist government in the Western Hemisphere': Lyndon B. Johnson, Radio and Television Report to the American People on the Situation in the Dominican Republic, 2 May 1965, available at <http://www.presidency.ucsb.edu/ws/?pid=26932>, last access 27 July 2018.

³²LeoGrande and Kornbluh, *Back Channel*, pp. 47–8.

³³*Ibid.*, p. 58.

The Embargo and the Dispute about International Law

The embargo was not simply part of an ideological struggle between the super-powers, but one over the development and understanding of fundamental principles of international law. In October 1960, President Eisenhower initially imposed measures, including revoking the sugar quota, which provided a US market for the bulk of Cuba's annual sugar production. As part of its effort to secure full independence, the Cuban government had introduced land reforms in 1959 and started to seize US and other Western-owned properties, businesses and assets early in 1960, with an offer of limited compensation that did not meet the Western international standard of being 'prompt, adequate and effective',³⁴ terms which disguised the reality of a demand of damages for the full market value of the assets plus loss of future profits.³⁵ Fidel Castro saw full-scale nationalisation of US property and businesses with an offer of minimal compensation at least in part as a response to the cutting off of the sugar quota by the United States, but there were more specific measures of Cuban expropriation of US-owned oil refineries before the United States had responded by cutting the quota. However, these were undertaken by Cuba because the United States had instructed US-owned oil refineries in Cuba not to refine Soviet oil.³⁶

It is difficult to impose a legal narrative of lawful and unlawful measure and counter-measure on this murky world of 'tit-for-tat' actions and counter-actions that were first threatened, then introduced in phases, and then implemented in phases, especially when the embargo was clearly not centrally an instrument of international law enforcement, but a significant element in a range of measures adopted by the US government aimed at regime change in Cuba.³⁷ From the Cuban point of view its nationalisation programme reduced the 'leverage of the United States over economic and political choices', freeing Cuba from pre-revolutionary US dominance of its economy 'including public utilities, energy industries, centers of finance, and large sugar estates'.³⁸

However, legally speaking it is certainly plausible to see the initial US sanctions, which were a forerunner to the full embargo imposed in 1962, as a justifiable form of counter-measure or non-forcible reprisal taken in response to violations of international law by Cuba or, more simply, as a decision not to trade with an enemy or

³⁴Gott, *Cuba*, p. 180.

³⁵As stated in an exchange between the United States and Mexico in 1938, the so-called 'Hull formula': Green Haywood Hackworth, *Digest of International Law*, vol. 3 (Washington, DC: US Government Printing Office, 1940), p. 655.

³⁶Gott, *Cuba*, pp. 183–4.

³⁷See, for example, Memorandum from the Deputy Assistant Secretary of State for Inter-American Affairs (Mallory) to the Assistant Secretary of State for Inter-American Affairs (Rubottom), proposing a sanctions regime that made 'the greatest inroads in denying money and supplies to Cuba, to decrease monetary and real wages, to bring about hunger, desperation and overthrow of government': John P. Glennon, *Foreign Relations of the United States, 1958–1960, Cuba*, vol. 6 (Washington, DC: US Government Printing Office, 1991), Document 499. See also Undersecretary of State George Ball describing the policy of 'economic denial' in detail on 23 April 1964, including: 'to make plain to the people of Cuba and to elements of the power structure of the regime that the present regime cannot serve their interests': George Ball, 'Principles of Our Policy toward Cuba', *Department of State Bulletin*, 50 (1964), pp. 738–44.

³⁸Richard E. Feinberg, 'Reconciling US Property Claims in Cuba: Transforming Trauma into Opportunity', Brookings Institute, Dec. 2015, p. 2.

unfriendly state until a debt was settled in full. As stated by William M. LeoGrande and Peter Kornbluh: 'viewed from Washington, the nationalization of US property in 1960 was the proximate cause for imposing the embargo, so it could not be lifted until the compensation issue was addressed'.³⁹ The fact that other Western governments were eventually prepared to accept payments on behalf of their companies did not, of itself, undermine US rights under international law. The primitive nature of the international legal system is reflected in the fact that it still recognises as lawful non-forcible forms of self-help, although the reality was that the revolutionary Cuban government had no money to pay any significant amount of compensation, given the overthrown regime's appropriation of such.⁴⁰

Initially, President Eisenhower used the Export Control Act 1949 to authorise US acts of self-help in response to the events of the Cuban revolution in 1960.⁴¹ A piece of legislation adopted when the US entered the First World War, the Trading with the Enemy Act of 1917, was invoked to supplement the Foreign Assistance Act 1961, which empowered the President to impose an embargo, culminating in President Kennedy's proclamation in 1962. The US Cuban Assets Control Regulations, first adopted in 1963, and still in force, were adopted under the rubric of that piece of 1917 legislation: they froze Cuban assets, prohibited US nationals from conducting financial transactions with Cuba, and banned the import of goods of Cuban origin into the United States.⁴² However, the fact that the embargo of Cuba finds a relatively clear basis in US law, and had an arguable basis in international law at least at the outset, does not signify that its continuation and entrenchment over time are lawful under international law.

The subsequent clarification of some aspects of international law surrounding non-forcible measures by the *Air Service Agreement Arbitration* in 1978,⁴³ and International Law Commission (ILC) in 2001, suggests that unilateral counter-measures should be temporary and proportionate, and should not be punitive.⁴⁴ These limitations have not been observed in the case of the Cuban embargo. However, it might be asked whether these limitations are realistic in the face of a continuing and unremedied breach by Cuba, in the form of non-settlement of compensation claims. Furthermore, justifications for the continuation of the embargo have broadened, especially after the Cold War, since when the US legal focus has been on the Cuban regime's denial of human rights and democracy.

Cuba's legal position in the period of nationalisation, however, was that it was concerned with reclaiming sovereignty and securing self-determination in the sense of freedom to choose a nation's economic, as well as political, future. In his speech to the UN General Assembly in 1960, Fidel Castro spoke of 'the right of the underdeveloped countries to nationalize their natural resources and the investments of the monopolies in their respective countries without

³⁹LeoGrande and Kornbluh, *Back Channel*, p. 164.

⁴⁰Julio César Mascarós, *Historia de la banca en Cuba, 1492–2000* (La Habana: Editorial de Ciencias Sociales, 2003).

⁴¹'Text of US Announcement of Embargo', *New York Times*, 20 Oct. 1960.

⁴²Cuban Assets Control Regulations, 31 CFR 515, 8 July 1963.

⁴³*Reports of International Arbitral Awards*, 18 (1978), pp. 417–93.

