



# **Economic Sanctions Under International Law:**

## **A Guide for Canadian Policy**

Craig Martin

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# CONTENTS

<b>Executive Summary</b>	<b>4</b>
<b>I – Introduction: Economic Sanctions and International Law</b>	<b>6</b>
1. Definition and Purpose of Economic Sanctions	6
2. Operation of Economic Sanctions	8
3. Underlying International Law Principles	10
<b>II – Authorized Sanctions</b>	<b>12</b>
1. U.N. Security Council Sanctions	12
2. Regional System Sanctions	17
<b>III – Autonomous Sanctions</b>	<b>20</b>
1. Nature and Legal Framework of Autonomous Sanctions	21
2. Possible Legal Objections to Autonomous Sanctions	22
3. Justifications for Unlawful Sanctions	36
<b>IV – Canadian Sanctions in Context</b>	<b>41</b>
1. Overview of Canadian Sanctions Law and Practice	42
2. Assessing the Lawfulness of Canadian Sanctions	45
<b>V – Conclusion</b>	<b>49</b>
<b>Bibliography</b>	<b>51</b>

## Executive Summary

Economic sanctions have become an increasingly favored tool of international relations over the last several decades, but they have also become increasingly controversial. Like other Western states, Canada has developed robust sanctions regimes during this period, not only to implement United Nations (U.N.) Security Council resolutions, but also to engage in autonomous action in response to human rights violations, gross corruption, and nuclear proliferation. While there has been recent discussion in Canada regarding the wisdom and appropriateness of such sanctions, there has been relatively little analysis of the international law issues raised by the increasing reliance upon economic sanctions.

This report provides an examination of the distinct areas of international law that govern the various forms of economic sanctions that are widely employed by states, and locates Canadian sanctions regimes within the context of that legal framework. The primary purpose of the report is to provide Canadian policy makers with a guide to the legal landscape and a sense of the legal imperatives that should be part of any consideration of sanctions as a potential foreign policy tool.

After exploring the nature and operation of modern economic sanctions, including so-called secondary and targeted sanctions, the report examines the legal basis for such sanctions when authorized by the U.N. Security Council, as well as other international and regional organizations, such as the European Union (E.U.) and the Organization of American States (O.A.S.). The core of the report focuses on autonomous sanctions, examining the validity of the various grounds for challenging the lawfulness of unauthorized sanctions. These range from general claims that such sanctions constitute unlawful coercive intervention in the domestic affairs of target states, or involve the unlawful exercise of extraterritorial jurisdiction, through to claims that such sanctions violate obligations under more specialized legal regimes such as international human rights law, and international trade and investment law. This report also explores whether sanctions that may be unlawful under any of these grounds could be justified under the doctrine of countermeasures, which requires that the sanctions be in response to a prior violation of a legal obligation by the target state. This entire analysis reveals that the law governing economic sanctions is complex, and in some areas, quite unsettled, with differing views between developing and developed states. At a minimum, comprehensive autonomous sanctions regimes that threaten the food security and health of target populations are likely to violate human rights law, and cannot be justified as countermeasures.

The final section of the report provides a review of the Canadian domestic law authority for imposing sanctions, and examines the nature of current Canadian sanctions regimes. In addition to legislation that implements sanctions authorized by the U.N. Security Council, Canada has legislation that authorizes broad autonomous sanctions both against states, and against individuals and private entities. Canada does avoid the issues related to the exercise of extraterritorial jurisdiction, because it does not impose secondary sanctions. Further and more detailed analysis would be required to assess specific sanctions regimes against other specialized areas of international law, such as international trade law. Questions of whether economic

sanctions may rise to the level of coercive intervention, or violate the human rights of the people in target states, remain debated and somewhat unsettled. But to the extent that some forms of economic sanction may constitute coercive unlawful intervention, or be inconsistent with human rights obligations and values, Canadian sanctions regimes are vulnerable to challenge and criticism on these grounds. What is more, it is unlikely that any of Canada's sanctions regimes could be justified as legitimate countermeasures.

There is an irony and possible hypocrisy in, for instance, using sanctions in an effort to enforce human rights norms, only to thereby undermine human rights law and cause humanitarian harm in the process. Similarly, there is a degree of paradox in using economic sanctions to address human rights violations and to enforce the rule of law against corruption in developing countries, when economic sanctions are typically viewed as not only coercive intervention but a throwback to Western imperialism and oppression. Thus, while some of the relevant areas of international law are unsettled, this uncertainty should be cause for some caution, and Canadian policy makers need to be mindful of Canada's role in helping to shape the evolving international law regime; and their decisions should arguably be mindful of whether the use of economic sanctions furthers Canada's championing of human rights, respect for sovereignty, and the primacy of the international rule of law.

# **I – Introduction: Economic Sanctions and International Law**

There has been a growing reliance on economic sanctions as a foreign policy tool, by an increasing range of countries, over the last several decades. What is more, the nature, scope, and sophistication of such sanctions have also evolved considerably over this period. More states are imposing unilateral or autonomous sanctions, are extending such sanctions against non-state entities, such as individuals and corporations, and are expanding the application of their sanctions beyond the target state, to include states and private entities that dare to engage in commerce with the true target of the sanctions regime. But these global developments have provoked questions regarding the lawfulness of some aspects of economic sanctions and the different ways in which they are wielded. Indeed, there is considerable debate and some uncertainty surrounding some of these issues in international law.

Canada too has developed increasingly robust sanctions regimes during the last several decades. This report provides a relatively brief examination of the lawfulness of the different forms of economic sanctions that are widely employed by states today, and locates Canadian sanctions regimes within the context of that legal framework. The primary purpose of this report is to provide guidance in thinking about the legality of the different options that may be proposed, or have already been employed, as part of Canadian foreign policy. There are, of course, a number of different imperatives and considerations that go into the shaping of any given foreign policy, or for assessing the wisdom of such a policy once it is in place. There is a considerable literature, in a range of different disciplines, that debates the effectiveness and strategic value of economic sanctions, examines in detail some of the collateral harms and potentially counterproductive effects of sanctions, and explores the moral legitimacy of economic sanctions in various contexts. While the report may draw on some of these arguments in passing, and notes that such considerations should be an essential component of foreign policy decision-making, they are not our primary concern here. Nor is it our purpose to drill down into the more technical analysis of the precise structure and operation of different forms of sanctions. The primary focus of the report is the lawfulness of economic sanctions under international law—for while there are many imperatives to contemplate in assessing policy options, the lawfulness of the tools being deployed as part of that policy is, or should be, of considerable importance.

## **1. Definition and Purpose of Economic Sanctions**

A week seldom passes without a reference in the news to some country imposing “sanctions” on another state, but the term itself is open to a wide range of meanings. The term “sanction” is used in international law to describe an action taken by a state to either compel some other state to comply with its obligations under international law, or to punish the state

for its violation of such obligations.<sup>1</sup> This is both broad, in the sense that it involves various kinds of measures short of the use of armed force; and narrow, in the sense that it is in response to violations of international legal obligations.

In the last few decades, however, state practice has been characterized by the imposition of sanctions in a wider range of contexts, often in response to conduct or policies on the part of the target state that do not comprise any clear violation of international law, and are certainly not a violation of any obligation owed to the sanctioning state. Indeed, in the last two decades we have seen a move towards imposing sanctions on non-state actors, in the form of both corporate entities and individuals, both as a means of influencing state behavior and to punish and deter the conduct of the non-state actors themselves. Moreover, states have increasingly looked to trade restrictions, the freezing of assets or blocking of financial transactions, and travel limits imposed on individuals—what we will here collectively label “economic sanctions”—as the favored form of such sanctions.<sup>2</sup> These economic sanctions are thought to modify behavior through not only the direct negative consequences that flow from the restrictions or limitations thus imposed, but also through a broader signaling function that imposes indirect costs by “outcasting” the targets of the sanctions.<sup>3</sup>

It is helpful at the outset to clarify some of the terminology relating to economic sanctions. Those sanctions that are imposed on states and other entities because of their continued dealings with the target state, primarily as a means of bringing pressure to bear on that target state, are commonly referred to as “secondary sanctions” or “third-party sanctions.” Sanctions that are tailored to target specific individuals or legal entities, whether within the target state or elsewhere, but again with the purpose of applying pressure for change within the target state, are commonly referred to as “targeted sanctions” or “smart sanctions.” It should be noted that targeted sanctions may be either direct, in that they are targeting individuals or entities within or related to the target state, or they may be both secondary and targeted sanctions, in that they target individuals or entities that are merely dealing with the target state. Finally, sanctions that are not authorized by the United Nations Security Council or some other international organization, such as the Organization of American States (O.A.S.) or the European Union (E.U.), are typically referred to as “autonomous” or “unilateral sanctions.” Because unauthorized sanctions can be deployed in concert with others, in which case they are multilateral but nonetheless autonomous, in this report we use the term autonomous sanctions.

The use of trade and financial limits can, of course, be traced back centuries, but there has been an explosion in the use of economic sanctions, beginning in the late 20<sup>th</sup> Century. This has provoked a growing chorus of objections and questions as to the legality and legitimacy of such policies—not only due to the more widespread use of sanctions, but because

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<sup>1</sup> See, e.g. Tom Ruys, “Sanctions, Retorsions and Countermeasures: Concept and International Legal Framework,” in Larissa van den Herik, ed., *Research Handbook on UN Sanction and International Law* (Elgar, 2016) at 19; and Richard Gordon *et al.*, *Sanctions Law* (Hart, 2018) at 57; see also, Malcolm Shaw, *International Law*, 6<sup>th</sup> ed., (Cambridge, 2008), at loc. 5393 (Kindle ed.).

<sup>2</sup> Gordon, *Sanctions Law*, *supra* note 1, at 58.

<sup>3</sup> Ruys, *supra* note 1, at 20; and see Oona Hathaway and Scott Shapiro, *The Internationalists* (Simon & Schuster, 2017), Chap. 16 (for a more detailed discussion of the idea of “outcasting”).

sanctions are increasingly detached from any underlying unlawful conduct, they have been extended to target individuals and non-state actors, and they are increasingly applied extraterritorially to third-parties merely due to their association with the primary targets.<sup>4</sup> This report will be primarily focused on the lawfulness of these economic sanctions, which may be defined as state measures, in the form of trade restrictions, constraints on financial assets and transactions, and travel limits, broadly designed to modify the behavior of either states or non-state actors.

## 2. Operation of Economic Sanctions

As indicated above, economic sanctions as defined here can implicate international trading relations among states, the ability of both states and private entities to engage in financial transactions or gain access to financial markets, and even the ability of individuals to travel internationally. Economic sanctions have evolved considerably over the last fifty years, from the more prevalent use of “comprehensive” trade embargoes against target states from the 1970s through to the end of the century, to an increasing reliance on a more sophisticated mix of comprehensive and targeted sanctions, and a more expansive use of secondary sanctions, in the last two decades. This sub-section will provide a very brief overview of some of the more typical forms such sanctions may take and how they operate.

The most traditional form of economic sanction involves the application of trade restrictions. These are typically implemented through export and import controls or other restrictions on trade with the target state, including the imposition of increased tariffs or other penalties. While these may be targeted on certain sectors or industries (such as weapons or nuclear technology), and likewise may exempt certain goods such as food and medicine for humanitarian reasons, they are by their nature “broad,” in that they frequently apply to trade with the country as a whole. They may also be “comprehensive” if they extend to all trade with the target state. The complete embargo of U.S. trade with Cuba imposed by President Kennedy in 1962 is one early example of such comprehensive trade sanctions.<sup>5</sup> When such sanctions are not authorized by the U.N. Security Council, they will typically raise questions as to whether they are in compliance with international trade law, or indeed constitute unlawful coercive intervention in the internal affairs of the state, issues that will be addressed below.

Financial sanctions take the form of freezing assets and limiting or restricting the flow of funds or other assets to and from the targeted state, individuals, or other entities. These restrictions can be implemented in various ways depending on the domestic legal system, but the effect is to force financial institutions to freeze assets and transactions in which targeted

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<sup>4</sup> There is a large and growing literature on the subject. For a small sample, see, e.g., Matthew Happold and Paul Eden, eds., *Economic Sanctions and International Law* (Hart, 2016); Masahiko Asada, ed., *Economic Sanctions in International Law and Practice* (Routledge, 2020); Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, *supra* note 1; Enrico Carisch *et al.*, eds., *The Evolution of UN Sanctions* (Springer, 2017).

<sup>5</sup> The sanctions were commenced by President Dwight Eisenhower, with an arms embargo in 1958, which was extended to include other exports in 1960, but Kennedy extended it to a virtually comprehensive trade and financial embargo in 1962-1963, enforced through the *Trading with the Enemy Act*, 1917 (12 U.S.C. §95), the *Foreign Assistance Act*, 1961 (22 U.S.C. §2151), and the *Cuban Assets Control Regulations*, 1963 (31 CFR 515).



states, individuals, or other legal entities have a financial interest. In the U.S., financial sanctions are imposed by a mix of executive orders and legislation, and implemented by regulation, overseen primarily by the Office of Foreign Assets Control (OFAC) within the Department of the Treasury, in cooperation with the Department of State and other agencies. The OFAC maintains a Specially Designated Nationals and Blocked Persons List (SDN List), and U.S. persons are prohibited from engaging in any transactions with those individuals and other entities identified on the SDN List (SDNs). In addition, American persons are generally prohibited from engaging in most transactions with certain states targeted by economic sanctions.<sup>6</sup>

This means that U.S. banks and other financial institutions, which include American subsidiaries of foreign banks and financial institutions, and arguably foreign subsidiaries of American banks, cannot participate in any aspect of a financial transaction involving an SDN or targeted state. As will be discussed further below, because most international financial transactions are denominated in U.S. dollars, they must be settled and cleared, at some point in the transaction process, through intermediary institutions in the U.S., which brings them within the jurisdiction of the sanctions regime. This provides the United States with enormous power to limit the ability of states, individuals, and other entities to engage in financial transactions anywhere in the world. As one example of the reach of such sanctions regimes, it was reported in the summer of 2021 that U.S. sanctions prevented Iran from being able to execute the payment of its annual fees to the United Nations, resulting in the suspension of Iran's voting rights within the U.N. Payment was only made possible after OFAC issued an exemption to allow a South Korean bank to release the Iranian funds designated for the transaction.<sup>7</sup>

Sanctions in the form of travel restrictions can entail blanket prohibitions on the entry of all nationals of a given country, as was famously at issue in the so called "Muslim travel ban" of the Trump Administration. They can also involve more targeted limits in the form of visa denials for specific individuals, whether they are in the government of target states, influential members of industry, or even officials within certain international organizations, as was the case with the recent Trump Administration denial of entry to the Chief Prosecutor of the International Criminal Court.<sup>8</sup>

A given sanctions regime will typically include a mix of these different forms of economic sanction, and they tend to be self-reinforcing. It should also be noted that both authorized and autonomous sanctions regimes are characterized by this range and mix of sanctions. Thus, the U.N. Security Council itself has created lists of individuals and entities that are to be the subjects of financial sanctions, which then requires states to enact domestic legislation or

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<sup>6</sup> For a good review of U.S. financial sanctions, *see, e.g.*, Barry Carter and Ryan Farha, "Overview and Operation of U.S. Financial Sanctions, Including the Example of Iran," (2013) 44 *Georgetown Journal of International Law* 903.

<sup>7</sup> Rick Gladstone, "Iran Pays Delinquent U.N. Dues, Getting Its Vote Back," *The New York Times*, Jun. 11, 2021, available at: <https://www.nytimes.com/2021/06/11/world/middleeast/iran-sanctions-us-un-dues.html>.

<sup>8</sup> Executive Order 13928, "Blocking Property of Certain Persons Associated with the Criminal Court," Jun. 11, 2020, available at: <https://www.federalregister.gov/documents/2020/06/15/2020-12953/blocking-property-of-certain-persons-associated-with-the-international-criminal-court>; *see also*, Center for Constitutional Rights, "Factsheet: U.S. Sanctions on the International Court," Apr. 2021, available at: <https://ccrjustice.org/factsheet-us-sanctions-international-criminal-court>.

regulation to implement such sanctions against those so designated—an issue that has given rise to controversy, as will be examined further below.

### 3. Underlying International Law Principles

Given that the focus of this report is on the lawfulness of economic sanctions under international law, it may be helpful to provide a brief review of some of the more relevant principles and concepts from public international law. As a starting point, it should be recalled that the primary sources of international law are: (i) treaties, which are written agreements entered into primarily by states (and, secondarily, international organizations); and (ii) customary international law, which comprises principles or rules that are inferred from a combination of the widespread practice of states, together with evidence that the states so acted due to a consciousness of legal obligation (the latter being referred to as *opinio juris*). There are, in addition, certain general principles of international law, and subsidiary sources in the form of judicial decisions and the writing of highly regarded publicists. When assessing the lawfulness of some state action, therefore, one must look to this range of sources to determine the relevant legal rules and principles.

These sources of law all reflect the extent to which positivism, the sovereign equality of states, consent, and voluntarism are central to the nature of modern international law. In other words, the international system is a horizontal system comprised of notionally equal sovereign states, and international law is what states decide it is, with states being largely bound by principles and rules to which they have in some sense consented.<sup>9</sup> In the absence of any global sovereign, the concept of self-help was also an important feature of international law prior to the 20<sup>th</sup> century. With the development of the League of Nations and then the United Nations system, however, there was a move to a legal system more oriented around multilateralism and institutional structures. As a result, certain mechanisms of self-help, such as the use of force and certain forms of reprisal, became significantly constrained. Indeed, it can be argued that recourse to the doctrine of self-help as a ground for employing unilateral autonomous sanctions (broadly construed) is inconsistent with modern conceptions of international law.<sup>10</sup>

The use of economic sanctions in international relations can be traced back to antiquity, and blockades and sieges were frequently employed as an accompaniment to the use of force throughout history. But the idea that they could serve as an alternative to the use of force really began to emerge with the development of the Covenant of the League of Nations. The Covenant did not prohibit the use of force outright, but it did require that states submit any disputes that could lead to war for consideration by either adjudication or by the Council, and it mandated the severance of all economic and commercial relations with a state that committed an act of war in disregard of these conditions in the Covenant.<sup>11</sup> With the establishment of the Charter of the United Nations (the Charter), the international community

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<sup>9</sup> For a general review of public international law, see, e.g., James Crawford, *Brownlie's Principles of Public International Law*, 9<sup>th</sup> ed. (Oxford, 2016); and Shaw, *International Law*, *supra* note 1.

<sup>10</sup> See, e.g., Shaw, *International Law*, *supra* note 1, at loc. 5393 (Kindle ed.).

<sup>11</sup> *Covenant of the League of Nations, Treaty of Versailles*, 26 June, 1919, 225 CTS 188, Arts. 12, 13, 15, and 16.

embraced a new collective security system in which there was an explicit prohibition on the use of force against other states. During the negotiations of the text of the Charter, Latin American countries proposed that the prohibition on the use of force should be understood to encompass economic and financial coercion, but this was explicitly rejected by the majority of states present.<sup>12</sup> The meaning of the prohibition on the use of force in Article 2(4) of the Charter was thus limited to the use of armed force.<sup>13</sup>

At the same time, however, Article 2(7) of the U.N. Charter also constrained any U.N. intervention in “matters which are essentially within the domestic jurisdiction of any state.” This is related to a principle of non-intervention that prohibits states from intervening in the sovereign affairs of any other state. This principle has been interpreted to mean that states may not adopt policies or engage in conduct that effectively coerces other states to change or modify their choices regarding socio-economic systems or their domestic or foreign policy.<sup>14</sup>

Both of these modern developments under the U.N. system are quite significant to the evolution of economic sanctions: first, because the prohibition on the use of force meant that states needed to find alternate measures to pressure and modify the behavior of other states; and second, because the principle of non-intervention raised questions as to whether some economic sanctions might rise to the level of constituting a prohibited coercive intervention in the internal affairs of target states—an issue that will be examined more closely below.

One last concept that will be important to our analysis, is that of “countermeasures.” A remnant of the self-help features of international law, the basic idea of countermeasures (traditionally referred to as reprisals) is that a state may violate its international legal obligations in response to the prior unlawful action of another state.<sup>15</sup> In other words, while the actions of the state would otherwise be unlawful, they will be excused or deemed not wrongful, if they are in response to a prior unlawful action by another state and they satisfy certain conditions, which have been formalized in the International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).<sup>16</sup> We will return to examine these specific conditions in more detail below.<sup>17</sup> Moreover, countermeasures cannot

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<sup>12</sup> See generally, *Documents of the United Nations Conference on International Organization*, 1945, Vols. I-III (available online at: <https://digitallibrary.un.org/record/1300969/files/UNIO-Volume-3-E-F.pdf>); see also Leland Goodrich et al., *Charter of the United Nations: Commentary and Documents*, 3<sup>rd</sup> ed., (Cambridge, 1969), and Bruno Simma et al., *The Charter of the United Nations: A Commentary*, 3<sup>rd</sup> ed. (Oxford, 2013).

<sup>13</sup> *Charter of the United Nations*, 1 UNTS XVI 1945, Art. 24 and 25 [hereinafter, *U.N. Charter*]. For more on the dispute over the scope of the use of force, see, e.g., sources in note 12, *supra*.

<sup>14</sup> See, e.g., *Corfu Channel* case, [1949] I.C.J. Rep. 4, at 35 [hereinafter, *Corfu Channel*]; *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, [1986] I.C.J. Rep. 14, 106, 109-10 [hereinafter, *Nicaragua*]; *Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States*, UN GA Res. 2625 (XXV)(1970) [hereinafter, *Declaration on Friendly Relations*]. See more detailed discussion of this issue in Part III(2)(i), *infra*.

<sup>15</sup> See, generally, Omer Yousif Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Clarendon Press, 1988).

<sup>16</sup> International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, *Yearbook of the International Law Commission*, 2001, Vol. II (2001), Articles 49-54 [hereinafter, ARSIWA]; see also, James Crawford, *State Responsibility: The General Part* (Cambridge, 2013), at 292-294; 684-705.

<sup>17</sup> See text associated with, and sources cited in, notes 144-146, *infra*.

involve the use of force or interfere with obligations for the protection of human rights.<sup>18</sup> The relevance of all of this to economic sanctions is that in some circumstances, where autonomous economic sanctions might be challenged as violating certain legal obligations, they may be nonetheless justified as countermeasures, so long as they are a proportionate and reversible response to a prior violation of international law.

## II – Authorized Sanctions

The least contentious economic sanctions are those that are formally authorized by international organizations, namely the U.N. or subordinate multilateral regional organizations. As we will see, they are not entirely without controversy, but to varying degrees they have the imprimatur of legal authority. At the apex of this hierarchy of authorized sanctions are those that flow from the U.N. Security Council.

### 1. U.N. Security Council Sanctions

#### (i) Legal Framework

The U.N. Security Council is the executive institution of the United Nations system. Article 24 of the U.N. Charter provides that the Security Council has the primary responsibility for the maintenance of international peace and security, and Article 25 imposes an obligation on all member states to accept and carry out decisions of the Security Council.<sup>19</sup> What is more, Article 103 of the Charter provides that U.N. member state obligations under the Charter take precedence over any obligations under any other treaties to which members may be party, to the extent that the obligations may be in conflict—which means that an obligation to comply with a Security Council decision will trump other treaty obligations.<sup>20</sup> One of the Security Council’s core functions, articulated in Article 39 of the Charter, is to “determine the existence of any threat to the peace, breach of the peace, or act of aggression,” and to “make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”<sup>21</sup> Article 42 provides that the Security Council has the power to authorize member states to use force against those states determined to pose a threat to peace and security, but prior to any such resort to force the Security Council may authorize other measures to address the threat to peace. Specifically, Article 41 provides that:

The Security Council may decide what measures not involving the use of force are to be employed to give effect to its decisions, and it may call upon the

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<sup>18</sup> ARSIWA, *supra* note 16, Art. 50(1)(a); *see also*, *Nicaragua v. United States*, *supra* note 14, at 101; *Declaration on Friendly Relations*, *supra* note 14, Principle 1, para. 6.

<sup>19</sup> U.N. Charter, *supra* note 13, Art. 24.

<sup>20</sup> *Ibid.*, at Art. 103.

<sup>21</sup> *Ibid.*, Art. 39.

Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.<sup>22</sup>

This framework provides the Security Council with powerful authority to determine that the policy of a given state constitutes a threat to international peace and security, make decisions that call upon the subject state to change its policy or behavior, and to require that all member states impose economic sanctions in various forms to compel the target state to comply with the Security Council's decision. Significantly, there is no requirement that the Security Council be responding to some prior violation of legal obligation by the target state, but only that it has determined there to be a threat to, or breach of, international peace and security—an undefined and rather ephemeral standard. What is more, the Security Council has authorized measures pursuant to Article 41 without explicit reference to Article 39 or any formal determination that there exists a threat to, or breach of, international peace and security—there is merely a broad understanding that such a determination is implicit in the Security Council's decision to impose measures.<sup>23</sup>

The power to impose sanctions, while ostensibly dependent upon a determination of a threat to international peace and security pursuant to Article 39, extends far beyond narrow efforts to address specific threats—indeed, the precise objectives of Security Council-authorized sanctions are not always entirely clear.<sup>24</sup> The independent organization named Security Council Report, claims that past U.N. Security Council sanctions regimes can be categorized as addressing: (i) conflict resolution; (ii) non-proliferation; (iii) counter-terrorism; (iv) democratization; and (v) protection of civilians.<sup>25</sup> In short, while the reasons for sanctions must theoretically be related to addressing threats to international peace and security, the purpose and objectives can be broad. What is more, the Security Council has been expanding what comes within the scope of Article 39 determinations. For instance, it identified the Ebola epidemic in 2014 as constituting a potential threat to international peace and security.<sup>26</sup>

## **(ii) Operation of U.N. Sanctions**

While the scope of activity or circumstances that may trigger the application of sanctions has expanded, the scope of the actual sanctions has actually narrowed significantly over time, from very broad trade embargos in the second half of the 20<sup>th</sup> century, to a much heavier reliance on targeted “smart” sanctions since 9/11. Indeed, there were relatively few U.N.-authorized sanctions regimes prior to the turn of the century. Prior to 1990 the primary sanctions regimes authorized by the U.N. were against Rhodesia and South Africa. The former was a fairly comprehensive trade embargo, but the latter, which is often cited as an example

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<sup>22</sup> *Ibid.* at Art. 41.

<sup>23</sup> Gordon, *supra* note 1, at 73; Security Council Report, *Special Research Report on UN Sanctions*, Nov. 25, 2013, at 6 (available at: [www.securitycouncilreport.org/research-reports/un-sanctions.php](http://www.securitycouncilreport.org/research-reports/un-sanctions.php)) [hereinafter, *SCR Sanctions Report*]

<sup>24</sup> Gordon, *Sanctions Law*, *supra* note 1, at 71.

<sup>25</sup> *SCR Sanctions Report*, *supra* note 23, at 3-5.

<sup>26</sup> SC Res. 2177 (2014), UN Doc. S/Res/2177 (2014).

of successful sanctions policy, was a much more limited arms embargo.<sup>27</sup> These were followed by the sanctions against Iraq after its invasion of Kuwait in 1990, and it is this sanctions regime that largely changed the nature of economic sanctions. It involved not only a very broad state-centered trade embargo, limiting trade in all products and commodities entering or leaving Iraq, but also imposed stringent financial sanctions—and it lasted until the invasion of Iraq in 2003.<sup>28</sup> This regime in particular led to considerable criticism of economic sanctions as being a very blunt instrument that caused severe and morally unjustifiable harm to the civilian populations of the targeted countries.<sup>29</sup> Indeed, where the professed purpose of sanctions was to punish governments for their violation of the human rights of their people, there was a tragic irony in the sanctions regimes harming precisely those people they were ostensibly designed to help.

The U.N. Security Council began to implement more targeted financial anti-terrorist sanctions regimes in 1999, in response to the Al Qaida attacks on American embassies in Tanzania and Kenya. With a sanctions regime established by Security Council Resolution 1267, the assets and financial transactions of the Taliban were specifically targeted, and the regime was extended to target the finances of Osama bin Laden himself, and all those “associated with him,” in 2000.<sup>30</sup> This was the beginning of the individual designation system, and the development of “smart sanctions” that sought to target individuals and specific entities. This was further entrenched in 2002, with the establishment of the “Consolidated List” of individuals targeted by U.N. sanctions.<sup>31</sup> As will be discussed below, this led to concerns regarding the process for designating individuals and entities, and more specifically, the lack of due process for those trying to challenge such designation and get removed from the lists.

While there has been much heavier reliance on such “smart” sanctions, there do remain broad state-centered and even comprehensive sanctions regimes, often combined with targeted sanctions against individuals within government, and secondary sanctions against other states and entities that dare to trade with the target state. An example of this kind of regime is the extremely severe Resolution 1718 regime against North Korea.<sup>32</sup> U.N. sanctions regimes today tend to comprise a mix of asset freezes, embargos on arms and other strategic

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<sup>27</sup> SC Res. 253 (1968), UN Doc. S/Res/253 (1968); and SC Res. 418 (1977), UN Doc. S/Res/418 (1977), respectively. For a review of the evolution of U.N. sanctions, see e.g. Benjamin Coates, “A Century of Sanctions,” (2020) 13 *Origins: Current Events in Historical Perspective* 4, available at: <https://origins.osu.edu/article/economic-sanctions-history-trump-global>; Carisch *et al.*, *supra* note 4, at chap. 5; on the sanctions against South Africa, which largely gave rise to the idea that sanctions were both effective and benign, see Bronwen Manby, “South Africa: The Impact of Sanctions,” (1992) 46 *Journal of International Affairs* 193.

<sup>28</sup> SC Res. 661 (1990), UN Doc. S/Res/661 (1990).

<sup>29</sup> Gordon, *Sanctions Law*, *supra* note 1, at 95, noting that even the UN Secretary General, Boutros Boutros-Ghali was critical. See also: Joy Gordon, *Invisible War: The United States and the Iraq Sanctions* (Harvard, 2010). UNICEF famously published a study in 1999 claiming that as much as half a million children had died as a result of the U.N. sanctions regime, and while this claim has been the subject of considerable controversy, there is sound evidence that the sanctions caused considerable humanitarian harm, including the death of significant numbers of the population.

<sup>30</sup> SC Res. 1267 (1999), UN Doc. S/Res/1267 (1999), and SC Res. 1333 (2000), UN Doc. S/Res/1333 (2000), respectively.

<sup>31</sup> SC Res. 1390 (2002), UN Doc. S/Res/1390 (2002).

<sup>32</sup> SC Res. 1718 (2006) UN Doc. S/Res/1718 (2006); as augmented by Security Council resolutions 1874 (2009), 2087 (2013), 2094 (2013), 2270 (2016), 2321 (2016), 2371 (2017), 2375 (2017), and 2394 (2017).

materiel, the interdiction of commodities linked to specific conflict areas, travel bans, and diplomatic sanctions.<sup>33</sup>

### **(iii) Legal Issues Raised by U.N. Sanctions**

As indicated at the outset, there is a heavy presumption that economic sanctions authorized by the U.N. Security Council are lawful and legitimate. There is fairly broad agreement that this authority of the Security Council is not unlimited—it rests on a determination that there is a threat to international peace and security, and that the sanctions are a response to that threat, pursuant to Chapter VII of the U.N. Charter. This means that there is scope for Security Council resolutions to be challenged as being unlawful, and indeed there have been such efforts in the past. The basis for such challenges can be divided generally into three lines of argument: (i) that the sanctions are *ultra vires*, meaning that the sanctions are outside or beyond the legal authority of the Security Council; (ii) that the sanctions are inconsistent with or violate a *jus cogens* norms (peremptory norms of customary international law, which are superior to other legal obligations and permit no derogation); and (iii) that the sanctions are inconsistent with the principles of the law of state responsibility on countermeasures.<sup>34</sup>

In addition to challenging the authority of the Security Council when it has imposed sanctions in circumstances that cannot reasonably be characterized as a response to a threat to international peace and security, the *ultra vires* argument may be raised where the sanctions might be inconsistent with other fundamental purposes and principles of the United Nations. In particular, it has been argued that sanctions that are not consistent with the principle and purpose of promoting and encouraging respect for human rights and fundamental freedoms, as articulated in Article 1(3) of the Charter, are legally invalid.<sup>35</sup> These limitations on Security Council authority were specifically articulated by the European Court of Justice (now the Court of Justice of the European Union) in the famous *Kadi* case.<sup>36</sup> The Court annulled E.U. regulations adopted to implement the U.N. Security Council sanctions pursuant to Security Council Resolution 1267 (1999) against Iraq, which had also targeted a number of individuals, including Mr. Kadi, on the grounds that the sanctions violated the applicant's human right to notice, to be heard, and to judicial review of the decision to target him (we will return to discuss this case in more detail below).

Such arguments tend to overlap with the argument that the Security Council must respect *jus cogens* principles, to the extent that certain human rights principles may be considered *jus cogens* norms. Indeed, in the *Kadi* decision the Court relied on these *jus cogens* arguments in holding that Articles 25 and 103 of the Charter were not supreme, noting in particular that they must give way to *jus cogens* norms—even though the Court did not find *jus*

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<sup>33</sup> Gordon, *Sanctions Law*, *supra* note 1, at 78-80; *SCR Report*, *supra* note 23, at 10-12.