⁴⁴Articles 49–53 ILC, Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/49/(Vol. I)/Corr.4 (2001).

compensation'.⁴⁵ It was in 1962 that the UN General Assembly adopted a resolution asserting that states had permanent sovereignty over their natural resources and, therefore, had the right to expropriate foreign interests for a public purpose, subject to paying 'appropriate' compensation.⁴⁶ Two years earlier, in 1960, the UN General Assembly had stated that all peoples had the right to self-determination in the shape of freedom from colonial or alien rule or subjugation.⁴⁷ Both of these Resolutions read in the context of events in Cuba show that the Cuban struggle for political and economic self-determination was at the fulcrum of changes in international law. It was no coincidence that Cuba rapidly became a leading light in the Non-Aligned Movement of developing countries that had freed themselves, at least *de jure*, from colonial rule, but who continued to push in the UN General Assembly for a new international economic order that would redress some of the imbalances between developed and developing countries.⁴⁸

Determining whether Cuba's seizure of US-owned property and assets in the immediate post-Revolution era was either a 'wrongful' act of expropriation or a 'lawful' act of self-determination would set in train a linear analysis of the legality of actions and reactions thereafter. However, international relations are not often so neatly packaged as to allow international law to operate in a structured way, whereby a violation of rights then leads to lawful acts of self-help which, somehow, remedy the original wrong. Such a one- or two-dimensional legal understanding of bilateral relations is inadequate, and the reality is more brutal.⁴⁹ For instance, Cuba's 'wrongs', at least from the perspective of the United States, were added to by its efforts to export revolution to overthrow US-supported regimes in Latin America and, later, in Africa. The details of each intervention varied but, in general terms, the United States appeared to be punishing Cuba by means of the embargo for Cuban breaches of community norms prohibiting unlawful force, while Cuba saw itself as providing support for peoples struggling to achieve another community norm – self-determination.⁵⁰ Cuba could point to a series of UN General Assembly resolutions that encouraged 'support' for such peoples without specifying what that meant; while the United States could point to different paragraphs in the same resolutions that outlawed indirect aggression.⁵¹ In addition, Cuba tellingly argued that it did not seek to punish the United States for its support of repressive foreign regimes and armed groups,⁵² highlighting a lack of reciprocal rights and duties that prevented the establishment of a normal bilateral relationship between the United States and Cuba.

⁴⁵UN Doc A/PV/864 (1960).

⁴⁶Resolution on Permanent Sovereignty over Natural Resources, UN Doc A/RES/1803 (1962).

⁴⁷Declaration on the Granting of Independence to Colonial Territories and Peoples, UN Doc A/RES/1514 (1960).

⁴⁸Declaration on the Establishment of the New International Economic Order, UN Doc A/RES/3201 (1974).

⁴⁹Michael J. Glennon, *The Fog of Law: Pragmatism, Security and International Law* (Redwood, CA: Stanford University Press, 2010), pp. 62–4.

⁵⁰Community norms were recognised by the International Court of Justice in *Barcelona Traction, Light and Power Co. Case* (Belgium v. Spain), (1970) ICJ Rep, p. 3.

⁵¹Articles 7, 3(g) Resolution on the Definition of Aggression, UN Doc A/RES/3314 (1974).

⁵²LeoGrande and Kornbluh, *Back Channel*, p. 193.

As has been stated, it is unlikely that the International Court of Justice will address the dispute – but not impossible, as the *Nicaragua v. United States* judgment of 1986 shows. Admittedly the refusal by the United States to accept the jurisdiction of the Court, as well as its rejection of the judgment itself, shows the limited value of the Court as a mechanism of dispute resolution. However, the Court did interpret and apply basic rules on the use of force and intervention and found that both countries had behaved unlawfully: Nicaragua by intervening in El Salvador and the United States by counter-intervening in Nicaragua.⁵³ Bearing in mind this was a judgment concerning Cold War interventions, including Nicaragua's intervention in El Salvador by supplying arms to the rebels in the country – arms that came from Cuba – a similar conclusion might be drawn in the Cuba–United States dispute: that both countries have behaved unlawfully. However, a distinction must be drawn between those illegalities committed in the context of the bilateral dispute – namely Cuba's unremedied expropriation of US-owned property and various forcible and non-forcible US interventions in Cuba – and those violations that have been committed against other states or against their own citizens. In the latter instance, US claims that Cuba has violated civil and political rights of the Cuban people are countered not only by Cuban claims that the embargo has violated the socio-economic rights of the Cuban people, but also by the fact that US policies have violated the human rights (for example, freedom of movement) of US citizens,⁵⁴ as well as the glaring human rights abuse committed against detainees held in the US base at Guantánamo.⁵⁵ While both states should bring their behaviour into line with applicable international norms, in the context of the bilateral dispute normalisation should be predicated on addressing violations of those rights and duties applicable between the two states.

Although it is possible to comprehend the embargo in the period 1962–91 in the context of a momentous struggle between the superpowers, it remains unlawful under international law as a violation of Cuba's rights as a sovereign nation as well as of the Cuban people's socio-economic rights; but this does not strike from the record the original Cuban breach of international law. Up until 1991 Soviet economic support made up for the lack of access to American markets and goods. Presidential executive acts in the early 1960s responded to violations of US rights under international law, but were primarily aimed at countering the threat from the Soviet Union. With the demise of the Soviet empire control of

⁵³Case Concerning *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. US) (1986) ICJ Rep, p. 14 at para 247. The Court found at para. 245, without offering reasons, that a US trade embargo imposed on Nicaragua did not breach the customary international law principle of non-intervention.

⁵⁴Ministry of Foreign Affairs of Cuba, 'The Blockade Imposed by the United States against Cuba is the Major Violation of the Human Rights of the Cuban People', 30 Sept. 2017, available at <http://www.minrex.gob.cu/en/blockade-imposed-united-states-against-cuba-major-violation-human-rights-cuban-people>, last access 21 June 2018; Ministry of Foreign Affairs of Cuba, 'Seventh Meeting of the Cuba–United States Bilateral Commission held in Washington DC', 14 June 2018, available at <http://www.minrex.gob.cu/en/seventh-meeting-cuba-united-states-bilateral-commission-held-washington-dc>, last access 21 June 2018.

⁵⁵Johan Steyn, 'Guantánamo Bay: The Legal Black Hole', *International and Comparative Law Quarterly*, 53 (2004), pp. 1–15.

the embargo passed to Congress in the 1990s, first with the Torricelli Act in 1992 and then the Helms-Burton Act of 1996, making the embargo a matter of domestic US politics and law.⁵⁶ Rather than seizing the opportunity to end the dispute when Soviet support to Cuba was removed in 1991 (meaning an immediate loss of 75–80 per cent of Cuban trade),⁵⁷ the United States chose to combine political expediency, by handing control to Congress and the influential Cuban lobby, with a worrying decision to tighten the embargo to finish off a weakened Cuban government by increasing the punitive nature of sanctions.⁵⁸ Finishing off a weakened Cuban government would inevitably impact upon an even weaker Cuban population, a population who were not comforted by the stated purposes of the Helms-Burton Act to: ‘assist the Cuban people in regaining their freedom and prosperity’; ensure free and fair elections; protect the United States from Cuban terrorism;⁵⁹ address the ‘theft’ of US-owned property; and respond to Cuba’s violation of human rights.⁶⁰

Under the Torricelli Act 1992 subsidiaries of US companies in third countries were prohibited from trading with Cuba and it banned third-country ships that had visited a Cuban port from entering US territory within 180 days.⁶¹ Under the Helms-Burton Act 1996 penalties for breach of the embargo, for example importing any goods of Cuban origin, in whole or in part, were increased.⁶² In Title III the Act granted US citizens a remedy in domestic courts against anyone ‘trafficking’ in property that was US-owned before its seizure by the Cuban government in the early 1960s. This was one of the so-called extra-territorial effects of Helms-Burton objected to by the UK and EU amongst others,⁶³ but its significance was far outweighed by the bringing together and tightening of all the previous elements of the embargo and its placement in legislation, legislation that remains in place to this day and will remain in operation, albeit in a reduced form since the rapprochement in December 2014, until Congress repeals it. Joy Gordon noted that ‘none of the changes introduced by President Obama [since December 2014]’ reversed ‘the congressional legislation that prohibits the direct or indirect sale of most Cuban products to US buyers and

⁵⁶Haney and Vanderbush, *The Cuban Embargo*, pp. 99–107. Cuban Liberty and Solidarity (LIBERTAD) Act, Public Law 104-114, 12 March 1996 (Helms-Burton Act 1996). Cuban Democracy Act, Public Law 102-484, 23 October 1992 (Torricelli Act 1992).

⁵⁷Joy Gordon, ‘Economic Sanctions as Negative Development’, *Journal of International Development*, 28 (2016), p. 474.

⁵⁸William M. LeoGrande, ‘Enemies Evermore: US Policy towards Cuba after Helms-Burton’, *Journal of Latin American Studies*, 29 (1997), pp. 211–21.

⁵⁹Cuba was removed from the US list of state sponsors of terrorism by President Obama in 2015, having been on it since 1982: Julie H. Davis, ‘US Removes Cuba from State-Sponsored Terrorism Lists’, *New York Times*, 29 May 2015.

⁶⁰Helms-Burton Act 1996.

⁶¹Toricelli Act 1992.

⁶²Section 110(a), Helms-Burton Act 1996.

⁶³UK Protection of Trading Interests Acts 1980 (applied by the Protection of Trading Interests Order, 1996, SI 3171, to trade with Cuba); Council Regulation (EC) Regulation 2271/96 (1996). Both remain in force, though there has been little enforcement. Foreign and Commonwealth Office (FCO)/UK Trade and Investment (UKTI) guidance of 29 October 2015 is pertinent here: ‘The UK Protection of Trading Interests Act makes it illegal for UK-based companies to comply with extraterritorial legislation (like Helms-Burton) and there is provision for fines to be levied against offending companies and individuals. In parallel an EU Blocking Statute also makes it illegal to comply’: <https://www.gov.uk/government/publications/overseas-business-risk-cuba/overseas-business-risk-cuba>, last access 16 June 2018.

prohibits the sale of most goods to Cuban state enterprises'.⁶⁴ However, there is some dispute regarding the extent of the President's competence to license exemptions from the embargo, given that the underlying statutory basis of the embargo (the Trading with the Enemy Act and the Cuban Assets Control Regulations codified into the Helms-Burton Act) do not appear to limit the President's licensing authority.⁶⁵ When President Obama licensed sales to Cuban state enterprises in January 2016, if those sales would 'meet the needs of the Cuban people',⁶⁶ this potentially had vast scope. However, given that a broad licensing approach would substantially impair the application of the Helms-Burton Act, there have to be question marks against the extent of the President's licensing competence. Furthermore, as will be discussed below, President Trump's policy changes towards Cuba announced on 16 June 2017 are likely to lead towards a limited re-tightening of the embargo, leaving the debate about the extent of licensing exceptions unresolved.

Despite President Obama's changes to the embargo fines were still imposed on US and third-country companies by the US Office of Foreign Assets Control (OFAC). Two of many examples given by the Cuban government include: a fine of \$272,000 imposed by OFAC in 2015 on a US maritime insurance company (Navigators Insurance Company) for making a claim payment in which a Cuban national had an interest; and a fine of \$1.7 billion imposed in 2015 on the German Bank Commerzbank for its operations with Cuban banks.⁶⁷ The OFAC made it clear in November 2017 that: 'The Cuba embargo remains in place. Most transactions between the United States, or persons subject to US jurisdiction, and Cuba continue to be prohibited, and OFAC continues to enforce the prohibitions of the CACR [Cuban Assets Control Regulations].'⁶⁸ The regulatory changes made under President Obama, effective in 2015–16, were targeted to further engage and empower the Cuban people by facilitating authorised travel to Cuba by persons subject to US jurisdiction; certain authorised commerce and financial transactions; and the flow of information to, from and within Cuba.

Following President Trump's policy changes announced on 16 June 2017, there was some tightening of the embargo once regulations were amended in November

⁶⁴Joy Gordon, 'El Bloqueo: The Cuban Embargo Continues', *Harper's* (July 2016), available at <http://harpers.org/archive/2016/07/el-bloqueo>, last access 16 June 2018.

⁶⁵Robert Muse, 'Can Obama Lift the Embargo on Cuba without Congress in Effort to Normalize US–Cuba Relations?', *Democracy Now*, 18 Dec. 2014, available at https://www.democracynow.org/2014/12/18/can_obama_lift_the_embargo_on, last access 16 June 2018.

⁶⁶US Department of the Treasury, 'Treasury and Commerce Announce Further Amendments to the Cuba Sanctions Regulations', 26 Jan. 2016, available at <https://www.treasury.gov/press-center/press-releases/Pages/jl0328.aspx>, last access 16 June 2018.

⁶⁷UN Secretary General's Report, 'Necessity of Ending the ... Embargo', UN Doc A/71/91 (2016), pp. 33–5. Marija Đorđeska, 'OFAC's Settlement with Commerzbank AG: Coerced Voluntary Settlements of the Competitively Disadvantaged', *EJIL Talk* (blog of the *European Journal of International Law*), 20 March 2015, in which it is explained that OFAC relies on voluntary settlement by foreign companies and banks who would rather pay the fine than challenge it and lose access to the US economy and financial system: <https://www.ejiltalk.org/ofacs-settlement-with-commerzbank-ag-coerced-voluntary-settlements-of-the-competitively-disadvantaged/>, last access 16 June 2018.

⁶⁸US Department of the Treasury, 'Frequently Asked Questions Related to Cuba', 8 Nov. 2017, available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf, last access 16 June 2018.