<sup>34</sup> Gordon, *Sanctions Law*, *supra* note 1, at 74; and *see also*, Ruys, *supra* note 1, at 32-33.

<sup>35</sup> See, e.g., Pierre-Emmanuel Dupont, "Human Rights Implications of Sanction," in Asada, *supra* note 4, at 43-47.

<sup>36</sup> *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351 (*Kadi I*) [hereinafter, *Kadi I*].



*cogens* to be at issue in the case itself.<sup>37</sup> There is little agreement as to exactly what principles of customary international law constitute *jus cogens* norms, but the typical short list includes the prohibitions on slavery, torture, genocide, uses of force constituting acts of aggression, crimes against humanity, and war crimes comprising of grave breaches of the Geneva Conventions.<sup>38</sup> It is not easy to imagine a U.N. economic sanctions regime that would be inconsistent with such principles, but it is not inconceivable that a comprehensive trade embargo causing famine and other widespread humanitarian consequences, might attract claims that the sanctions constitute crimes against humanity, or at a minimum the violation of the right to life—and as will be seen below, Venezuela has recently advanced precisely such claims.<sup>39</sup>

The third line of argument relates to countermeasures under the law of state responsibility. As noted in the introduction, countermeasures are actions or omissions that would normally be unlawful, but which are excused or justified in the particular circumstances on the grounds that they are adopted by the state in response to a prior violation of legal obligation by the state targeted by the countermeasure.<sup>40</sup> Countermeasures do not directly apply to U.N.-authorized sanctions, first because the U.N. itself is not a state, and thus cannot be an “injured state” for the purposes of establishing the justification. What is more, U.N. sanctions do not require an unlawful act or violation of legal obligation as condition precedent to impose sanctions in any event. Finally, for the reasons explained above, U.N. sanctions are presumptively, if not always, lawful, and in such cases would not require the kind of justification that the doctrine of countermeasures provides. Nonetheless, it has been argued that to the extent U.N. sanctions are “functionally analogous” to countermeasures, they should comply with the principles of the law of state responsibility on countermeasures, as articulated in the ARSIWA.<sup>41</sup> In particular, it is argued that U.N. sanctions should be both proportionate, and fully compliant with human rights and humanitarian law obligations, in accordance with the ideas underlying the ARSIWA conditions.<sup>42</sup>

There is no mechanism for fully challenging or seeking judicial review of the legality of a U.N. sanctions regime in general—indeed, this is one of the primary criticisms of the system. But challenges have been made in various fora, including international courts such as the Court of Justice of the European Union and the European Court of Human Rights, as in the *Kadi* case discussed above. The U.N. Security Council has responded in particular to the questions and criticisms regarding the apparent lack of procedural due process in the designation and de-listing of targets of smart sanctions. Until 2006 this process was overseen by the sanctions committee established for each sanctions regimes, but in 2006 the Security

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<sup>37</sup> *Ibid.* It should be noted that the Court did not find that *jus cogens* norms had been implicated or violated in the case itself.

<sup>38</sup> Shaw, *supra* note 9, at loc. 8020-48 (Kindle ed.); *Report of the International Law Commission*, Seventy-First Session, UN Doc. A/74/10 (2019), at Chap. V (“Peremptory norms of general international law (*jus cogens*)”).

<sup>39</sup> See discussion in text associated with, and authority cited in, notes 120, *infra*.

<sup>40</sup> See text associated with notes 15 and 18, *supra*.

<sup>41</sup> Gordon, *Sanctions Law*, *supra* note 1, at 77.

<sup>42</sup> *Ibid.*



Council established a “Focal-Point for De-listing” with Security Council Resolution 1730.<sup>43</sup> This is part of the U.N. Secretariat, and it operates to review and process de-listing requests from designated entities and individuals that are targeted by U.N. sanctions. In addition, an “Office of the Ombudsman” was established in 2009 to add even greater protections for those targeted under the Al Qaida 1267 Sanctions Regime.<sup>44</sup> Nonetheless, criticism persists regarding the process, and the insufficient safeguards and independent oversight to protect the rights of designated persons.<sup>45</sup>

## 2. Regional System Sanctions

Below the U.N. in the hierarchy of the international legal order, international organizations associated with multilateral regional systems, such as the E.U., the O.A.S., and the African Union (A.U.), have also imposed or authorized economic sanctions.<sup>46</sup> These sanctions tend to take a range of forms similar to those of the U.N. sanctions discussed above, and in many cases they actually operate to implement or complement U.N. sanctions. But for reasons discussed below, sanctions authorized or imposed by regional organizations can raise questions of lawfulness and legitimacy that the U.N. sanctions regimes escape—primarily because the sanctions imposed by regional organizations are not supported by the supreme authority created by the combination of Articles 25, 41, and 103 of the U.N. Charter. In this section we will review very briefly the sanctions regimes of some of the more prominent regional organizations, and then turn to examine the legal issues implicated by such regional sanctions regimes.

### (i) European Sanctions Regimes

By far the most active international organization in the context of economic sanctions is the E.U. It has an explicit sanctions policy as one component of its Common Foreign and Security Policy (CFSP), which is implemented by the European External Action Service (EEAS).<sup>47</sup> E.U. sanctions policy is a tool for the achievement of CFSP objectives, which are listed as follows: safeguarding E.U. values and its security; supporting democracy, the rule of law, human rights and the principles of international law; and preserving peace, preventing conflicts, and strengthening international security.<sup>48</sup> Since the *Treaty of Lisbon* came into effect

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<sup>43</sup> SC Res. 1730 (2006), UN Doc. S/RES 1730 (2006). For discussion, see e.g., Thomas Dörfler, *Security Council Sanctions and Governance: The Power and Limits of Rules* (Routledge, 2019), at 53-57, 114-19.

<sup>44</sup> Initially established by SC Res. 1904 (2009), UN Doc. S/RES 1904 (2009), with the mandate extended in SC Res. 2253 (2015), UN Doc. S/RES 2253 (2015), and SC Res. 2368 (2017), UN Doc. S/RES 2368 (2017). The mandate is currently scheduled to expire in December, 2021. More information on the Ombudsman is available at: <https://www.un.org/securitycouncil/ombudsperson>.

<sup>45</sup> Gordon, *Sanctions Law*, *supra* 1, at 274.

<sup>46</sup> The term “international organization” is here used in the technical sense, meaning an entity constituted by agreement among states, subject to international law, and enjoying a measure of legal personality under international law. Regional organizations like the E.U. and the O.A.S. are international organizations in this sense. For more on international organizations, and international organizations law, see e.g., Shaw, *supra* note 1, at chap. 23; Jacob Katz Cogan *et al.* eds., *The Oxford Handbook of International Organizations* (Oxford, 2016).

<sup>47</sup> European External Action Service, *Sanctions Policy*, Aug. 3, 2016 (available at: [https://eeas.europa.eu/topics/sanctions-policy\\_en](https://eeas.europa.eu/topics/sanctions-policy_en)) [hereinafter *EU Sanctions Policy*].

<sup>48</sup> *Ibid.*

in 2009,<sup>49</sup> which amended the two treaties that provide the constitutional structure of the E.U.,<sup>50</sup> the E.U. has had the authority to impose and implement a broad array of sanctions directly, though some forms of sanction, such as travel bans, continue to require implementation at the state level.<sup>51</sup>

The E.U. makes a distinction between those sanctions that are imposed for the purpose of implementing U.N. sanctions within the E.U. system, and those sanctions that are referred to as “autonomous sanctions,” being sanctions originating with the E.U. and imposed for the purpose of achieving E.U. foreign policy objectives.<sup>52</sup> Although this distinction is highly significant to some of the legal issues raised by E.U. sanctions, it is important to note that they are indistinguishable as a matter of E.U. law—they have the same legal basis and effect.<sup>53</sup> Sanctions typically originate in the form of a CFSP Decision, and are then implemented in the form of an E.U. Regulation, or as directions to member states to implement the sanctions within domestic legislation. E.U. Regulations are binding on E.U. member states and take precedence over any domestic law with which they may be inconsistent. At the same time, while most sanctions are implemented by way of E.U. Regulation, enforcement is typically left to domestic authorities in each member state.

It is important to note that although sanctions imposed through E.U. Regulation operate throughout the territory of the E.U., and apply to all nationals of member states, as well as companies and other entities constituted under the laws of any member state, and any and all business done within the E.U., they are not intended to operate extraterritorially.<sup>54</sup> As will be discussed below, this is in distinct contrast to U.S. sanctions regimes, and significant for some of the legal questions raised regarding autonomous sanctions. What is more, unlike U.N. sanctions, sanctions imposed pursuant to E.U. Regulation are subject to judicial review,<sup>55</sup> and there are more elaborate protections afforded to those individuals and entities seeking to be removed from the lists of Designated Persons established under E.U. sanctions regimes.<sup>56</sup>

## **(ii) Other Regional Organization Sanctions**

Other regional organizations are also active in imposing economic sanctions. The most prominent in this regard are the O.A.S. and the A.U. While we typically think of such countries as Iran and North Korea as the primary targets of sanctions, the nations of the African

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<sup>49</sup> *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 2007/C 306/01, Dec. 13, 2007, entered into force Dec. 1, 2009.

<sup>50</sup> Consolidated Version of *The Treaty on the European Union*, and the *Treaty on the Functioning of the European Union*, 2010 O.J. (C83), 2012 O.J. (C326).

<sup>51</sup> Gordon, *Sanctions Law*, *supra* note 1, at 111.

<sup>52</sup> *Ibid.*; see also, *EU Sanctions Policy*, *supra* note 47.

<sup>53</sup> Gordon, *Sanctions Law* *supra* note 1, at 114. As Gordon points out, this was significant to the European Court decision in *Kadi I*, *supra* note 35.

<sup>54</sup> Gordon, *Sanctions Law*, *supra* note 1, at 117.

<sup>55</sup> For analysis of this, see Luca Pantaleo, “Sanctions Cases in European Courts,” in Happold, *Economic Sanctions and International Law*, *supra* note 4.

<sup>56</sup> Gordon, *Sanctions Law*, *supra* note 1, at 120.

continent are collectively the most targeted by economic sanctions.<sup>57</sup> These are not just in the form of U.N. and E.U. sanctions, but include wide-ranging sanctions regimes within Africa as authorized by African regional organizations. In addition to the A.U., Africa has a number of other smaller regional organizations, such as the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC), all of which are formal international organizations, and which may authorize the imposition of sanctions against member states.<sup>58</sup> In contrast, the Association of South East Asian Nations (ASEAN) is notorious for its opposition to sanctions as being inconsistent with its fundamental principle of non-interference in the affairs of its member states.<sup>59</sup>

One of the central differences between the E.U. sanctions regimes and those of most other regional organizations, is that the E.U. imposes sanctions against non-member states and entities, while the A.U., O.A.S., and other regional groups such as ECOWAS, primarily impose sanctions on states that are members of the regional organization, typically for reasons that have to do with the target state's violation of the terms or principles of the agreements constituting the organization. As an aside, common references to "NATO sanctions" typically relate to autonomous sanctions imposed by NATO members in cooperation with one another, and with "support" from NATO, rather than sanctions in any way formally authorized by NATO as an international organization.<sup>60</sup> The E.U. is somewhat unique in authorizing and imposing sanctions on states outside of its own membership. This is a key distinction for purposes of questioning the lawfulness of the different kinds of sanctions regimes these organizations may impose, to which we turn next.

### **(iii) Legal Issues Raised by Regional Organization Sanctions**

Sanctions regimes authorized and imposed by international organizations such as the E.U. do have some legal authority, but as suggested above, that authority is not as invulnerable to challenge as U.N. Security Council sanctions. Not only are the sanctions of such organizations not defended by Articles 25 or 103 of the U.N. Charter, but to the extent the sanctions are inconsistent with other principles or provisions of the U.N. Charter, they may be deemed unlawful. Similarly, if the sanctions authorized or ordered by the regional organization are inconsistent with the treaty provisions of any treaty to which some of its member states are party, those member states will likely not be able to rely on the legal authority provided by the regional organization as a defence against charges of violating the

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<sup>57</sup> Andrea Charron and Clara Portela, "The UN, Regional Sanctions and Africa," 91 *International Affairs* 1269 (2015), at 1369.

<sup>58</sup> For details on the regional organizations in Africa, see e.g., Frederik Söderbaum and Rodrigo Tavares, eds., *Regional Organizations in African Security* (Routledge, 2009); Andrea Charron, "Sanctions and Africa: United Nations and Regional Responses," in Jane Boulden, ed., *Responding to Conflict in Africa: The United Nations and Regional Organizations* (Palgrave, 2013).

<sup>59</sup> On the most recent calls for ASEAN to impose sanctions on Myanmar, see e.g., "Southeast Asian Politicians: ASEAN Must Sanction Myanmar if Military Doesn't Budge," *Radio Free Asia*, Mar. 17, 2021 (available at: <https://www.rfa.org/english/news/myanmar/sanction-03172021184302.html>).

<sup>60</sup> See e.g., "NATO Allies 'Stand' with US on Russia Sanctions," *Agence France-Presse*, Apr. 15, 2021, available at: <https://www.barrons.com/news/nato-allies-stand-in-solidarity-with-us-on-russia-sanctions-statement-01618489524>.

treaty (unless, perhaps, it is a treaty involving only states party to the regional organization itself).<sup>61</sup>

This is one reason that most regional organizations other than the E.U. limit their imposition of non-U.N. sanctions to member states of the organization. As such, these sanctions are authorized as a matter of international law by the international organization that constitutes the institutional framework for such regional groups, and the member states that are subject to such sanctions are typically obligated to recognize and submit to that authority. Thus, for instance, if an African state is the target of E.U. sanctions that are not in turn authorized by the U.N., it may argue that such sanctions are not lawful, regardless of the fact that they are authorized by an international organization, because the E.U. has no special legal authority to impose sanctions against African states. But, if the same African state is a member of the A.U. and is made the target of sanctions authorized by the A.U., it can make no similar claim, as it will itself be bound by the treaty that constituted the A.U., and from which the relevant authority flows. In such cases, the primary remaining questions regarding the legality of sanctions regimes would be: (i) whether the specifics of the sanctions regimes are consistent with the authority provided by the treaty; and (ii) whether the organization has made adequate provision for the due process rights of individuals and entities targeted by smart sanctions, along the lines that the E.U. has undertaken to do.

To the extent that regional organizations such as the E.U. impose sanctions on states outside the membership of the regional organization, those sanctions can be challenged on many of the same grounds as autonomous sanctions, which are considered in the next section below. There are some differences, which largely flow from the fact that such regional organizations, as international organizations, are subject to a somewhat different legal regime when it comes to responsibility for wrongful acts.<sup>62</sup> Thus, to the extent that the organization itself is said to have caused harm or violated international law by the imposition of sanctions, a different legal regime applies in determining responsibility. But to the extent the legal authority provided by the international organization is deemed to be no defence, then the member states can be challenged for implementing the sanctions in just the same way as states imposing sanctions autonomously. For this reason, we need not dwell at length here on sanctions law as it applies to other regional organizations, and turn instead to the issue of autonomous sanctions.

### III – Autonomous Sanctions

The broad category of economic sanctions that raise the most difficult legal issues, and which are the focus of the most controversy, are those that are imposed by states without any specific legal authority from the U.N. Security Council or any other international organization.

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<sup>61</sup> Ruys, *supra* note 1, at 39-40.

<sup>62</sup> See e.g., Crawford, *supra* note 16, at 343-53; “ILC Draft Articles on the Responsibility of International Organizations,” *Yearbook of the International Law Commission*, 2011, Vol. II, Part II [hereinafter, DARIO].

These are typically referred to as unilateral or autonomous sanctions. They are “unilateral” in the sense that they are unauthorized, not in the sense that they are the policy of one state alone, as they are frequently imposed by several states pursuant to some shared or cooperative policy towards the target state (as in the case of NATO sanctions referred to above). For this reason “autonomous” is perhaps the better term. The lawfulness of this range of sanctions is the subject of considerable debate, and it is in the context of autonomous sanctions that the precise form of any specific sanction becomes far more relevant to the assessment of its lawfulness.

## **1. Nature and Legal Framework of Autonomous Sanctions**

### **(i) Range and Form of Autonomous Sanctions**

A review of state practice over the last thirty years reveals that states imposing autonomous sanctions have deployed the full range of economic sanctions discussed earlier. That is, in form and substance autonomous sanctions, particularly as implemented by the United States, are not more limited than the range of sanctions authorized by the U.N. They include broad trade embargoes, more limited trade restrictions such as weapons embargoes, financial sanctions that involve the freezing and seizure of assets and the barring of financial transactions, travel bans, and so forth. They also include targeted or “smart” sanctions that are aimed at individuals and corporate entities, as well as “secondary” or “third party” sanctions that target entities and individuals in states other than the target state, or indeed such third states themselves. In the absence of U.N. Security Council authority, these different forms of sanction raise distinct and complex legal issues.