2017,⁶⁹ but the changes announced were less than anticipated, and amounted to a revision rather than a reversal.⁷⁰ President Obama had used his executive powers, after the agreement towards normalisation was announced in December 2014, to ensure that exceptions in the embargo were extended so as to become difficult to reverse. Indeed, it is possible that the changes they produced in Cuba by increasing the presence of US companies, goods and citizens, will make the embargo difficult to sustain politically and economically in the long run.⁷¹

The Post-Cold War Embargo as Deliberate Harm

Thus far international law has been depicted as an element of the dispute, due in part to the problem of its indeterminacy. However, there are aspects of the dispute between Cuba and the United States that demonstrate clear breaches of fundamental legal rules. That is not to say that the governments do not dispute them, but that the evidence of breach is compelling and the actions leading to those breaches are indefensible in law. This is particularly so in the case of the tightening of the embargo by the United States in the 1990s, which had dramatic effects on the health of the Cuban population. The government of the United States took cruel advantage of the removal of Soviet support to try to force regime change by a starving population. The effect on life expectancy, the reduction in weight of the average Cuban, the impact on new-born babies are all detailed in a report by the independent and respected American Association for World Health (AAWH) in 1997.⁷² The period of 5–10 years after the demise of the Soviet Union, when the Cuban population was especially vulnerable, was when the US legislature chose to continue, indeed intensify, its sanctions against Cuba. That demonstrates intent on the part of the United States to cause deliberate harm and damage to Cuba and to its people, over and beyond the United States exercising its rights to choose trade partners.

⁶⁹On 8 September 2017 President Trump extended the embargo of Cuba for a further year under the Trading with the Enemy Act: Presidential Memorandum for the Secretary of State and the Secretary of the Treasury, <https://cuba-solidarity.org.uk/news/article/3485/trump-quietly-extends-cuba-embargo-just-as-irma-pummels-island>, last access 21 June 2018.

⁷⁰Michael Putney, 'Trump's Cuba Policy Looks a Lot like President Obama's', *Miami Herald*, 20 June 2017. The amended regulations restricted financial transactions with those individuals and entities on the 'Cuba Restricted List' and restricted travel freedoms introduced by President Obama: US Department of Treasury, US Department of the Treasury, 'Frequently Asked Questions Related to Cuba', 8 Nov. 2017, Question 3.

⁷¹The Cuban government claims that 'There are only four aspects of the embargo that are beyond the reach of Presidential decisions: 1. The rule that prohibits US subsidiaries in third countries trading with Cuba (Torricelli Act). 2. The ban on transactions with United States properties that were nationalized in Cuba (Helms-Burton Act). 3. The law that prevents United States citizens from visiting Cuba as tourists (Trade Sanctions Reform and Enhancement Act of 2000). 4. The ban on granting financing for the sale of United States agricultural products to Cuba (Trade Sanctions Reform and Export Enhancement Act of 2000)': UN Secretary General's Report, 'Necessity of Ending the ... Embargo', UN Doc A/71/91 (2016), p. 32.

⁷²AAWH, *Denial of Food and Medicine: The Impact of the US Embargo on Health and Nutrition in Cuba* (Washington, DC: AAWH, 1997), available at <http://www.medicc.org/resources/documents/embargo/The%20impact%20of%20the%20U.S.%20Embargo%20on%20Health%20&%20Nutrition%20in%20Cuba.pdf>, last access 17 June 2018.

One of the unaddressed aspects of when a state can be held legally responsible for internationally wrongful acts is causation – did the wrongful act (in this case the continuation and tightening of the embargo in 1992) cause the damage to the Cuban people?⁷³ The decision to continue the embargo was clearly an act of state by the United States, as it was a decision by its legislative body, but did it cause the losses suffered by the Cuban population? The evidence drawn from bodies like the AAWH, as well as reports from the Inter-American Commission on Human Rights (IACHR),⁷⁴ all clearly point to violations of the socio-economic rights of thousands of individuals in Cuba as a result of the impact of the United States' legislation tightening the embargo in the 1990s⁷⁵ – this was deliberate damage inflicted on Cuba, more specifically its people, and was not sufficiently mitigated by any of humanitarian exceptions built into the embargo.⁷⁶

Furthermore, this squeeze could not be justified by the on-going violations of civil and political rights by the Cuban government as claimed in the Helms-Burton Act. Those violations have been condemned by the IACHR, for instance in the so-called Black Spring clampdown on dissent of 2003.⁷⁷ However, the continuing imposition of punitive measures by the United States that impact upon the whole of the population, as opposed to targeted measures that might have been directed at the Cuban regime, are not justified under international law, indeed they constitute a form of collective punishment of the Cuban government and the Cuban people. Furthermore, such measures, which go beyond temporary counter-measures, should be imposed multilaterally, through the Organization of American States (OAS) or the UN, and not unilaterally on the basis of one state's understanding of international law. The OAS did exclude Cuba in 1962 and then imposed certain non-forcible measures against it in 1964 under Articles 6 and 8 of the Rio Treaty,⁷⁸ but these were repealed in 1975.⁷⁹ In 2009 the OAS rescinded its exclusion of Cuba.⁸⁰

There have been claims that breaches of fundamental norms of international law are violations of obligations owed to the whole international community and,

⁷³Brigitte Stern, 'The Elements of an Internationally Wrongful Act', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), p. 193.

⁷⁴For example, IACHR, *IACHR 2012 Annual Report*, Chapter IV, 'Cuba', para. 17, available at <http://www.oas.org/en/iachr/docs/annual/2012/TOC.asp>, last access 17 June 2018. See also Report to the UN Human Rights Council, *The Situation of Human Rights in Cuba*, 26 January 2007, para. 7, available at <http://www.refworld.org/docid/45fead5a2.html>, last access 17 June 2018.

⁷⁵Gordon, 'Economic Sanctions', p. 474.

⁷⁶For example, the prohibition of ships trading with Cuba from docking in the US meant that mixed cargoes containing medical supplies would not be exported to Cuba: see Cuban government's statement in UN Secretary General's Report, 'Necessity of Ending the ... Embargo', UN Doc A/71/91 (2016).

⁷⁷For example, *Oscar Elías Biscet et al. v. Cuba*, IACHR Report No. 67/06, Case 12.476, 21 Oct. 2006.

⁷⁸OAS Doc OEA/Ser C/II.9, Doc 48, Rev 2 (1964).

⁷⁹OAS Doc OEA/Ser F/II, Doc 9/75 Rev 2 (1975).

⁸⁰On 3 June 2009, the Ministers of Foreign Affairs of the Americas adopted resolution OAS AG/Res 2438 (XXXIX-O/09), which resolved that the 1962 exclusion of Cuba from participation from the OAS ceased to have effect. The 2009 resolution stated that the participation of Cuba will be the result of a process of dialogue initiated at the request of the government of Cuba, and will be in accordance with the practice, purposes and principles of the OAS. Cuba welcomed this development but has not yet re-joined the organisation.

therefore, can be responded to by any state or states.⁸¹ However, the International Law Commission did not accept this when codifying the law on responses to violations of international law, and limited and disputed state practice revolves around responses to atrocities and core crimes, such as the crime of genocide, not to the type of human rights violations as have occurred in Cuba.⁸² Thus the Cuban government's human rights record cannot justify the continuing imposition of the embargo and in particular the tightening of it that occurred in the 1990s in circumstances where the United States intended it to have devastating consequences.

Although the Cuban government has claimed in the past that the impact of embargo amounted to the crime of genocide,⁸³ for the claim of genocide to be upheld it would be necessary to prove that the US government, or its leaders, had the intent to destroy, in whole or in part, the Cuban people.⁸⁴ In its more recent statements the Cuban government has justifiably pointed to violation of the rights to health and food, education and culture, and more broadly the right to development, attributable to the embargo.⁸⁵ Although these are socio-economic rights, and neither the US nor Cuba is a party to the appropriate human rights treaties (principally the International Covenant on Economic, Social and Cultural Rights),⁸⁶ the rights to food, medicine and education are seen as core customary rights that can apply extraterritorially irrespective of treaty obligation.⁸⁷ Thus, while it would be very difficult to prove a genocidal intent to destroy the Cuban people on the part of the United States, there is little doubt that the embargo has caused and continues to cause serious human rights violations in Cuba for which the United States is responsible.

International Law and Dispute Settlement

It is thus possible to isolate certain aspects of the embargo and analyse them as clear violations of international laws; in these instances international law can provide relatively definite and precise determinations of legal responsibility. Outside of those determinations, the bilateral dispute between the United States and Cuba has involved escalating measures and countermeasures by both states: Cuba expropriated US-owned property in the first years after the revolution in 1959 and the United States imposed trade measures and then an embargo although there are question marks over who acted first; Cuba intervened in Latin America and Africa, the United States viewed this as a threat to its interests as well as a violation

⁸¹Elena Katselli Prouaki, *The Problem of Enforcement in International Law* (London: Routledge, 2010), p. 285.

⁸²James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002), p. 302.

⁸³UN Doc A/64/PV.27 (2009), p. 29: Mr Rodríguez Parrilla (Minister for Foreign Affairs, Cuba).

⁸⁴UN, Office of the High Commissioner for Human Rights, *Convention on the Prevention and Punishment of the Crime of Genocide 1948*, Article 1.

⁸⁵UN Secretary General's Report, 'Necessity of Ending the ... Embargo', UN Doc A/71/91 (2016), pp. 36–43.

⁸⁶Cuba signed the Covenant in 2008 but has not ratified it. The US signed in 1977 but has not ratified the Covenant. Only ratification will oblige states to protect all the rights contained in the Covenant.

⁸⁷UN Committee on Economic, Social and Cultural Rights, General Comment 3, 'The Nature of States Parties Obligations: Article 2(1) of the Covenant', UN Doc E/1991/23 (1991), para. 10.

of preemptory norms and hardened the embargo; despite the end of the Socialist Bloc in 1991 the Cuban regime of Fidel Castro survived and was criticised for continuing to violate basic civil and political rights, so the United States responded further by tightening the embargo and giving it extraterritorial effect and, by so doing, did deliberate harm to the Cuban population. International law not only failed to control this escalation but, in some ways, facilitated it by providing the legal basis for each side's justifications and, furthermore, by not clearly prohibiting economic coercion as it has done military coercion.⁸⁸ So how can international law provide a solution?

A suggested answer is that international law can provide a route to the establishment of full, stable and normal inter-state relations based on mutual respect for each state's sovereignty and self-determination. This is one of the functions of the laws on state responsibility – the so-called secondary rules of international law that determine liability for breaches of the primary rules (such as those prohibiting aggression, and those protecting the right to self-determination and to basic socio-economic and well as civil and political rights), so that when wrongful acts have been committed by states their legal responsibility should be established and addressed by a variety of means, some judicial but mostly diplomatic and non-judicial.

Such methods of dispute settlement may include mechanisms for attributing individual criminal responsibility; for example, as found in the trial of the two Libyan agents suspected of the Lockerbie bombing of 1988, which was part of a restoration in 2003 of normal relations between the United States and the United Kingdom on one side and the Libyan government on the other. In the United States–Cuba dispute, there are criminal cases to be answered: for instance in relation to the destruction of the Cuban Airlines plane in 1976 with the loss of 73 lives; and the shooting down of the two 'Brothers to the Rescue' planes in 1996 by the Cuban Air Force (the immediate reason for the adoption of the Helms-Burton Act). The attribution of individual criminal responsibility will probably be a necessary part of the restorative process between the two countries, but, given the basic inter-state nature of the dispute, full restoration will depend upon agreeing a process of peaceful settlement that should start with the establishment of diplomatic relations, as was announced in December 2014,⁸⁹ and should then include fact finding and conciliation, as well as agreement on mechanisms for settlement of the US claims to compensation for expropriation of US-owned properties and businesses

⁸⁸While Article 2(4) of the UN Charter prohibits the 'threat or use of force' in international relations, this is understood as covering only military force. Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963), p. 362. But see Jordan Paust and Albert P. Blaustein, 'The Arab Oil Weapon – a Threat to International Peace', *American Journal of International Law*, 68 (1974), p. 417.

⁸⁹The Cuban Embassy was reopened in Washington in July 2015, the first time since 1961: P. Lewis, 'Cuban Embassy Opens in Washington but Important Issues Remain Unresolved', *The Guardian*, 20 July 2015. The US Embassy in Havana was officially re-opened in August 2015: T. McCarthy, 'US Embassy in Cuba Formally Reopens: "A Day for Pushing Aside Old Barriers"', *The Guardian*, 14 Aug. 2015. But see J. Borger, 'US Warns Americans to Avoid Cuba and Slashes Embassy Staff after Sonic Attacks', *The Guardian*, 29 Sept. 2017.

by the Cuban government in the early years of the revolution,⁹⁰ and Cuban claims for human rights damage caused by the US embargo and for individual acts of sabotage. This could take the form of a tribunal to receive individual claims by US citizens and Cuban citizens who have suffered loss as a result of the wrongful acts of both states, on the lines of the Iran–US Claims Tribunal established in 1981, forged in the context of a very hostile relationship to adjudicate and compensate claims by US businesses that had been expropriated or had suffered loss during the Iranian revolution.⁹¹ Alternatively, it might include an inter-state agreement on a joint compensation fund to be handled by a non-judicial joint claims commission set up by the respective governments. Of course there have to be bilateral negotiations and compromise about which claims are in principle receivable and about the parameters of compensation.⁹²