### **(ii) Affirmative Legal Authority**

Autonomous sanctions are, of course, typically authorized and implemented by the domestic legal system of the state imposing the sanctions. In Part IV below we will turn to briefly examine just how such sanctions have been authorized and implemented within the Canadian legal system. The more important question, however, is whether there is any affirmative legal authority in international law for such autonomous sanctions. One perspective, often referred to as the “*Lotus* principle” (after the famous case of that name that articulated the position most strongly),<sup>63</sup> is that anything is permissible as a matter of international law unless it is affirmatively forbidden by specific rules or principles of international law. Although this principle is often challenged, it has some salience in the current analysis. This is because, even if there are no international law principles that specifically authorize autonomous sanctions, it is typically argued that the burden is on those who would assert that certain forms of sanction are unlawful, to identify specific rules that prohibit such sanctions. In the absence of arguments establishing how any given form of sanction violates specific principles of international law, autonomous sanctions could be said to fall within the scope of “retorsions.”

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<sup>63</sup> *S.S. Lotus (France v. Turkey)*, P.C.I.J. (Ser. A) No. 10 (1927).

### (iii) Sanctions as Retorsions

The concept of retorsion is one of the surviving forms of self-help in international law. It refers to the unilateral, unfriendly, and harmful conduct or action of a state that is directed towards another state in retaliation for its injurious but lawful activity.<sup>64</sup> While harmful to the other state, retorsion is understood to be limited to lawful and legitimate conduct, such as severing diplomatic ties, expelling diplomats, imposing travel restrictions, and even the imposition of some economic restrictions. Thus, retorsion stands in contrast to reprisals or countermeasures, which, as discussed above, comprise conduct or activity that would cross the line of legality, and would thus be unlawful but for the fact that it was itself in response to a prior unlawful act of the target state.

From the *Lotus* principle perspective, then, it could be argued that autonomous sanctions should be understood to be a form of retorsion unless one can establish that any given sanctions regime violates specific rules or principles of international law. And even in the event that a given sanctions regime does violate certain legal obligations, it is possible that it could in turn be justified as being a valid form of reprisal or countermeasure. It is to these two distinct issues we turn next: namely, what are some of the possible specific legal objections to autonomous sanctions, and when could sanctions be justified as countermeasures?

## 2. Possible Legal Objections to Autonomous Sanctions

### (i) The Principle of Non-Intervention and Coercion

A good starting point for assessing the lawfulness of any particular unilateral sanctions regime, is the question of whether it may violate the principle of non-intervention. The prohibition against intervention in the internal affairs of other states is a principle of customary international law,<sup>65</sup> and it relates to the foundational concept of respect for the equal and territorial sovereignty of states articulated in the U.N. Charter itself.<sup>66</sup> As the International Court of Justice (ICJ) articulated in the famous case *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States*), states are free to choose their own political, economic, social and cultural systems, and to formulate their own foreign policy.<sup>67</sup> Another state's efforts to interfere in those matters becomes wrongful when it rises to the level of being coercive. Coercion is what transforms mere interference into intervention, and thereby makes it unlawful. Coercion in this context may be defined as conduct that effectively deprives the state of free choice in the development of its own policy.

Coercion can take many forms, with the threat or use of force at one end, and far less direct methods of applying extreme political pressure at the other end.<sup>68</sup> But the exact contours

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<sup>64</sup> Shaw, *supra* note 9, at loc. 3 (Kindle ed.).

<sup>65</sup> *Corfu Channel*, *supra* note 14; Shaw, *supra* note 9, at loc. 38205 (Kindle ed.).

<sup>66</sup> U.N. Charter, *supra* note 13, Article 2(7).

<sup>67</sup> *Nicaragua v. United States*, *supra* note 14, at p. 108.

<sup>68</sup> Mohamed Helal, "On Coercion in International Law," (2020) 52 *New York Journal of International Law and Policy* 1.

of what constitutes coercion constituting wrongful intervention are themselves hotly debated. On one side of this debate, the editors of Oppenheim opined that “to constitute intervention the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question.”<sup>69</sup> Others would define coercion, or the point at which foreign conduct interferes with the free choice of a state in determining its own policy, rather less strictly.<sup>70</sup> Unfortunately, differences regarding the scope and contours of the very concepts of “coercion” and “free choice” are the basis of philosophical debates that extend far beyond the domain of international law.<sup>71</sup>

The question for international law, however, is whether at least some forms of economic sanctions can rise to the level of constituting coercive interference, and thus unlawful intervention, in the affairs of the target state. Economic sanctions are most often, if not always, animated by an intent to exercise influence over, and indeed to change, the policy of the target state. Often, that targeted policy is precisely the kind of policy that is considered to be within the *domaine réservé* of the state, which is deemed to be protected from external interference.<sup>72</sup> What is more, the economic sanctions are typically part of a larger set of policies aimed at pressuring the target state to alter its behavior, and some would argue that the status of the sanctions needs to be assessed as part of the coerciveness of the entire combination of policies.<sup>73</sup> Some sanctions regimes, such as the U.S. regime imposed against the Venezuelan government under President Maduro, are quite explicitly for the purpose of trying to force or cause “regime change.”<sup>74</sup> On one level, then, such sanctions would seem to satisfy at least the less strict definitions of coercion.

This view is further supported by a number of international law instruments that explicitly condemn the use of “coercive measures of an economic character.”<sup>75</sup> The tenor of an annual U.N. General Assembly resolution condemning “unilateral economic measures as a means of political and economic coercion,”<sup>76</sup> for instance, would imply that autonomous sanctions are typically coercive. There have been other General Assembly resolutions that

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<sup>69</sup> Sir Robert Jennings and Sir Arthur Watts, *Oppenheim’s International Law*, Vol. I, 9<sup>th</sup> ed., (Oxford, 1992), at 432.

<sup>70</sup> See e.g., Antonios Tzanakopoulos, “The Right to Be Free from Economic Coercion,” (2015) 4 *Cambridge International Law Journal* 616; Ido Kilovaty, “The Elephant in the Room: Coercion,” (2019) 113 *AJIL Unbound* 87.

<sup>71</sup> See e.g., Craig Carr, “Coercion and Freedom,” (1988) 25 *American Philosophy Quarterly* 59; Hiba Hafiz, “Beyond Liberty: Toward a History and Theory of Economic Coercion,” (2106) 83 *Tennessee Law Review* 1071.

<sup>72</sup> Derek Bowett, “International Law and Economic Coercion,” (1976) 16 *Virginia Journal of International Law* 245; Richard Lillich, “The Status of Economic Coercion Under International Law: United Nations Norms,” (1977) 12 *Texas International Law Journal* 17.

<sup>73</sup> Helal, *supra* note 68, at 35.

<sup>74</sup> David Cohen and Zoe Weinberg, “Sanctions Can’t Spark Regime Change: The Trouble with Trump’s Approach to Venezuela and Iran,” *Foreign Affairs*, Apr. 29, 2019, available at: <https://www.foreignaffairs.com/articles/united-states/2019-04-29/sanctions-cant-spark-regime-change>.

<sup>75</sup> *Charter of the Organization of American States* (as amended), 30 Apr. 1948, Can. T.S. 1990 No. 23 (entered into force Dec. 13, 1951); *Resolution on Friendly Relations*, *supra* note 14; see also, Ruys, *supra* note 1, at 25-26.

<sup>76</sup> Beginning in 1983 with UNGA Res. 38/197 (1983), UN Doc. A/RES/38/197 (1984); Matthew Happold, “Economic Sanctions and International Law,” in Happold, *Economic Sanctions*, *supra* note 4, at 4-5; Ruys, *supra* note 1, at 25-26.



have included similar language.<sup>77</sup> Yet, such instruments are not themselves sources of law, but merely serve as possible evidence of a customary international law norm. That is, they potentially reflect an expression of consciousness of legal obligation—*opinio juris*—but the problem is that state practice would tend to suggest that many states do not subscribe to this view, including states that actually voted for these very resolutions.

One instrument that is widely viewed as reflecting customary international law, is the famous 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*, a U.N. General Assembly resolution that was adopted by consensus. It provided that “no state may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.”<sup>78</sup> But the interpretation of this principle, and how precisely it might apply to economic sanctions, is much debated. It is notable that a clearer prohibition against economic coercion could not be agreed upon during the drafting of the Declaration.<sup>79</sup>

The countervailing view is that there is no principle of customary international law that characterizes autonomous economic sanctions as a form of unlawful intervention and thereby prohibits them as unlawful.<sup>80</sup> This view suggests that the definition of coercion in the context of intervention is quite strict, that economic sanctions do not satisfy that definition, and that state practice clearly supports the argument that there is no principle of customary international law that prohibits sanctions. The ICJ itself seemed to support this view in the *Nicaragua* case—immediately after defining the nature of unlawful intervention, the court rejected the notion that states could be obliged to continue trade relations with another country absent some treaty commitment.<sup>81</sup> The Secretary General of the U.N. similarly concluded in 1993 that there was no clear consensus that coercive economic measures were improper.<sup>82</sup> While there have been some indications that views have evolved since that time, and there are claims that a prohibition on some forms of sanctions is emerging, others argue that no such prohibition has crystallized.<sup>83</sup> Even states that have issued declarations condemning autonomous sanctions, have themselves begun to engage in the practice, with China being the most prominent example.<sup>84</sup>

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<sup>77</sup> See e.g., UNGA Res. 2131 (XX)(1965), UN Doc. A/RES/2131/(XX)(1965); and UNGA Res. 3281 (XXIX)(1974)(*Charter of Economic Rights and Duties of States*), UN Doc. A/RES/3281/(XXIX)(1974); most recently, see “Human Rights and Unilateral Coercive Measures,” UNGA Res. 74/154 (2019), UN Doc. A/RES/17/154 (2020).

<sup>78</sup> *Declaration on Friendly Relations*, *supra* note 14, Principle No. 3.

<sup>79</sup> See discussion in Dapo Akande *et. al.*, “Economic Sanctions, International Law, and Crimes Against Humanity: Venezuela’s Referral to the International Criminal Court,” (2021) 115 *American Journal of International Law* 1.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Nicaragua v. United States*, *supra* note 14, at para. 276.

<sup>82</sup> Boutros Boutros-Ghali, *Economic Measures as Means of Political and Economic Coercion Against Developing Countries*, Note, UNGAOR, 48<sup>th</sup> Sess., Agenda Item 91(a), UN Doc. A/48/535, para. 2 (1993).

<sup>83</sup> See e.g., Akande, *supra* note 79.

<sup>84</sup> *Ibid.*, at 11, citing Patrick Wintour, “China Imposes Sanctions on the UK MPs, Lawyers and Academics in Xinjiang Row,” *The Guardian*, Mar. 26, 2021.



What is more, to the extent that objections to sanctions may depend upon such principles as are articulated in the *Declaration on Friendly Relations*, these are limited to condemning intervention in the target state's exercise of its sovereign rights within its *domaine réservé*. But the policy and conduct of the target state that comprise the very grounds for sanctions, may in fact fall outside of the realm of the *domaine réservé*. For example, if economic sanctions are responding to gross violations of human rights committed by the target state, it can be argued that the target state has no sovereign right to engage in the conduct that gives rise to such human rights violations, and thus such policy is not within the *domaine réservé* that is protected from foreign interference.<sup>85</sup>

Unfortunately, therefore, this question of whether some forms of economic sanctions are sufficiently coercive to constitute unlawful intervention remains quite unsettled.<sup>86</sup> A final point that may be worthy of consideration for Canada, however, is that perspectives on the issue tend to split along North-South lines. As both the language and the voting record of the annual U.N. General Assembly resolution on this issue reflect, it is primarily the developing countries of the global South that take the position that economic sanctions are coercive and thus unlawful. In addition, there is evidence that a prevailing view among scholars, policy makers and others in the global South, and within the Third World Approaches to International Law (TWAIL) theoretical school of international law, is that economic sanctions represent a form of oppressive and imperialistic conduct that is inflicted primarily upon the countries and peoples of the developing world by the Western developed nations.<sup>87</sup>

## **(ii) Jurisdictional Objections**

A second general objection, before we get to those grounded in specialized areas of public international law, relates to questions of jurisdiction and extraterritoriality. More specifically, questions are raised as to whether so-called secondary sanctions (or third country sanctions) violate international law principles regarding the extraterritorial exercise of jurisdiction. To explain this, we need to review briefly the general international law principles on jurisdiction.

The starting presumption is that states may not exercise jurisdiction, in the form of either enacting laws (the exercise of so-called prescriptive jurisdiction), or attempting to enforce or adjudicate such laws (referred to as the exercise of executive and judicial jurisdiction, respectively), in relation to the conduct of non-nationals outside of the state's own territory. There are exceptions to this general prohibition, such that states may, for instance, prescribe laws that implicate conduct abroad that is intended to, and does, have an impact within the state (the "objective territoriality" principle); for purposes of protecting the state from threats to its fundamental institutions (the "protective" principle); or, more controversially, to protect

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<sup>85</sup> Akande, *supra* note 79, at 7.

<sup>86</sup> Ruys, *supra* note 1, at 28-29; Happold, "Economic Sanctions," *supra* note 76.

<sup>87</sup> This is reflected in the annual U.N. General Assembly resolutions condemning economic coercion, *supra* note 77. For a more general critique of how international law serves Western interests, and how it facilitates the use of economic power in coercive ways, see generally: B.S. Chimni, "Third World Approaches to International Law: A Manifesto," (2006) 8 *International Community Law Review* 3.

nationals abroad (the “passive personality” principle).<sup>88</sup> There is also an exception for the exercise of “universal jurisdiction,” for the prosecution of some violations of *jus cogens* or preemptory norms of international law—such as the prohibitions against torture, grave war crimes, crimes against humanity, and genocide. This not only permits but requires all states to exercise jurisdiction if the perpetrators come within their territory.

It will be apparent that targeted sanctions, secondary sanctions, and most particularly targeted secondary sanctions, in which the domestic law of a state purports to sanction a specific individual or entity in a third country for purposes of punishing or deterring interaction with the target state, will potentially run afoul of these principles. Such sanctions constitute the extraterritorial exercise of prescriptive jurisdiction and will be unlawful unless they satisfy one of the exceptions. Having said that, the question of whether and when these kinds of sanctions actually constitute the extraterritorial exercise of jurisdiction can be factually and legally complicated, particularly when it relates to U.S. sanctions.<sup>89</sup>

Consider, for instance, a case in which the U.S. imposes sanctions against a Kuwaiti national residing in Germany, for engaging in transactions with Iranian entities in violation of the U.S. Iranian sanctions regime. As a result of his name being listed by OFAC as a Specially Designated National (SDN), any transaction he attempts that is denominated in U.S. dollars is going to get blocked at some stage by a financial institution operating in the U.S., in accordance with U.S. law. Or, even if he tries to circumvent the U.S. banking system altogether, foreign banks will themselves be subject to the secondary sanctions regime, such that their U.S. operations will be impacted if they process financial transactions for someone on the OFAC SDN list.<sup>90</sup> In either case, the relevant law is being used to “proscribe” activity conducted by a non-national outside of the United States, but it is actually operating to constrain activity—the clearance of a financial transaction by an American company—within the territory of the United States. Canadians have, of course, been witness to some of these issues in the high-profile case involving U.S. efforts to extradite Huawei CFO Meng Wanzhou for allegedly misleading the Hong Kong-based bank HSBC regarding Huawei’s relationship with the Iran-based company Skycom, all of which was designed to circumvent the American sanctions regime against Iran.<sup>91</sup>

Returning to the hypothetical above, some would argue that the application of U.S. law to foreign banks with U.S. operations is effectively an extraterritorial exercise of jurisdiction, while others would defend it as being either an entirely appropriate exercise of domestic

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<sup>88</sup> For an overview of these principles, see Crawford, *Brownlie’s Principles*, *supra* note 9, at ch. 21.

<sup>89</sup> In support of the legality of secondary sanctions, see e.g., Jeffrey Mayer, “Second Thoughts on Secondary Sanctions,” (2009) 30 *University of Pennsylvania Journal of International Law* 905.

<sup>90</sup> See e.g., Seyed Razavi *et al.*, “Economic Sanctions and the Protection of Fundamental Human Rights: A Review of the ICJ’s Ruling on Alleged Violations of the Iran-US Treaty of Amity,” (2020) 29 *Washington International Law Journal* 303, at 320-22.

<sup>91</sup> For background on the case, see Robert Lewis, “Tracing the Origins of the Case Against Huawei CFO Meng Wanzhou: How Global Banks Extend the Reach of U.S. Extraterritorial Jurisdiction, Directly and Indirectly Impacting the Global Expansion of Chinese Companies,” *Asia Law Portal*, Feb. 19, 2021, available at: <https://asialawportal.com/2021/02/19/tracing-the-origins-of-the-case-against-huawei-cfo-meng-wanzhou-how-global-banks-extend-the-reach-of-u-s-extraterritorial-jurisdiction-directly-and-indirectly-impacting-the-global-expansion-of-chin/>.

jurisdiction, or within the permitted exceptions to the extraterritorial exercise of jurisdiction. The former claim would be highly fact-specific but would also be complicated. But with respect to the latter claim, the reality is that U.S. sanctions are frequently responding to conduct that is neither a threat to fundamental institutions, nor likely to have significant effects within the United States, and thus could not be justified as an exception to the basic rule against extraterritorial exercise of jurisdiction. Yet another complicating factor is the attempt to impose secondary sanctions on subsidiaries of U.S. corporations incorporated in foreign jurisdictions, on the basis that they are American owned companies. Foreign courts have refused to enforce such sanctions in the past.<sup>92</sup>

There is significant state practice that supports the claim that states view at least some forms of secondary sanctions as being unlawful. Ironically, the United States itself began as a vociferous critic of secondary sanctions when the Arab League, as part of its boycott of Israel, effectively imposed sanctions on any country or entity that engaged in commerce with the newly formed state of Israel.<sup>93</sup> The United States enacted “anti-boycott” legislation in the 1970s to dissuade U.S. entities from complying with the secondary sanctions. In some respects, the legislation went so far as to prohibit U.S. companies from participating in any foreign boycott of Israel—an issue that has again arisen recently in response to the Boycott, Divestment, and Sanctions (BDS) campaign.<sup>94</sup>

In recent years, however, it is U.S. secondary sanctions that have more commonly been the subject of objection and opposition. This began most prominently in the 1990s, with the response to the so-called *Helms-Burton Act*, which sought to sanction any companies that did business with Cuba.<sup>95</sup> The European Council enacted regulations that prohibited nationals of any E.U. state or persons residing within the E.U., and any E.U. registered companies, from complying with either the *Helms-Burton Act*, or the secondary sanctions that were part of U.S. sanctions regimes imposed on Iran and Libya in the same time frame.<sup>96</sup> This issue is familiar to Canadians, as the *Helms-Burton Act* implicated a number of Canadian companies involved in Cuba, and Canada similarly enacted revisions to the existing *Foreign Extraterritorial Measures Act*, which provided among other things, that no judgment issued pursuant to the *Helms-Burton Act* would be enforceable in any manner within Canada.<sup>97</sup> This not ancient history either—the Trump Administration announced that it would take action to implement certain provisions of the *Helms-Burton Act*, to which Canada responded by publishing notifications to

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<sup>92</sup> Ruys, *supra* note 1, at 29, citing *Compagnie européenne des Pétrole, S.A. v. Sensor Nederland, B.V.*, Dict. Ct. The Hague, Sept. 17, 1982, (translation in 22 *ILM* 66).

<sup>93</sup> Martin Weiss, “Arab League Boycott of Israel,” *Congressional Research Service Reports*, Aug. 25, 2017, available at: <https://fas.org/sgp/crs/mideast/RL33961.pdf>.

<sup>94</sup> *Ibid.*, at 5, citing Department of Commerce Office of Antiboycott Compliance, at: <http://www.bis.doc.gov/AntiboycottCompliance/oacrequirements.html#whatscovered>.

<sup>95</sup> *Cuban Liberty and Democratic Solidarity (Libertad) Act*, 1996, 22 U.S.C. ch. 69A, §§6021-6091.

<sup>96</sup> *European Council Regulation 2271/96*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01996R2271-20140220>. For more on the blocking statute, see *European Commission guidance*, available at: [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/blocking-statute\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/blocking-statute_en).

<sup>97</sup> *Foreign Extraterritorial Measures Act*, R.S.C. 1985, c. F-29 (as amended), available at: <https://laws-lois.justice.gc.ca/eng/acts/F-29/index.html>.

Canadian companies about both the *Helms-Burton Act* and the existing Canadian blocking legislation.<sup>98</sup>

The conflicting obligations created by secondary sanctions and blocking legislation can create enormous risk and legal complications for individuals and companies caught in the crossfire. But the primary point here is that there is significant state practice to support the claim that secondary sanctions, and particularly secondary sanctions that target individuals and private entities, are an extraterritorial exercise of jurisdiction—and that unless they can be justified in accordance with the specific established exceptions, they are thus unlawful.

Before turning to questions of justification, however, there are other more specific ways in which certain kinds of sanctions may be unlawful under principles or rules of more specialized regimes in international law. The legal regime that provides some of the most difficult questions and exquisite ironies relating to the lawfulness of autonomous sanctions, is that of international human rights, to which we turn next.

### **(iii) Humanitarian and Human Rights Law Objections**

There have long been vociferous objections to economic sanctions on the grounds that they cause significant harm to the populations of the states targeted. There is, of course, considerable irony and paradox in this, given that many sanctions regimes are ostensibly imposed for the very purpose of forcing states to improve their compliance with human rights obligations. Nonetheless, there is extensive support for the argument that broad economic sanctions regimes can have severely negative human rights and humanitarian consequences for the populations in the targeted states. As mentioned earlier, there was significant evidence that the sanctions regimes imposed on Iraq in the 1990s caused widespread and severe harm to the population, including considerable loss of life.<sup>99</sup> More recently, there have been claims that U.S. sanctions against Iran, particularly during the period of the Coronavirus pandemic, have caused unnecessary illness and death.<sup>100</sup> Distinct from broad-based state-oriented trade and financial sanctions, there are arguments that targeted sanctions regimes tend to violate the due process rights of the individuals targeted. As was also mentioned earlier, such claims have been upheld in court.<sup>101</sup>

All of these arguments provide a basis for powerful opposition to economic sanctions as being unethical, unwise, and counterproductive.<sup>102</sup> Nonetheless, it is considerably more

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<sup>98</sup> *Update on the Helms-Burton Act and Canadians Doing Business in Cuba*, Apr. 18, 2019, available at: <https://www.canadainternational.gc.ca/cuba/highlights-faits/2019/2019-04-18-helms-burton.aspx?lang=eng>.

<sup>99</sup> Gordon, *Invisible War*, *supra* note 29, at ch. 86; Michael Malloy, “Human Rights and Unintended Consequences: Empirical Analysis of International Economic Sanctions in Contemporary Practice,” (2013) 31 *Boston University International Law Journal* 75; “Symposium: The Impact on International Law of a Decade of Measures Against Iraq,” (2002) 13 *European Journal of International Law* 1.

<sup>100</sup> Djavād Salehi-Isfahani, “Iran: The Double Jeopardy of Sanctions and COVID-19,” *Brookings*, Sept. 23, 2020, available at: <https://www.brookings.edu/opinions/iran-the-double-jeopardy-of-sanctions-and-covid-19/>.

<sup>101</sup> See, e.g., *Kadi I*, *supra* note 36.

<sup>102</sup> See sources cited in note 99 *supra*; see also, Ash Bāli and Aziz Rana, “Sanctions are Inhumane—Now, and Always,” *Boston Review*, Mar. 26, 2020, available at: <http://bostonreview.net/war-security-politics-global-justice/asl%C4%B1-ub%C3%A2li-aziz-rana-sanctions-are-inhumane%E2%80%94now-and-always>.

difficult to establish the more specific legal claim that economic sanctions violate human rights law obligations, and that in the absence of some specific legal justification, such violations thereby make the sanctions unlawful.

The first difficulty for such claims relates, once again, to jurisdictional issues. Under such treaties as the International Covenant on Civil and Political Rights (the ICCPR), states have been traditionally understood to be obligated only to respect and enforce the civil and political rights of persons within their own territory or under their own jurisdiction.<sup>103</sup> When a country places a broad trade embargo on another state, and even if such trade restrictions are the proximate cause of specific harm to the population of that state, and one could establish that the harm thus caused came within the scope of specific human rights treaty obligations (such as, ultimately, the right to life), the sanctioning state arguably has no specific treaty obligation to the population of the target state. Thus, from this perspective, the ICCPR imposes no specific legal obligation in relation to the rights of non-Canadians residing in Venezuela, and sanctions imposed by Canada cannot be said to violate the human rights of such people, even if the sanctions cause them harm.

This well-established view is not, of course, without some challenges. For instance, the Human Rights Committee, which is the institutional body that oversees and implements the ICCPR, has taken a strong contrary view, arguing that it would be “unconscionable” to interpret the ICCPR in a manner that would permit a state to engage in conduct and perpetrate harms in some other state that would otherwise constitute violations of the Covenant.<sup>104</sup> What is more, there is some debate over whether the imposition of certain forms of sanction may constitute an extraterritorial exercise of jurisdiction over those foreseeably affected, so as to trigger the operation and application of human rights obligations.<sup>105</sup> The Human Rights Committee has, in particular, suggested that with respect to the right to life, state parties to the ICCPR have an obligation to ensure that all activities taking place within their territory or under their jurisdiction, but which “have a direct and reasonably foreseeable impact on the right to life of individuals outside their territory . . . are consistent with Article 6.”<sup>106</sup>

The jurisdictional constraint on extraterritorial application of human rights is also not as clear in the case of some economic, social, and cultural rights instruments, most importantly the International Covenant on Economic, Social and Cultural Rights (the ICESCR).<sup>107</sup> The ICESCR itself lacks any reference to territorial or jurisdictional limits (in distinct contrast to the ICCPR), and indeed includes some language that can be interpreted to imply some

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<sup>103</sup> See e.g., *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, Dec. 16, 1966, Article 2.

<sup>104</sup> Human Rights Committee, *Sergio Euben Lopez v. Uruguay*, Communication No. R. 12/52, U.N. Doc. Supp. 40, A/36/40 (1981); see also Human Rights Committee, *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, 30 Oct. 2018, UN DOC CCPR/C/GC/36.

<sup>105</sup> Akande, *supra* note 79, at 16.

<sup>106</sup> Human Rights Committee, *General Comment No. 36*, *supra* note 104, para. 22.

<sup>107</sup> *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, Dec. 16, 1966 [hereinafter, the ICESCR], and Dupont, *supra* note 35, at 52.

extraterritorial application.<sup>108</sup> While some of the more ambitious and aspirational obligations to realize the rights in the ICESCR have been found to be limited to the jurisdiction of each state party,<sup>109</sup> other aspects of the treaty may indeed have extraterritorial application. The Committee on Economic Social and Cultural Rights, which oversees and implements the ICESCR, has itself taken the position that the Covenant not only has extraterritorial application, but more specifically, it imposes obligations on states to take precautions when imposing economic sanctions.<sup>110</sup> Article 1(2) of the ICESCR (which is actually common to both the ICCPR and the ICESCR), provides that “in no case may a people be deprived of its own means of subsistence,” and Article 11 requires state parties to take into account the problems of both food-importing and food-exporting countries, and to ensure an equitable distribution of food, in the context of a right to adequate food. These provisions, in particular, are implicated by sanctions regimes that are likely to contribute to starvation or threaten food security, as will be discussed further below.<sup>111</sup> But, again, key commentaries on the ICESCR note that notwithstanding efforts by developing countries to develop the law in this direction, there is insufficient consensus to conclude that economic sanctions, in general, are prohibited, or that they in some way violate the obligations in the ICESCR.<sup>112</sup>

In addition to the debate over the question of whether human rights treaties may give rise to specific extraterritorial obligations, there is an ever-growing body of resolutions and other sources of “soft-law” that reflect a widespread state recognition that some forms of autonomous sanctions are inconsistent with human rights norms. As indicated earlier, there is an annual U.N. General Assembly resolution that condemns “unilateral coercive measures,” and specifically those that impede “the full realization of the rights set forth in the Universal Declaration of Human Rights and other international human rights instruments, in particular the right of individuals and peoples to development.”<sup>113</sup> Similarly, the U.N. Human Rights Council, as well as other regional rights bodies, have annually passed resolutions condemning autonomous sanctions regimes that are seen as impacting the human rights of people in target states.<sup>114</sup>

What is more, all such arguments and declarations find support in Articles 55 and 56 of the U.N. Charter, which provide that the state parties shall promote respect for human rights

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<sup>108</sup> ICESCR, Article 2 (state parties undertake to “take steps, individually and through international assistance and cooperation, especially economical and technical . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means . . .”).

<sup>109</sup> See e.g., *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] I.C.J. 136, para. 112.

<sup>110</sup> Committee on ICESCR, General Comment No. 8: *The Relationship Between Economic Sanctions and Respect for Social and Economic Rights*, Dec. 4, 1997, U.N. Doc. E/C. 12/1997/8.

<sup>111</sup> Akande, *supra* note 79, at 14, citing James Crawford, *Third Report on State Responsibility*, UNILCOR, 52<sup>nd</sup> Sess., Agenda Item 3, UN Doc. A/CN.4/507, at 20, para 39 (2000).

<sup>112</sup> Ben Saul *et al.*, *The International Covenant on Economic, Social, and Cultural Rights: Commentary, Cases and Materials* (2004), at 106-07.

<sup>113</sup> UNGA Res. 73/167 (2018). UN Doc. A/Res/73/167 (2018) (adopted with 133 votes in favour, 53 against, and 3 abstentions - Canada voted no).

<sup>114</sup> See e.g., Human Rights Council Resolution 37/21, “Human Rights and Unilateral Coercive Measures,” Apr. 13, 2017, UN Doc. A/HRC/RES/37/21 (2018).



and fundamental freedoms, and that they shall take joint and separate action in cooperation with the U.N. to achieve that objective.<sup>115</sup> It may be argued that quite apart from any possible territorial limits to specific treaty obligations, the commitments in Articles 55 and 56 preclude state conduct that would cause humanitarian harm to the people in other member states. Such claims are further buttressed by arguments that alleged jurisdictional limitations can be overcome by understanding core concepts of international human rights law as having a “transnational operation.”<sup>116</sup>

Likely as a consequence of these developments, there is increasingly widespread recognition that economic sanctions must, at a minimum, be subject to *ex ante* human rights impact assessments, as well as human rights and humanitarian waivers and exceptions built into the legal framework of the regime. It is now widely accepted, for instance, that comprehensive trade sanctions regimes ought to have humanitarian exceptions, permitting the export/import of basic food, medicine, and other goods deemed essential for the health and welfare of the population in the target state. Such exceptions were developed in response to a growing body of analysis that documented the serious and extensive humanitarian consequences of comprehensive sanctions regimes, such as those imposed on Iraq in the 1990s.<sup>117</sup> The International Court of Justice lent further weight to this idea by recently ordering the United States to include such protections in its Iranian sanctions regime, albeit in response to claims made in relation to specific treaty rights.<sup>118</sup>

Notwithstanding the development of such humanitarian constraints on sanctions regimes, strong arguments remain that sanctions regimes continue to cause harm. Most recent examples include the claims that U.S. sanctions on Iran during the Trump administration were the proximate cause of unnecessary death and suffering within the Iranian population during the coronavirus pandemic.<sup>119</sup> Venezuela has also recently filed a claim with the International Criminal Court challenging the U.S. sanctions against it as not only being in violation of international law, but even rising to the level of being crimes against humanity.<sup>120</sup> In short, the development of humanitarian and human rights exceptions and waivers, and constraints on the imposition of sanctions that would have certain humanitarian impacts, may lend support to the idea we are witnessing the emergence of customary international law norms that limit those economic sanctions that cause certain forms of humanitarian injury to target populations. But this too remains unsettled, and harm continues to be done.

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<sup>115</sup> U.N. Charter, *supra* note 13, Articles 55 and 56.

<sup>116</sup> See e.g., Tilmann Altwicker, “Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts,” (2018) 29 *European Journal of International Law* 581.

<sup>117</sup> See e.g. Mohamed Ali and Iqbal Shah, “Sanctions and Childhood Mortality in Iraq,” (2000) 335 *The Lancet* 1851; Gordon, *Invisible War*, *supra* note 29; Malloy, *supra* note 99.

<sup>118</sup> *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.)*, Provisional Measures, [2018] I.C.J. 624, at 652-53.

<sup>119</sup> Salehi-Isfahani, *supra* note 100.

<sup>120</sup> *Situation in the Bolivarian Republic of Venezuela II*, ICC-01/20, “Referral Pursuant to Article 14 of the Rome Statute to the Prosecutor of the International Criminal Court by the Bolivarian Republic of Venezuela with respect to Unilateral Coercive Measures,” (Mar. 4, 2020), available at: [https://www.icc-cpi.int/RelatedRecords/CR2020\\_00802.pdf](https://www.icc-cpi.int/RelatedRecords/CR2020_00802.pdf); but for criticism of this claim, see Akande, *supra* note 79.