The restoration of diplomatic relations between the United States and Cuba, achieved by President Obama and continued under President Trump, is only the first step that will facilitate a ‘deliberative dialogue’ towards further normalising their wider bilateral relations.⁹³ The dialogue will feature international law as a central part of the language of diplomacy. Indeed, the history of the United States–Cuba dispute shows that this dialogue has continued behind the scenes even during the Cold War period. For example, during the presidency of Jimmy Carter in 1978, quiet diplomacy came close to rapprochement, with Cuban diplomats indicating an acceptance of the principle of compensation for US citizens whose property had been expropriated, while the US envoy raised the issue of whether the Cuban government expected compensation for the costs of the embargo and the acts of sabotage in the 1960s.⁹⁴ However, the opportunity to make further progress was lost because of continuing disagreement about Cuba’s Africa policy. Cuba insisted that its interventions in Angola and Ethiopia were at the invitation of the governments of those countries to help defend against external aggression and, further, were within ‘the purview of Cuban sovereignty’ and, therefore, ‘should have no bearing on bilateral relations’.⁹⁵ Nevertheless, Cuba’s Africa policy blocked the path towards normalisation based on a common legal understanding. Although it is important to maintain such ‘back channel’ dialogue as it prevents an escalation towards armed conflict, it can come to fruition only in the sense of facilitating a settlement of the dispute when the political context allows for inter-subjective

⁹⁰Creighton University and USAID, ‘Report on the Resolution of Outstanding Property Claims between Cuba and the United States (Omaha, NE: Creighton University Press, 2007), pp. 3–5. See more recently Feinberg, ‘Reconciling US Property Claims in Cuba’. Both reports make it clear that under international law Cuba’s obligation to compensate related only to properties and businesses that were owned by US nationals at the time of expropriation, and not to properties of Cuban citizens who subsequently received US citizenship.

⁹¹David Muller, ‘The Iran–US Claims Tribunal’, in Crawford, Pellet and Olleson (eds.), *Law of International Responsibility*, p. 843.

⁹²Feinberg, ‘Reconciling US Property Claims in Cuba’, p. 24.

⁹³Steven Wheatley, *The Democratic Legitimacy of International Law* (Oxford: Oxford University Press, 2010), p. 138. Some non-essential US embassy staff were withdrawn in September 2017 as a result of health concerns: <https://www.brookings.edu/blog/order-from-chaos/2018/04/16/u-s-cuban-relations-are-about-to-get-worse/>, last access 21 June 2018.

⁹⁴LeoGrande and Kornbluh, *Back Channel*, p. 188.

⁹⁵*Ibid.*, pp. 191–3.

understanding of the applicable law by the disputants acting as an interpretive community.⁹⁶

A constructivist approach to international law views norms as 'reasons for action not causes of action'. Moreover, such norms are construed by different actors from their subjective viewpoints so that norms have an inter-subjective nature and are employed by actors, including states, to 'coordinate outcomes'.⁹⁷ Constructivism explains this inter-subjectivity in terms of how 'actors behave towards the world around them in ways that are shaped by ideas that they hold about the world, and that these ideas are generated by past interactions' and, furthermore, that these ideas can change over time.⁹⁸ Social interactions between states shape the ideas of each actor, including the way states respond to the rules of international law.⁹⁹ Constructivism explains the fluidity of the law applicable to states and, in this respect, contrasts with the orthodox positivist depiction of law as objective and certain. However, the modern legal positivist approach of Herbert L. A. Hart, which sees law as a 'social rule', depicts laws as having core certainty, but admits of a degree of uncertainty inherent in the very nature of language, where interpretation is contested.¹⁰⁰

In effect, in a constructivist conception of law, international law operates as the common language for diplomacy and not as a system of readily applicable rules. This allows the parties to achieve understanding upon which a peaceful solution can be built. When the political relationship governing two states comes to an end international law operates to fill in the space vacated by politics, but it does not do so by providing a ready solution or answer. International law must be discussed, interpreted, agreed upon in formal or informal terms and, finally, implemented. If common ground has been successfully captured in that agreement subsequent political relations can be framed by international law and encapsulated in that agreement. It may take several further years of negotiation and diplomacy, with no guarantee of success, to attempt to deal with past wrongs and ensure that future relations are based on mutual respect for sovereignty and self-determination. Advances in the application of international law to seemingly intractable disputes depend upon major changes in political context that serve to remove the obstacles to establishing bilateral relations based on mutual respect.¹⁰¹ The United States (and Cuba) missed the opportunity to turn to international law at the end of the Cold War, while the stepping down of Fidel Castro from power in 2008 and his death on 25 November 2016, the changing Latin American political landscape, and the fact that President Obama was in his last term, have all led to the recent

⁹⁶Ian Johnstone, 'The Plea of "Necessity" in International Law Discourse: Humanitarian Intervention and Counter-Terrorism', *Columbia Journal of Transnational Law*, 43 (2005), p. 381.

⁹⁷Rodney B. Hall, 'Constructivism', in Thomas G. Weiss and Rorden Wilkinson (eds.), *International Organization and Global Governance* (London: Routledge, 2014), p. 148.

⁹⁸Ian Hurd, *International Organizations: Politics, Law and Practice*, 2nd edn (Cambridge: Cambridge University Press, 2011), p. 23. See further Alexander Wendt, 'Constructing International Politics', *International Security*, 20 (1995), pp. 71–81.

⁹⁹Hurd, *International Organization*, p. 23.

¹⁰⁰Herbert L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 126–9.

¹⁰¹Martti Koskeniemi, 'The Place of Law in Collective Security', *Michigan Journal of International Law*, 17 (2006), p. 476.

shift. However, the final stage will probably require a more momentous shift in political context.

The repeal of the Helms-Burton Act may occur only when politics within the United States are in alignment, and may also require the complete withdrawal from the Cuban government of Raúl Castro since the Act explicitly states that the United States will not fully accept a Cuban government with either Castro brother in it.¹⁰² Until then full respect for international law in relations between the two countries may remain unfulfilled. Nonetheless, international law does not disappear since both parties constantly frame their dispute by reference to it, but it will not be implemented until both parties can agree on common ground within those disputed principles of sovereignty, non-intervention, self-determination and human rights. LeoGrande and Kornbluh point to one of the key lessons to be distilled from years of back channel dialogue between the two governments, namely that 'Cuba wants to be treated as an equal, with respect for its national sovereignty.'¹⁰³ International law provides a level playing field between disputants by its continued foundation on sovereign equality, but it requires the United States to agree to join Cuba on this field.

The possibilities of this process being embarked upon were demonstrated by the content of the simultaneous announcements made by Presidents Barack Obama and Raúl Castro on 17 December 2014, after they had both thanked Pope Francis for 'helping to broker a historic deal to begin normalising relations between the United States and Cuba, after 18 months of secret talks over prisoner releases brought a sudden end to decades of Cold War hostility'.¹⁰⁴ Under the agreement full diplomatic relations were to be re-established for the first time since January 1961. President Obama agreed to use his executive powers to relax aspects of the embargo.