Leaving aside the unsettled question of whether and to what extent human rights obligations extend generally to the populations of target states, there is a stronger argument that human rights law does prohibit comprehensive economic sanctions regimes that rise to the level of causing starvation among the population. Starvation in this context is not defined narrowly as directly causing widespread death from lack of food and water, but rather is the process of creating conditions of severe malnutrition, limited access to water and to basic sanitation, and denial of basic medicines.<sup>121</sup> This is consistent with the fact that even in famine most fatalities are not caused by caloric deprivation itself, but rather by the spread of disease made possible by the conditions of malnutrition, lack of sanitation, and shortage of clean water.<sup>122</sup> International Humanitarian Law, which governs the conduct of hostilities in armed conflict, not only prohibits states from using starvation as a method of warfare, but makes it a war crime—and it defines starvation in a broad sense similar to how it is being used here.<sup>123</sup> It would be anomalous indeed, if states could cause harm to civilians in peacetime in a manner that would constitute a war crime in a time of armed conflict.

It is difficult to dispute that comprehensive economic sanctions regimes, particularly those that are multilateral, and which employ secondary sanctions to prevent any other states or entities from trading with the target state—such as the U.N. sanctions against Iraq in the 1990s, and the U.S. sanctions against Iran, Cuba, Venezuela, and North Korea in the last decade—run the risk of creating conditions that come within this broader definition of starvation. And it can also be argued with some confidence that comprehensive sanctions regimes that do rise to this level of causing starvation are prohibited by human rights law. That is, it can be argued that the combination of the broad scope of Article 6 (the right to life) under the ICCPR, Article 1(2) common to the ICCPR and ICESCR (the people’s right not be deprived of its own means of subsistence), and Article 11 of the ICESCR (right to adequate food), together with the general provisions of the U.N. Charter requiring respect for human rights, operate in combination to prohibit, at a minimum, sanctions that would cause starvation.<sup>124</sup> Even those who take a more traditional and statist view on the extent to which human rights law may constrain economic sanctions, concede that international law “does

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<sup>121</sup> See e.g., Bridget Conley and Alex de Waal, “The Purposes of Starvation: Historical and Contemporary Uses,” (2019) *Journal of International Criminal Justice* 699, at 700-01; and Tom Dannenbaum, “Encircling, Deprivation, and Humanity: Revising the San Remo Manual Provisions on Blockade,” (2021) 97 *International Law Studies* 307, at 323 (examining the definition of starvation for purposes of IHL).

<sup>122</sup> Conley and de Waal, *supra* note 121, at 700. See also, Alex de Waal, *Mass Starvation: The History and Future of Famine* (Polity Press, 2017).

<sup>123</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Protocol I)*, 1125 UNTS 3 (1979), Jun. 8, 1977, Art. 54(1); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Protocol II)*, 1125 UNTS 609 (1979), Jun. 8, 1977, Art. 14; The Rome Statute, Art. 8(2)(b)(xxv). For complete review, see International Committee of the Red Cross, *IHL Database: Customary International IHL, Practice Relating to Rule 53. Starvation as a Method of Warfare*, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule53](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule53).

<sup>124</sup> James Crawford, *Third Report on State Responsibility*, UNILCOR, 52<sup>nd</sup> Sess., Agenda Item 3, UN Doc. A/CN.4/507, at 20 para. 39 (2000).



impose a limit . . . in the extreme circumstances where unilateral sanctions rise to the level of depriving a people of its own means of subsistence or threatens the starvation of the state.”<sup>125</sup>

In parallel with ideas of humanitarian constraints on broad or comprehensive state-oriented sanctions, there has been a growing recognition that sanctions regimes targeting specific individuals and entities must similarly provide safeguards, including fully disclosed criteria for designating persons as being subject to the sanctions, clear procedures for seeking removal from such lists, as well as provision for exemptions.<sup>126</sup> This recognition was driven not only by criticism from civil society, but through several high profile cases in domestic courts (including Canadian courts),<sup>127</sup> and most prominently, the Court of Justice of the European Union (then called European Court of Justice) in the famous *Kadi* case.

The *Kadi* case involved a claimant whose assets had been frozen pursuant to a U.N. Security Council anti-terrorism resolution,<sup>128</sup> as implemented by an E.C. Regulation.<sup>129</sup> Mr. Kadi challenged his designation as constituting a violation of his fundamental human rights, and the Grand Chamber of the Court held that the U.N. Security Council resolutions, and the implementing regulation of the E.C., were indeed inconsistent with the human rights obligations created by the founding E.U. treaties.<sup>130</sup> In particular, the lack of procedures for challenging one’s designation or the underlying provision authorizing such designation, and the lack of any requirement for the Council to provide evidence or give reasons for refusing to remove someone from the list, was inconsistent with the applicant’s rights of defence, and in particular the right to be heard.<sup>131</sup>

Largely as a result of *Kadi* and other similar challenges, the U.N. Security Council established the Office of the Ombudsman in 2009, and the E.U. established even more elaborate protections within its sanctions framework, all to provide a greater degree of procedural protection for those individuals and entities specifically targeted by U.N. authorized sanctions.<sup>132</sup> All of these developments lend weight to the idea that sanctions regimes must be designed so as to comply with certain fundamental human rights principles. But one of the criticisms of autonomous sanctions is that, depending on the country, they frequently have far fewer safeguards and lack transparency.

In summary, therefore, it is difficult to come to any very definitive conclusion regarding the extent to which certain forms of economic sanctions, in some specified circumstances, may

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<sup>125</sup> Akande, *supra* note 79, at 18. *See also*, my discussion of these issues with Aslı Bâli, in “Episode 25 - Aslı Bâli on Economic Sanctions and the Laws of War,” *JIB/JAB: The Laws of War Podcast*, Jul. 25, 2021, available at: <https://jibjabpodcast.com/episode-25-asli-bali-on-economic-sanctions-and-the-laws-of-war/>.

<sup>126</sup> Paul Eden, “United Nations Sanctions, Human Rights and the Office of the Ombudsman,” in Happold, *Economic Sanctions*, *supra*, note 4, at 135 *et seq.*

<sup>127</sup> *See e.g., Abdelrazik v. Canada (Minister of Foreign Affairs)*, [2010] 1 F.C.R. 267 (F.C.).

<sup>128</sup> SC Res. 1373 (2001), UN Doc. S/RES/1373 (2001).

<sup>129</sup> E.C. Regulation No. 2062/2001.

<sup>130</sup> *Kadi I*, *supra* note 36; for analysis of the case, *see* Eden, *supra* note 126, at 142-44.

<sup>131</sup> *Kadi I*, *supra* note 35, at para 348.

<sup>132</sup> Eden, *supra* note 126, at 145. *See also*, U.N. SC Res. 1904 (2009), UN Doc. S/RES/1904 (2009).

violate international human rights law obligations so as to render them unlawful. There is certainly a growing recognition that sanctions regimes ought to contain humanitarian safeguards and exemptions, and most multilateral authorized regimes now do include such limits. There is also growing evidence of an emerging principle of customary international law that may in time crystallize such constraints into legal obligations. As well, it can be argued that comprehensive sanctions regimes that rise to the level of causing starvation and denying the population the ability to sustain itself are a violation of existing prohibitions in human rights law. Further, there is growing evidence that sanctions targeting specific individuals and entities must, at a minimum, provide some form of procedural fairness safeguards. All of these developments could provide a basis for arguments that a specific sanctions regime might be unlawful, but it would still be difficult to point to bright line rules that would make such arguments certain.

#### **(iv) International Trade and Investment Law Objections**

Sanctions that take the form of trade restrictions may clearly violate rules of the international trade regime. Indeed, most sanctions that take the form of trade restrictions will typically violate the most-favored nation principle, provided for in Article I of the General Agreement on Tariffs and Trade (GATT),<sup>133</sup> which aims to eliminate discriminatory practices in international trade, and forms the very core of the international trade regime. Similarly, Articles XI and XIII prohibit discriminatory non-tariff or quantitative restrictions on imports or exports, and Article III requires that imported goods are treated no less favorably than domestic goods.<sup>134</sup> Most sanctions in the form of trade restrictions or embargoes would be *prima facie* violations of these principles, so long as the target state is also a member of the World Trade Organization (WTO) and the sanctions did not satisfy any exceptions. Of the 193 states that are members of the U.N., 164 are currently party to the WTO. Of the states that have been most subjected to extensive sanctions in the last few years, Iran, Syria, and North Korea are not members of the WTO, while Cuba, China, Myanmar, Russia, and Venezuela all are.<sup>135</sup>

The GATT does, of course, provide for exceptions. Thus, before one could conclude that any given sanctions regime did violate one of the foregoing rules, one would have to determine if the sanctions could satisfy any of the exceptions. Article XX provides for the “general exceptions,” which include exceptions for measures considered necessary to protect human, animal or plant life or health (paragraph (b)), and those considered necessary to protect public morals (paragraph (a)).<sup>136</sup> If a sanctions regime is determined to fall within one of these exceptions, it must also satisfy what is known as the “Chapeau” provision of Article XX, which

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<sup>133</sup> *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 55 U.N.T.S. 194, [hereinafter, GATT 1947], Article II.

<sup>134</sup> See e.g., Robert Howse and Jared Genser, “Are EU Trade Sanctions on Burma Compatible with WTO Law?” (2008) 29 *Michigan Journal of International Law* 165.

<sup>135</sup> See “World Trade Organization: Members and Observers,” available at: [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

<sup>136</sup> GATT 1947, *supra* note 133, Article XX.

requires proof that the measures are not applied “in a manner which would constitute a means of arbitrary or unjustifiable discrimination...or a disguised restriction on trade.”<sup>137</sup>

Article XXI creates the “security exceptions,” which provide that a state may take any action which it considers necessary for the protection of its essential security interests, so long as they relate to fissionable material, the traffic in arms or materials related to war, or are taken in a time of war or other emergency in international relations.<sup>138</sup> These exceptions are considered to be “self-judging” clauses, in that they confer upon the state party the discretion to decide for itself whether the measures are considered necessary—although the discretion is arguably subject to a good faith requirement.<sup>139</sup> Interestingly, however, no WTO panel has directly considered the question of what might be “necessary” for purposes of national security in the context of Article XXI, though some relationship to security is clearly required.<sup>140</sup> Article XXI also includes an exception for any measures required by the U.N. Charter for the maintenance of international peace and security, thus confirming that any U.N.-authorized sanctions would override WTO obligations.<sup>141</sup>

The foregoing is just the most cursory review of both the prohibitions and the exceptions, and the analysis of whether a particular exception applies in an actual WTO case is detailed, precise, and context specific. But this review provides some indication of the kinds of exceptions that might be available, and could be invoked, to justify the imposition of sanctions that would on their face appear to violate GATT rules.

There are specific rules in international investment and finance law that economic sanctions may similarly run afoul of. This includes broad international finance law frameworks, such as the *Articles of Agreement of the International Monetary Fund* (the IMF Agreement), and its underlying By-Laws, Rules, and Regulations.<sup>142</sup> By way of example, Article VIII(2)(a) of the IMF Agreement provides that no IMF member shall, without the approval of the Fund, impose restrictions on the making of payments and transfer of funds for current international transactions—a provision that financial sanctions could clearly violate. Aside from such broad multilateral legal regimes, most countries are now party to large numbers of bilateral investment treaties or BITs, all of which are subject to investor-state arbitration proceedings in the event of any dispute. In addition, of course, there are other bi-lateral trade agreements, such as the one that was invoked by Nicaragua in the *Nicaragua v. United States* case, and which the ICJ held was violated by the U.S. embargo.<sup>143</sup> Thus, considerable care has to be taken to

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<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*, at Article XXI(b).

<sup>139</sup> See e.g., *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, [2008] I.C.J. 179; William Burke-White and Andreas von Staden, “Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties,” (2008) 48 *Virginia Journal of International Law* 307, at 311.

<sup>140</sup> Ruys, *supra* note 1, at 30-31.

<sup>141</sup> GATT 1947, *supra* note 133, at Article XXI(c).

<sup>142</sup> *Articles of Agreement of the International Monetary Fund*, 2 U.N.T.S. 39, Dec. 27, 1945

<sup>143</sup> *Nicaragua v. United States*, *supra* note 14, at para. 276.

ensure that financial sanctions do not violate specific provisions of particular BITs or other bilateral trade agreements.

### 3. Justifications for Unlawful Sanctions

In the event that one is able to establish that a specific sanctions regime (or certain aspects thereof) is *prima facie* unlawful in accordance with one or more of the foregoing arguments, it is still possible that the regime could be ultimately justifiable. This is where the doctrine of countermeasures comes into play.

#### (i) Countermeasures

It will be recalled from the discussion earlier that countermeasures (formerly referred to as reprisals) comprise action or conduct by the state that would otherwise be unlawful, but which may be excused or justified, because it is undertaken in response to the prior unlawful conduct of the state against which the countermeasures are directed. In other words, economic sanctions that would otherwise be unlawful, may be justified as countermeasures if they are imposed in response to some unlawful conduct of the target state. This requires, however, that the invoking state must first be able to establish that the conduct of the target state is indeed unlawful, and arguably a violation of an international law obligation specifically owed to the state invoking countermeasures (a qualification to be discussed further below), and also establish that the sanctions satisfy the other specific conditions for lawful countermeasures.

Beginning with the latter, the International Law Commission (ILC) *Articles on the Responsibility of States for Internationally Wrongful Acts* (ARSIWA or ILC Articles) articulate the widely accepted principles that govern the conditions for lawful countermeasures.<sup>144</sup> As indicated above, countermeasures must be in response to unlawful acts, and the primary condition for their legitimacy is that they may only be implemented for the very purpose of inducing the target state to comply with its legal obligations. Moreover, they may only be imposed after the sanctioning state has called upon the target state to return to compliance, and notice has been given that countermeasures will be adopted in the event such action is not taken. As such, countermeasures must be temporary, and they should also be reversible to the extent possible. What is more, the countermeasures must be terminated as soon as the offending unlawful conduct itself ceases, or when the issue has been taken up by some court or tribunal which has jurisdiction over the matter. Some argue that the countermeasures must be terminated as soon as the Security Council has begun to address the target state's conduct.<sup>145</sup> As mentioned earlier, a state cannot engage in activity for purposes of countermeasures if such conduct would violate human rights or humanitarian obligations, or would violate a *jus cogens* norm. Finally, countermeasures are also subject to the principle of proportionality, in that they must be commensurate with the harm caused by the prior

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<sup>144</sup> ARSIWA, *supra* note 16, at Articles 49-54.

<sup>145</sup> Dupont, *supra* note 35, at 54-56. *But see* Jansen Calamita, "Sanctions, Countermeasures, and the Iranian Nuclear Issue," (2009) 42 *Vanderbilt Journal of Transnational Law* 1393, at 1418-19.

violations of law by the target state, and with the gravity of the rights and obligations thereby affected.<sup>146</sup>

It will be immediately apparent that many autonomous economic sanctions regimes will have difficulty satisfying the conditions required for legitimate countermeasures.<sup>147</sup> Perhaps ironically, this is particularly so for the kinds of sanctions regimes that are most likely to be *prima facie* unlawful, and thus require the justification afforded by countermeasures. For instance, the U.S. sanctions regime against the Maduro administration in Venezuela, which is commonly characterized as serving the ultimate objective of causing “regime change,”<sup>148</sup> cannot possibly satisfy the primary condition for countermeasures—that is, being imposed for the sole purpose of inducing the target state to return to a state of compliance with its legal obligations.

Indeed, one of the common criticisms of many sanctions regimes is that their objectives are diverse and vaguely defined, if they are defined at all. That being the case, such sanctions regimes are not typically responding to some specific unlawful action by the target state, and they are certainly not accompanied by any prior demands of the target state, any offers to negotiate, or notice of pending reprisals, and thus they also fail to satisfy those specific conditions required for legitimate countermeasures. What is more, sanctions regimes tend to remain in place for extended periods (the U.S. embargo of Cuba has been in place for almost six decades), and often do not get removed, even when the target state makes moves to address the allegations of unlawfulness—and so they will often fail the conditions of being temporary and reversible. Finally, it will be apparent that many economic sanctions regimes, from the broad embargoes against Iraq in the 1990s and the crippling comprehensive regimes against Iran and Venezuela in the last decade, to even some of the narrower autonomous regimes, such as those against Russia, would be unlikely to satisfy the conditions of proportionality.<sup>149</sup>

The foregoing addresses the problems related to satisfying the specific conditions for legitimate countermeasures. But returning to the prior and fundamental condition for countermeasures, it will be recalled that they must be responsive to a violation of some legal obligation by the target state. This preliminary condition creates several problems in the context of economic sanctions. First, of course, the sanctioning state must establish, or at least have a strong supportable claim, that the offending conduct of the target state constitutes a violation of a specific legal obligation. This by itself can prove difficult in the context of some economic sanctions. Some of the state-targeted sanctions imposed by the Trump

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<sup>146</sup> Dupont, *supra* note 35, at 60. *See also*, International Law Commission, “Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts,” 2001 *ILC Yearbook II* (2001); James Crawford, “The ILC Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect,” 96 *American Journal of International Law* 874 (2002).

<sup>147</sup> *See e.g.*, Lori Damrosch, “The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts,” 46 *Ecology Law Quarterly*, 95 (2015).

<sup>148</sup> *See e.g.*, Cohen and Weinberg, *supra* note 74.

<sup>149</sup> *See e.g.*, Dupont, *supra* note 35, at 63-64.

administration, for instance, did not and could not identify any specific unlawful act to which they were responding.<sup>150</sup> But this is only the beginning of the difficulties.

Second, this condition raises serious obstacles to any justification for targeted sanctions against individuals and entities that are independent of the target state. It may be one thing to target individuals who are within the government and are arguably part of the policy-making apparatus responsible for the targeted unlawful conduct; but targeting businessmen and oligarchs for the sole purpose of trying to bring indirect pressure on the government to change its policy is impossible to justify as a legitimate countermeasure. As one example, OFAC added three Russian companies to the SDN list (thereby targeting them for financial sanctions) simply because of their “entanglement” with Russian Oligarch Oleg Deripaska.<sup>151</sup> Such sanctions could not possibly be justified as a countermeasure, even in the event that they were responding indirectly to some underlying unlawful conduct by Russia. To put it more starkly, countermeasures operate at the inter-state level, and so the concept cannot be invoked to justify or excuse the violation of obligations owed to individuals or other private entities.<sup>152</sup>

A third problem relates to secondary sanctions. Just as targeted sanctions against private entities cannot be justified as countermeasures responding to the unlawful actions of the state, there are similar though distinct problems with so-called secondary sanctions against other states. Sanctions imposed on China because it has engaged in trade with Iran, thereby running afoul of the American autonomous sanctions regime that is itself justified as responding to Iranian violations of the Non-Proliferation Treaty (NPT), cannot in turn be justified as a legitimate countermeasure. Countermeasures can only be directed against the state that is responsible for the internationally wrongful act to which the sanctions are responding, and so cannot be extended to sanction third states.<sup>153</sup> Attempting to punish China for the unlawful act of Iran, even if the ultimate purpose for doing so is to increase pressure on Iran, is simply not within the scope of lawful countermeasures.

The fourth and final problem arising from this preliminary condition is, in a sense, the flip side of the targeted and secondary sanctions issues—these latter issues related to punishing states, individuals, and private entities that were not legally responsible for the unlawful action of the target state. A corollary to this, is the question of whether states that were not owed the legal obligation that the target state is said to have violated, or which did not suffer direct harm from the violation of legal obligation in question, can nonetheless justify sanctions against the violator as a form of countermeasure. This question implicates a complicated set of issues that relate to what are known as rights and obligations *erga omnes*, to which we turn next.

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<sup>150</sup> For helpful analysis of the main sanctions imposed by the U.S. government each year, see the Gibson Dunn *Year End Sanctions Updates*, available at: <https://www.gibsondunn.com/2018-year-end-sanctions-update/>.

<sup>151</sup> Gibson Dunn *2018 Year-End Sanctions Update*, Feb. 11, 2019, available at: <https://www.gibsondunn.com/2018-year-end-sanctions-update/>.

<sup>152</sup> Ruys, *supra* note 1, at 15

<sup>153</sup> ARSIWA, *supra* note 16, at Article 49.

## (ii) *Erga Omnes* Issues

Obligations *erga omnes* are those obligations that are owed to a group of states, or to the entire international community of states. In a number of separate judgements, the ICJ has identified several such obligations *erga omnes*, including obligations relating to the prohibition on aggression, genocide, and torture, as well as the collective right to self-determination.<sup>154</sup> And while the obligations cited here are owed to the entire international community of states, rights and obligations *erga omnes partes* are limited to a smaller group of states, for instance applying only to those party to a particular human rights treaty. All of this means that those states that come within the scope of obligations *erga omnes* are deemed to have a legal interest in any violation of the obligation.

The relevance of all of this for economic sanctions and countermeasures, is that the concept is relied upon for arguing that a state may justify as countermeasures the imposition of economic sanctions against a target state, even though the sanctioning state was not directly harmed by the unlawful action of the target state; and where the violation in question may not have been of an obligation directly owed to the sanctioning state. In concrete terms, when Canada imposes autonomous sanctions on Myanmar or Syria, to the extent it seeks to justify the lawfulness of such sanctions as countermeasures, it will have to make recourse to *erga omnes* arguments, since the obligations violated were not obligations owed directly to Canada, nor was Canada harmed by the wrongful acts to which Canada is responding.

The specific basis for this in the law of state responsibility is to be found, once again, in the ILC Articles. Article 42 provides that a state may invoke the responsibility of other states for unlawful acts if the obligation breached is either owed directly to that invoking state, or to a group of states of which the invoking state is a member, or to the international community as a whole; and the breach either specifically affects the invoking state, or the nature of the breach is such as to change the position of all states to which the obligation is owed.<sup>155</sup> Similarly, Article 48 provides that a state other than an injured state may invoke the responsibility of a breaching state, if the obligation breached is owed to a group of states including the invoking state, or to the international community as a whole. The distinction between these two provisions may be subtle, but the one focuses on the obligation, while the other focuses on the injury as a basis for invoking responsibility.

More ambiguously, however, in the specific provisions of ARSIWA relating to countermeasures, Article 54 merely provides that non-injured states may, pursuant to Article 48, “invoke the responsibility of another state, to take lawful measures against that State to ensure cessation and reparation in the interest of the injured state...”<sup>156</sup> There is debate over the precise meaning of the phrase “lawful measures.” Countermeasures are, as discussed above, measures that would otherwise be unlawful, and so some argue that the “lawful measures” referred to here, must be limited to retorsions and otherwise *prima facie* lawful acts, and thus in their view Article 54 does not recognize any right of non-injured states to engage

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<sup>154</sup> See generally Shaw, *supra* note 9, at loc. 8048 (Kindle ed.)

<sup>155</sup> ARSIWA, *supra* note 16, at Article 42.

<sup>156</sup> *Ibid.*, at Article 48.



in countermeasures. The arguably better view, is that Article 54 is to be understood as either being agnostic on the issue, or even that it recognizes the lawfulness of countermeasures by non-injured states for violations of *erga omnes* obligations.<sup>157</sup> But there was, indeed, disagreement within the ILC itself on the matter, and it recognized that state practice was uncertain.<sup>158</sup> Scholarship since then suggests that there is clearer state practice now, arguably further supporting the idea that sanctions by non-injured states may be justified as countermeasures, but the issue remains both unsettled and important.<sup>159</sup>

An example of where sanctions imposed by non-injured states might constitute countermeasures invoked on an *erga omnes* basis, is the sanctions imposed on Iran for alleged violations of the NPT, which extended beyond what was authorized by the U.N. Security Council (recall that U.N.-authorized sanctions do not need justification as countermeasures). There is debate regarding the justification for the E.U. and U.S. sanctions imposed on Iran and related targeted entities that were beyond the scope of the U.N. Security Council authority.<sup>160</sup> It has been argued that the NPT created obligations *erga omnes partes*—that is, obligations owed to each of the other parties to the treaty that create a common interest among the group of state parties, such that a violation of the treaty by one party constitutes a breach of an obligation owed to the entire group of state parties. The nature of the NPT is indeed such that if one party to the treaty begins developing nuclear weapons, that violation will create insecurity for all parties and undermine the collective interest that the treaty was designed to create.

Therefore, this collective interest is said to provide a basis for all state parties to invoke the responsibility of the violating state, and to impose countermeasures in response.<sup>161</sup> This claim is advanced, first, on the argument that the violation does cause harm to all state parties by doing violence to the collective interest created by the treaty. In the alternative, a second claim could be advanced on the basis that, pursuant to Article 54 of the ILC Articles, states may take countermeasures for the violation of an *erga omnes* obligation, even when not able to show any specific direct harm from the violation.<sup>162</sup> What is more, it is argued that the NPT is in some respects the model regime for permitting such countermeasures. One of the concerns with the very idea of *erga omnes* countermeasures, is that they may become a form of vigilante justice within the international community, with states deciding for themselves that there has been a violation, and that they have an *erga omnes* basis for action. But there should be less basis for such concern in the context of the NPT, because there is an independent agency, the International Atomic Energy Agency (IAEA), that determines whether state action is in violation of obligations under the treaty.

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<sup>157</sup> Dupont, *supra* note 35, at 52-53; Patrick Hamilton, Counter(measur)ing Climate Change: The ILC, Third State Countermeasures and Climate Change, (2008) 4 *McGill International Journal of Sustainable Development Law and Policy* 2 at 96-97. Calamita, *supra* note 145, at 1424.

<sup>158</sup> Ruys, *supra* note 1, at 23.

<sup>159</sup> *Ibid.*

<sup>160</sup> Calamita, *supra* note 145, at 1406-10.

<sup>161</sup> *Ibid.*, at 1429.

<sup>162</sup> *Ibid.*



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To briefly summarize this discussion of justifications, the basic point is that where autonomous sanctions are at risk of being deemed unlawful, it may be possible to justify them as legitimate countermeasures. But sanctions as countermeasures must satisfy stringent conditions. First and foremost, they must be applied in response to an internationally wrongful act on the part of the target state. Most narrowly, the conduct of the target state must have been a violation of an obligation owed to the sanctioning state. Although unsettled, it is possible that states may impose sanctions for violations of *erga omnes* obligations, which still means that the sanctioning state must be in a relationship with the target state, such that it may invoke responsibility for such unlawful act, and must have some affected interest that allows it to impose countermeasures even if not directly injured. However, this also means that secondary sanctions against third-party states cannot be justified as countermeasures. Furthermore, countermeasures are only available against states, and so cannot be a justification for targeted sanctions against individuals or private entities. Finally, even when countermeasures may be imposed in accordance with the foregoing limits, they must be preceded by a demand for compliance, an offer to negotiate, and notice of pending countermeasures; the countermeasures must be temporary, reversible to the extent possible, and terminated as soon as the target state comes back into compliance; and they must be proportionate to the violation they are responding to, as well as to the gravity of the rights and obligations at stake. Finally, countermeasures cannot affect human rights and humanitarian obligations, or be inconsistent with *jus cogens* norms.

Many, if not most, autonomous sanctions regimes that are arguably unlawful for one or more of the reasons discussed earlier, cannot satisfy these conditions either, and so are not justifiable as legitimate countermeasures.

## **IV – Canadian Sanctions in Context**

We turn next to examine how Canada's current sanctions law and policy fits into this analysis. This will include, first, a brief overview of the current law and practice, and then some analysis, based on the foregoing discussion, of the extent to which Canadian policy may be vulnerable to allegations of unlawfulness. Left to the conclusion is some further discussion of more normative considerations for those deciding on Canadian law and policy, such as how Canada might want to be viewed regarding the lawfulness, legitimacy, and justness of its sanctions policy; and what role Canada might want to play in shaping the evolving international law principles that govern economic sanctions.

## 1. Overview of Canadian Sanctions Law and Practice

There are a number of very recent reports,<sup>163</sup> and a lengthy law review article,<sup>164</sup> that provide an overview of Canada's economic sanctions law and policy. The Government of Canada website also provides considerable up-to-date information regarding the legal framework and the sanctions currently in place.<sup>165</sup> As such, only a relatively brief analysis is provided here.

Canada enacted the *United Nations Act*<sup>166</sup> for the purposes of authorizing the implementation of economic sanctions in compliance with U.N. Security Council resolutions. In turn, regulations are promulgated under the *United Nations Act* for the purpose of implementing specific sanctions regimes. Canada currently has sanctions authorized under this legal structure against the following states: Central African Republic, Democratic Republic of the Congo, Eritrea, Iran, Iraq, Lebanon, Libya, North Korea, Somalia, South Sudan, Sudan, and Yemen. In addition, it has imposed sanctions authorized by the U.N. Security Council against certain terrorist entities, including Al Qaida, the Taliban, and ISIS.<sup>167</sup>

Canada does, however, also impose autonomous sanctions. The Government of Canada website insists that “Canadian policy seeks to ensure, whenever possible, that sanctions are applied multilaterally.” Multilateral action has the veneer of greater legitimacy, but as discussed earlier, it does not make the sanctions any less autonomous if they are imposed without the authority of the U.N. or some other international organization. Autonomous sanctions are imposed pursuant to one of two pieces of legislation: the *Special Economic Measures Act* (SEMA),<sup>168</sup> or the *Justice for Victims of Corrupt Foreign Officials Act* (the *Sergei Magnitsky Law*).<sup>169</sup>

SEMA provides the domestic legal basis for Canada to impose sanctions in any one of the following situations:

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<sup>163</sup> Scott McTaggart, “Sanctions: The Canadian and International Architecture,” *Library of Parliament Background Paper No. 2019-45-E*, Nov. 18, 2019, available at: [https://lop.parl.ca/sites/PublicWebsite/default/en\\_CA/ResearchPublications/201945E?](https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201945E?); Andrea Charron *et al.*, *Expert Roundtable on Canadian Economic Sanctions: Summary of Findings and Recommendations*, University of Manitoba, Nov. 2019, [hereinafter, *University of Manitoba Report*], available at: [https://umanitoba.ca/centres/media/Canadian-Economic-Sanctions-Workshop\\_finalreport\\_Nov-2019.pdf](https://umanitoba.ca/centres/media/Canadian-Economic-Sanctions-Workshop_finalreport_Nov-2019.pdf); see also Greg Kanargelidis *et al.*, “Primer on Canadian Sanctions Legislation – January 2021,” *JD-Supra*, Jan. 26, 2021, available at: <https://www.jdsupra.com/legalnews/a-primer-on-canadian-sanctions-8927124/>.

<sup>164</sup> Michael Nesbitt, “Canada’s “Unilateral” Sanctions Regime Under Review: Extraterritoriality, Human Rights, Due Process, and Enforcement in Canada’s *Special Economic Measures Act*,” (2017) 48 *Ottawa Law Review* 513.

<sup>165</sup> Government of Canada, *Sanctions*, available at: [https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/sanctions/index.aspx?lang=eng&\\_ga=2.254039880.1794973445.1622906671-19439264.1622660999](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/index.aspx?lang=eng&_ga=2.254039880.1794973445.1622906671-19439264.1622660999)

<sup>166</sup> *United Nations Act*, R.S.C. 1985, c. U-2 (as amended).

<sup>167</sup> Government of Canada, *Canadian Sanctions Legislation*, available at: [https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/sanctions/legislation-lois.aspx?lang=eng](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/legislation-lois.aspx?lang=eng). For the full list of entities statutorily defined as terrorist entities, pursuant to the Regulations under the *Anti-Terrorism Act*, see Government of Canada, *Currently Listed Entities*, available at: <https://www.publicsafety.gc.ca/cnt/ntnl-scrtr/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx>.

<sup>168</sup> *Special Economic Measures Act*, S.C. 1992, c. 17 (as amended).

<sup>169</sup> *Justice for Victims of Corrupt Foreign Officials Act*, S.C. 2017, c. 21 (as amended).

- (i) – where an international organization to which Canada belongs calls on its members to take economic measures against a foreign state;
- (ii) – where a grave breach of international peace and security has occurred and is likely to result in a serious international crisis;
- (iii) – where gross and systemic human rights violations have been committed in a foreign state; or
- (iv) – where a national of a foreign state, who is either a foreign public official or an associate of such an official, is responsible for or complicit in acts of significant corruption.<sup>170</sup>

It will be noted that the first “circumstance” explicitly contemplates sanctions authorized by an international organization, but the other three are all potentially autonomous in nature. The Act authorizes the government to make orders or regulations that impose restrictions or prohibitions on a list of economic activities in relation to a foreign state, or cause to be seized, frozen, or sequestered, the property of foreign states or persons who are either nationals or residents of that state. Thus, it creates authority for both broad counter-state sanctions, and targeted sanctions against individuals and private entities. The listed economic activities that may be subject to restriction or prohibition is extensive, and could form the basis of a complete embargo.<sup>171</sup> This framework does not appear to absolutely preclude the imposition of secondary sanctions, but it is clearly designed for primary sanctions against both the target state, and persons within or nationals of that state. Canadian practice to date does not involve the imposition of secondary sanctions.<sup>172</sup>

Regulations enacted under SEMA currently authorize and implement sanctions against the following states: Belarus, Iran, Libya, Myanmar, Nicaragua, North Korea, China, Russia, South Sudan, Syria, Ukraine, Venezuela, and Zimbabwe.<sup>173</sup> Most of these are in response to human rights violations, but those against Iran and North Korea are for nuclear proliferation; those against Syria are for both the humanitarian crisis and the resulting breach of international peace and security; and those against Russia and Ukraine are, in part, in response to Russia’s violation of Ukrainian sovereignty.