President Raúl Castro's speech of 17 December 2014 was peppered with international legal principles, and with offers to discuss differences between the governments within the parameters of those principles. President Castro expressed his 'willingness to hold a respectful dialogue with the United States on the basis of sovereign equality, in order to deal reciprocally with a wide variety of topics without detriment to the national independence and self-determination of our people'. He recalled the struggle of the Cuban people to achieve that independence and self-determination, a struggle begun in the fight for independence from Spain in 1868 culminating in the coming to power of the revolution of 1959. The principles of the revolution had been defended in the face of 'serious dangers, aggressions, adversities and sacrifices'. President Castro expressed his commitment to 'the task of updating our economic model in order to build a prosperous and sustainable Socialism'. The Cuban leader remarked that the dialogue between the two sovereign governments at the 'highest level' had resulted in 'headway' being made 'in the solution of some topics of mutual interest for both nations'. Although the governments had 'agreed to renew diplomatic relations', the 'heart of the matter' had not been

¹⁰²Section 205, Helms-Burton Act 1996. Raúl Castro stepped down as President on 19 April 2018, but retains his position as the First Secretary of the Communist Party.

¹⁰³LeoGrande and Kornbluh, *Back Channel*, p. 415.

¹⁰⁴'US Decides to Bring Cuba in from the Cold', *The Guardian*, 18 Dec. 2014.

solved as the 'economic, commercial, and financial blockade, which causes enormous human and economic damages' to Cuba continued. However, President Castro noted that 'though the blockade has been codified into law, the President of the United States has the executive authority to modify its implementation'. He finished his speech by appealing to principles of peaceful settlement, non-intervention and peaceful co-existence.¹⁰⁵

The content of President Obama's speech shows that he viewed steps towards normalisation of relations between the two governments as a change in method, away from isolating Cuba by sanctions towards engaging with it by peaceful means, but to the same ends as before, namely of 'promoting the emergence of a democratic, prosperous, and stable Cuba'. The President argued that by easing the effect of extremely coercive sanctions, the allegedly repressive nature of the Cuban regime should become clearer and, with no external enemy to be blamed for their deprivations, the Cuban people should be more demonstrative in their demands for democratic reform and for a government that respects their civil and political rights. In making this statement, President Obama did not accept the illegality of the embargo, rather its ineffectiveness in promoting democratic change, as well as the failure by the United States to gain multilateral support for it, leading to its isolation in this matter.¹⁰⁶ In fact one of the on-going measures undertaken by the United States has been the allocation of funds to promote democracy in Cuba,¹⁰⁷ something which the Cuban government views as illegal funding of subversion in violation of the prohibition on interference in its domestic affairs.¹⁰⁸

Despite the many obstacles that remained, President Obama portrayed the move towards normalisation of relations with Cuba as part of a wider process of reconciliation regionally and internationally, one that would bring Cuba into the formal processes of international exchange, influence and scrutiny, nudging it towards openness and democracy. However, for Cuba to remain engaged any external pressure for reform must enable it to retain its hard-fought-for sovereignty and independence from foreign domination. President Obama seemed to recognise this balance between external promotion of democracy and respect for the right of the Cuban people to choose the future direction of their country: 'The promotion of democracy supports universal human rights by empowering civil society and a person's right to speak freely, peacefully assemble, and associate, and by supporting the ability of people to freely determine their future.' The United States' 'efforts are

¹⁰⁵Speech by Cuban President Raúl Castro on Re-Establishing US-Cuba Relations', *The Washington Post*, 17 Dec. 2014.

¹⁰⁶White House, 'Fact Sheet: Charting a New Course on Cuba', 17 Dec. 2014, available at <http://www.whitehouse.gov/the-press-office/2014/12/17/fact-sheet-charting-new-course-cuba>, last access 19 June 2018. For speech see 'Statement by the President on Cuba Policy Changes', 17 Dec. 2014, available at <http://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes>, last access 19 June 2018.

¹⁰⁷Section 109, Helms-Burton Act 1996.

¹⁰⁸Ted Piccone and Ashley Miller, 'Cuba, the US, and the Concept of Sovereignty: Toward a Common Vocabulary?', 9 Dec. 2016, available at <https://www.brookings.edu/research/cuba-the-u-s-and-the-concept-of-sovereignty-toward-a-common-vocabulary>, last access 19 June 2018. Another example of US-sponsored interference was the creation of Radio Martí in 1985: Wilson Sayre, 'Radio Martí Turns 30 – But Is Anyone Listening?', *Miami Herald*, 20 May 2015.

aimed at promoting the independence of the Cuban people so they do not need to rely on the Cuban state', but importantly, 'Ultimately, it will be the Cuban people who drive economic and political reforms.'¹⁰⁹

By framing their agreement by reference to fundamental principles of international law, both leaders offered the prospect of being able to normalise relations in the common ground that can be found if the processes of peaceful settlement, that have been initiated by the restoration of diplomatic relations, are given a chance to work.

A Hardening of Pragmatism

The US government's handling of United States–Cuba relations has varied between US presidents,¹¹⁰ although the embargo has persisted. Most if not all presidents have adopted a pragmatic position, whereby the power of the United States prevailed over the principles of international law when it was faced with arguments that it had acted unlawfully, but there was no such inversion when it was alleged that Cuba behaved unlawfully. The latest administration behaves in a way that indicates a turn to a very strong version of pragmatism, captured by the *New York Times* in its headline after the election – 'Business or Politics? What Trump Means for Cuba.'¹¹¹ Unfortunately, there does not appear to be much room for law in that equation. However, pragmatic reasoning does not ignore law. Pragmatic reasoning includes international law in its calculations, but inherently accepts only rules that 'reflect underlying geopolitical realities', so that states will judge for themselves what is required to defend their essential interests.¹¹² Pragmatism and constructivism do not diverge greatly in their understanding of the subjectivity of norms, though they disagree as to their influence on state behaviour. 'Pragmatism focuses on what experience tells us will work, not on what doctrine, dogma, or morality tells us must work.' For the pragmatist the 'question is always, what are the probable costs and benefits – the long- and short-term consequences – of the proposed action?'¹¹³

Candidate Trump hardened his stance on Cuba throughout the 2016 Presidential election campaign, promising to undo the concession made by President Obama under executive orders until the Castro regime met US demands. However, US businesses that exploited the concessions since 2014 have legitimate claims for compensation if these are retrospectively deemed unlawful under US law. The policy changes announced by President Trump on 16 June 2017 seek to protect existing commercial arrangements, while prohibiting future transactions between US businesses and the Cuban military (which is deeply embedded in the Cuban economy) under new regulations adopted in November 2017.¹¹⁴ This

¹⁰⁹White House, 'Fact Sheet: Charting a New Course on Cuba'.

¹¹⁰LeoGrande and Kornbluh, *Back Channel*.

¹¹¹Frances Robles, 'Business or Politics? What Trump Means for Cuba', *New York Times*, 15 Nov. 2016.

¹¹²Glennon, *The Fog of Law*, pp. 122–3.

¹¹³*Ibid.*, p. 124.

¹¹⁴'National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba', 16 June 2017, available at <https://fas.org/irp/offdocs/nspm/nspm-5.pdf>, last access 19 June 2018. Cuban Assets Control Regulations, 31 CFR 515, Federal Register, 82 FR 51998, 9 Nov. 2017, available

indicates a significant tightening of the embargo, but much will depend upon the way the regulations are understood and enforced. The other restriction announced by President Trump, involving the closing off of individual travel by US citizens that was clearly being exploited for the purposes of tourism, will also have an impact on the Cuban economy but, overall, the policy changes seem limited and as yet do not appear to have undermined broader cooperation.¹¹⁵ The indication that President Trump will continue the previous policy of suspending the application of Title III of the Helms-Burton Act 1996, under which US citizens can bring claims before US courts,¹¹⁶ also demonstrates that pragmatic reasoning has not precluded the possibility that the process of normalisation will continue.

Conclusion

In a UN report of 2016 published before the US Presidential election, the Cuban government stated that many aspects of the embargo not only remained US law but were being enforced by US authorities, with continuing extraterritorial effects.¹¹⁷ In justification, the United States continues to point to violations of human rights by the Cuban government,¹¹⁸ and persists in its claims to compensation for expropriations of US-owned property and businesses in the 1960s. Thus, the dispute remains a long way from resolution.

To fully unblock the process of normalisation, both sides need to recognise their own responsibility for violations of international law and to cease those violations. Both states then need to move from disputes about which primary rules of international law have been breached in the context of the bilateral dispute between the two countries to the secondary level of responsibility. These rules have the potential to unlock the means and methods of dispute settlement such as fact finding, tribunals and other remedial mechanisms. There have been some encouraging signs with the establishment in 2015 of a United States–Cuba Bilateral Commission established to advance the normalisation process between the United States and Cuba, and a United States–Cuba Dialogue on Claims to exchange details on outstanding claims,¹¹⁹ but the question remains whether these initiatives will produce results or even continue under President Trump.

at <https://www.federalregister.gov/documents/2017/11/09/2017-24447/cuban-assets-control-regulations>, last access 19 June 2018.

¹¹⁵Jorge I. Domínguez, 'Can Trump Compete with Obama on Cuba?', *New York Times*, 27 June 2017.

¹¹⁶US Department of State, Media Note, 'US Determination of Six-Month Suspension under Title III of LIBERTAD', 14 July 2017, available at <https://www.state.gov/r/pa/prs/ps/2017/07/272620.htm>, last access 19 June 2018.

¹¹⁷UN Secretary General's Report, 'Necessity of Ending the ... Embargo', UN Doc A/71/91 (2016).

¹¹⁸According to the Council of Foreign Relations Report, Cuba detained 8,600 political activists in 2015. The same report indicates that since December 2014 the US Treasury Dept. has fined companies more than \$5.2 million for violating the embargo: Council on Foreign Relations, 'US–Cuba Relations', 7 September 2016, available at <http://www.cfr.org/cuba/us-cuba-relations/p11113>, last accessed 19 June 2018.

¹¹⁹On 11 September 2015 the United States and Cuba established the Bilateral Commission as the primary vehicle for advancing normalisation, while on 8 December 2015 the US and Cuban governments held the first Dialogue on Claims with the aim of resolving claims against the Cuban government: <https://obamawhitehouse.archives.gov/issues/foreign-policy/cuba>, last access 19 June 2018. US Embassy in Cuba, 'United States and Cuba Hold Fifth Bilateral Commission Meeting in Havana, Cuba', 7 Dec. 2016, available

In such negotiations international legal discourse forms a pivotal part of the exchanges, given that claims, remedies and compensation have to derive from legal obligations and agreed understandings of responsibility for violating laws that bind both states. Moreover, remedies themselves are shaped by legal doctrine and norms, but require dialogue and compromise to be realised.¹²⁰ The recent turn to pragmatism under President Trump might operate against an equitable understanding of compensation that recognises that both sides have legitimate claims, but would instead use the power imbalance to assert the primacy of the US position. More broadly, it remains to be seen whether President Trump will respect the very basic obligation that underpins the international legal order, namely, to settle disputes peacefully on the basis of international law and justice.¹²¹ Only a peaceful settlement, in which both parties turn to compliance with international law by settling claims and ending the embargo as part of a mutual recognition of sovereignty and of all the international rights and duties that this entails, will produce a stable and beneficial bilateral relationship between Cuba and the United States – one that has a chance of lasting as long as the embargo itself.

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Spanish abstract

En diciembre de 2014, los presidentes Obama y Castro anunciaron importantes medidas para normalizar las relaciones interestatales. Aun cuando este anuncio sea principalmente parte de un proceso político, implica también el retorno de relaciones interestatales pacíficas, basadas en el respeto de principios fundamentales del derecho internacional. Este comentario explora cómo estos principios han contribuido a definir la confrontación entre Estados Unidos y Cuba desde la revolución de 1959, que se ha basado en un embargo económico, comercial y financiero a Cuba por parte de Estados Unidos. Este comentario argumenta que el rol del derecho internacional puede cambiar en momentos claves, pasando de ser parte integral de una disputa bilateral a ser parte de su solución. El clima político cambiante incrementa las posibilidades de que las partes recurran al derecho internacional como una forma de normalizar sus relaciones, provocando, entre otros cambios, el fin del embargo.

Spanish keywords: Cuba; embargo; derecho internacional

at <https://cu.usembassy.gov/tag/bilateral-commission/>, last access 19 June 2018. The third Dialogue on Claims meeting was held on 12 January 2017: Abel Fernández, 'US and Cuba Meet to Discuss Human Trafficking and Confiscated Property Claims', *Miami Herald*, 12 Jan. 2017. Ministry of Foreign Affairs of Cuba, 'Seventh Meeting of the Cuba-United States Bilateral Commission held in Washington DC', 14 June 2018, available at <http://www.minrex.gob.cu/en/seventh-meeting-cuba-united-states-bilateral-commission-held-washington-dc>, last access 21 June 2018.

¹²⁰Feinberg, 'Reconciling US Property Claims in Cuba', p. 22.

¹²¹Contained in Article 2(3) of the UN Charter 1945: 'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.'

Portuguese abstract

O anúncio feito pelos presidentes Obama e Castro, em dezembro de 2014, de um importante passo para a normalização das relações internacionais foi parte do que é basicamente um processo político, embora normalização implique no retorno a relações pacíficas entre estados baseado no respeito pelos princípios fundamentais do direito internacional. Este comentário explora o papel que esses princípios tem desempenhado ao ajudar a moldar o confronto entre os Estados Unidos e Cuba desde a revolução de 1959, que foi sustentada por um embargo econômico, comercial e financeiro de Cuba pelos Estados Unidos. Este comentário argumenta que, por ser uma parte integrante da disputa bilateral, o direito internacional pode, em momentos cruciais, mudar para formar parte de uma solução. A mudança do cenário político aumenta as perspectivas de as partes se voltarem para o direito internacional como um meio de restaurar as relações normais entre os dois países, resultando, entre outras mudanças, na retirada do embargo.

Portuguese keywords: Cuba; embargo; direito internacional

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