The *Justice for Victims of Corrupt Foreign Officials Act* is also titled the *Sergei Magnitsky Law* because it was enacted specifically to respond to the kinds of human rights violations that led to the death of Sergei Magnitsky, a prominent lawyer in Russia who was detained without trial, tortured, and ultimately died in November 2016 as a consequence of this maltreatment by the authorities. Several Western countries enacted similar “Magnitsky Laws” to authorize sanctions against individuals and entities alleged to be responsible for such human rights

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<sup>170</sup> *Special Economic Measures Act*, *supra* note 168; *Canadian Sanctions Legislation*, *supra* note 167.

<sup>171</sup> *Special Economic Measures Act*, *supra* note 168, s. 4(1)(a) and (2)(a)-(i).

<sup>172</sup> *University of Manitoba Report*, *supra* note 164; Nesbitt, *supra* note 164.

<sup>173</sup> *Canadian Sanctions Legislation*, *supra* note 167.

violations, and in some cases, against the oligarchs and powerful people who were thought to be able to influence policy in the offending states.<sup>174</sup>

The Canadian *Sergei Magnitsky Law* provides the domestic legal authority for Canada “to impose an asset freeze and a dealings prohibition against individuals who...are responsible for or complicit in gross violations of internationally-recognized human rights or are foreign public officials, or their associates, who are responsible for or complicit in acts of significant corruption.” The Regulations under the Act designate individuals and entities subject to the sanctions, and the Act specifically prohibits persons within Canada, and Canadian nationals anywhere in the world, from dealing in any property of, engaging in or facilitating any transaction with, providing any financial services or making available any property to, any of the individuals or entities so designated.<sup>175</sup> The Act also includes amendments to the *Immigration and Refugee Protection Act*, effectively rendering inadmissible to Canada any persons (other than those who are already permanent residents) who are designated under the Regulations to the *Sergei Magnitsky Law*. As of this writing, the Regulations have designated 70 individuals, primarily in response to circumstances in Russia surrounding the persecution of Sergei Magnitsky, and circumstances of corruption and human rights violations by specified officials in Venezuela, Saudi Arabia, South Sudan, and Myanmar.<sup>176</sup>

In addition to these three main pieces of legislation that provide the domestic legal authority for the imposition of sanctions, there are two other related pieces of legislation. The *Freezing Assets of Corrupt Foreign Officials Act*<sup>177</sup> authorizes the government to freeze the assets or restrain property of current or former officials within foreign governments, but this is limited to circumstances in which a foreign government in a country experiencing turmoil has specifically requested such sanctions.<sup>178</sup> The *Export and Import Permits Act*<sup>179</sup> provides Canada with additional mechanisms for controlling trade, and thus imposing limits in accordance with other sanctions regimes.

It should be noted that the criteria under SEMA relate to broader circumstances in the target state, while those of the *Sergei Magnitsky Law* are tied to the actions of individuals and entities in the target state. These can, of course, overlap, and they may also overlap with sanctions imposed under the *United Nations Act*. For example, different sanctions were imposed under all three pieces of legislation in relation to South Sudan.<sup>180</sup> A parliamentary report on

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<sup>174</sup> See e.g., Hagar Hajjar Chemali, “The European Magnitsky Law – A Milestone with a lot of Potential,” *Atlantic Council*, Dec. 10, 2020, available at: <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-european-magnitsky-law-a-milestone-with-a-lot-of-potential/>; U.S. Department of State, *Global Magnitsky Act*, available at: <https://www.state.gov/global-magnitsky-act/>.

<sup>175</sup> Government of Canada, *Justice for Victims of Corrupt Foreign Officials Act*, [hereinafter *Justice for Victims Website*] available at: [https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/sanctions/victims\\_corrupt-victimes\\_corrompus.aspx?lang=eng](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/victims_corrupt-victimes_corrompus.aspx?lang=eng); *Justice for Victims of Corrupt Foreign Officials Act*, supra note 169.

<sup>176</sup> *Justice for Victims Website*, supra note 175; *Justice for Victims of Corrupt Foreign Officials Regulations*, SOR/2017/33, available at: <https://laws.justice.gc.ca/eng/regulations/SOR-2017-233/page-1.html>.

<sup>177</sup> *Freezing Assets of Corrupt Foreign Officials Act*, S.C. 2011, c. 10 (as amended).

<sup>178</sup> *Canadian Sanctions Legislation*, supra note 167.

<sup>179</sup> *Export and Import Permits Act*, R.S.C. 1985, c. E-19 (as amended).

<sup>180</sup> McTaggart, supra note 164, at 5.

sanctions visualized the overlap of sanctions under the three regimes, as of 2019, in the following manner:

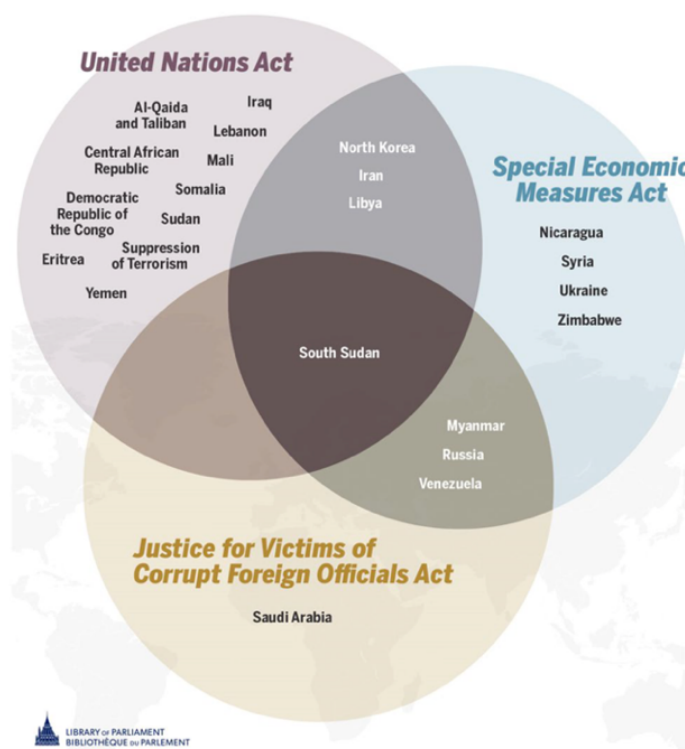


Fig.1, from McTaggart, *Sanctions: The Canadian and International Architecture*.

## 2. Assessing the Lawfulness of Canadian Sanctions

The purpose of this section is not to assess in detail the lawfulness of each, or indeed any, of the specific sanctions regimes imposed by Canada. Rather, it is to discuss in general terms the lawfulness of the legislative approach to sanctions in light of the legal issues that were examined in the preceding parts of this report. It is to serve as a foundation upon which more detailed and deeper analysis can be developed.

Sanctions imposed under the *United Nations Act* are obviously the least likely to be raise questions of legality. Nonetheless, as discussed earlier, even U.N.-authorized sanctions may be vulnerable to allegations of violations of due process and other human rights obligations. Canada does impose targeted sanctions against individuals via Regulations promulgated under the *United Nations Act*, and while these typically take the form of directly prohibiting residents of Canada, or Canadian nationals abroad, from dealing with those designated individuals, they will nonetheless cause financial harm to those persons so designated. As in the *Kadi* case, it could be argued that Canada needs to ensure that there are sufficient procedural mechanisms

in place, affording designated persons with the means to challenge their designation, above and beyond what is provided for within the U.N. system itself. Another possible problem of note, is that Canada does not always update the Regulations under the *United Nations Act* in a timely fashion, such that states that have been removed from the U.N. Security Council lists of designated targets for sanctions, sometimes remain subject to Canadian sanctions for some time thereafter. This means, of course, that those sanctions—such as those against Liberia, Sierra Leone, Cote d’Ivoire, and Eritrea—have remained in place for an extended period during which they were not authorized by the U.N. Security Council.<sup>181</sup>

The autonomous sanctions imposed pursuant to SEMA and the *Sergei Magnitsky Law* raise more complicated questions. It will be recalled from the earlier discussion that the lawfulness of economic sanctions may be challenged on the basis that they constitute unlawful intervention, or that they violate prohibitions on the exercise of extraterritorial jurisdiction, or again that they violate particular rules and principles from specific legal regimes such as international human rights law or international trade law.

Beginning with the easier of the general objections, Canadian sanctions are far less vulnerable to questions over jurisdiction than those of the United States and some of its other Western allies. This is because Canada has not, to date, engaged in the imposition of so-called secondary sanctions, and the targeted sanctions that it does impose, while extending to persons in foreign countries, are implemented through prohibitions and restrictions applied within Canada, or against Canadian nationals abroad.<sup>182</sup> Indeed, the report of the University of Manitoba Expert Roundtable on Canadian Economic Sanctions, a study funded by SSHRC, explicitly questioned why Canada does not engage in extraterritorial application of sanctions law, and why it does not apply secondary sanctions. The report further suggested that such questions had not been sufficiently debated or researched.<sup>183</sup> A recent law review article made similar arguments.<sup>184</sup> The implication appeared to be that Canada ought to consider engaging in both secondary sanctions and extraterritorial application of targeted sanctions. From the foregoing analysis of the international law perspectives, there is very good reason for not engaging in secondary sanctions, or extending the prescriptive jurisdiction of domestic sanctions law extraterritorially for purposes of targeted sanctions. To do so would be to make the sanctions regime vulnerable to charges of unlawfulness, in precisely the way that Canada has claimed that U.S. secondary sanctions affecting Canadian entities are unlawful. On this issue, therefore, Canada’s sanctions law and policy are on fairly solid ground.

On the issue of unlawful intervention, however, the picture is murkier. In part this is because of the unsettled nature of the law regarding the extent to which economic sanctions

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<sup>181</sup> *University of Manitoba Report*, *supra* note 164, at 11.

<sup>182</sup> Even this conduct is vulnerable to some arguments regarding extraterritorial jurisdiction. The Canadian government has explained its position on the extraterritorial exercise of jurisdiction in the context of economic sanctions in the U.N. General Assembly: see comments of Debra Price representing Canada, quoted in U.N. Press Release, “General Assembly Adopts Resolution Calling on States not to Recognize Unilateral Coercive Economic Measures,” Oct. 16, 2002, available at: <https://www.un.org/press/en/2002/ga10083.doc.htm>.

<sup>183</sup> *Ibid.*, at 7.

<sup>184</sup> Nesbitt, *supra* note 164, Part IV.

may be so coercive as to rise to the level of unlawful intervention. As discussed earlier, there are grounds to argue that some forms of autonomous economic sanctions regimes are coercive and thus do constitute unlawful intervention; but state practice would also suggest otherwise, and in this regard Canada is not an outlier, at least among other developed Western states. At the same time, several of Canada's sanctions regimes, such as that against Iran until it was relaxed in 2016 (and which involved autonomous sanctions to the extent that they went beyond the scope of U.N.-authorized sanctions), were quite comprehensive, and clearly designed to compel a change in domestic policy that came within the *domaine réservé* of the target state. That is to say, to the extent economic sanctions may constitute unlawful coercion, these sanctions were arguably coercive in nature, they were also not justified as countermeasures at the time, and they would not in any event satisfy the conditions for countermeasures. What is more, they were arguably inconsistent with such instruments as the bi-annual U.N. General Assembly Resolution calling upon states to terminate unilateral coercive measures against developing countries. And yet, Canada has itself supported this resolution, and others like it, in the past.<sup>185</sup>

There are no doubt legal analyses within Global Affairs Canada that explain how, in the government's view, such sanctions regimes do not constitute coercion, such that there is no inconsistency here. But the position is surely subject to question, and regardless of whether it could be successfully challenged as a matter of law, it certainly provides the basis for perceptions of inconsistency and hypocrisy. As indicated earlier, such policies tend to be viewed in the developing world as being imperialistic and oppressive features of a Western-dominated system, and this too is inconsistent with the position Canada has typically tried to take in its foreign policy.

The question of consistency with human rights law is similarly complicated. Again, this too is partly because of the unsettled nature of the issues, as was discussed earlier. But to the extent that comprehensive embargoes against states can be said to violate human rights obligations, values, or norms, particularly in relation to the economic, social and cultural rights of the populations of the target states, then Canadian sanctions too are vulnerable to challenge on this basis. While it may be true that Canadian autonomous sanctions regimes, on their own, are highly unlikely to rise to the level of causing starvation, multilateral autonomous sanctions regimes to which Canada is contributing, certainly may—and Canadian policy makers should be particularly sensitive to whether Canadian sanctions are thereby contributing to conditions that are indeed prohibited by human rights law. Another area of concern, is the extent to which the humanitarian exceptions and limitations built into specific sanctions imposed under SEMA, are consistent with current expectations regarding *ex ante* human rights impact assessments, and humanitarian carve-outs for broad economic sanctions regimes against states. Similarly, Canada could be vulnerable to claims that some of its targeted sanctions may violate the individual civil and political rights of the individuals targeted by such sanctions. Indeed, an area of specific concern that should be subject to deeper research and analysis, is the extent to which the targeted sanctions authorized by Canadian legislation provide for sufficient

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<sup>185</sup> U.N. Press Release, "General Assembly Adopts Resolution Calling on States not to Recognize Unilateral Coercive Economic Measures," Oct. 16, 2002, available at: <https://www.un.org/press/en/2002/ga10083.doc.htm>.



procedural safeguards, including mechanisms for challenging designation as a target, and requesting removal from target lists.

These questions should be of particular concern and salience for Canadians, given that Canada's embrace of economic sanctions as a tool of foreign policy is apparently driven to a considerable degree by its support for international human rights. The possibility that a policy can be challenged as violating and undermining the very legal regime that it is claimed to be defending and advancing, obviously creates the grounds for allegations of irrationality and hypocrisy—and indeed, Canadian sanctions policy has been challenged at the United Nations on just that basis in the past.<sup>186</sup> Thus, on both the issues of unlawful intervention and on human rights the Canadian government needs to be sensitive to the powerful negative perceptions that may be shaped in general terms by these legal norms, even if there is determined to be little risk that these aspects of Canadian policy could be judged unlawful in any formal sense.

The question of whether Canadian sanctions regimes may violate, or be inconsistent with, rules or principles of such specific treaty regimes as international trade law, international finance and investment law, or indeed any of the many bilateral investment treaties that Canada has entered into, will require a granular analysis of each of the sanctions provisions, as promulgated in the detailed Regulations under each of the related pieces of legislation, through the lens of each of the relevant treaty regimes. But as outlined earlier, the kinds of trade restrictions authorized by SEMA, and the financial restrictions authorized by both SEMA and the *Sergei Magnitsky Law*, certainly have the potential to run afoul of such treaty regimes. On the positive side, however, these regimes tend to provide mechanisms for injured parties to assert their objections and claims. As a result, to the extent Canadian sanctions do stray offside, Canada is likely to be alerted to the issue rather quickly, and there are dispute resolution mechanisms in place for such claims to be resolved.

Finally, any detailed assessment of the lawfulness of any specific sanctions regime will have to consider the question of whether the sanctions, to the extent that they are likely to be deemed unlawful, may be nonetheless justified as legitimate countermeasures. This too will require a granular analysis of whether the sanctions satisfy the conditions provided for in the ILC Articles, as discussed in the Part III above. But, as indicated earlier, it seems unlikely that Canadian sanctions currently in place could satisfy these conditions. First and foremost, this is because Canada has never claimed that any of these sanctions were being imposed as a form of countermeasure, nor has it ever provided notice or any offer to negotiate when imposing such sanctions. Although some may have been imposed with claims that they were aimed at inducing target state compliance with, for instance, human rights law or the NPT, it is not clear that many of them are temporary in nature. They are also typically not imposed in response to a violation of any legal obligation owed specifically to Canada, or in response to any harm caused to Canada; and aside from sanctions against Iran for violations of the NPT,

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<sup>186</sup> U.N. Press Release, “General Assembly Endorses Landmark Global Compact on Refugees, Adopting 53 Third Committee Resolutions, 6 Decisions Covering Range of Human Rights,” Dec. 17, 2018, available at: <https://www.un.org/press/en/2018/ga12107.doc.htm>; see statements of the representative of Iran, in discussion of the resolution on the human rights situation in Iran.

it is not clear that there are *erga omnes* grounds for any of these sanctions. Finally, it is not entirely obvious that these sanctions are proportionate.

## V – Conclusion

As stated at the outset, this report aimed to provide a relatively brief examination of the lawfulness of the different forms of economic sanctions that are widely employed by states today, and to locate Canadian sanctions regimes within the context of that legal framework. It will now be apparent that this is a complex area of international law. Some aspects of the related legal regimes are relatively clear, but regrettably some of the most important issues regarding the lawfulness of sanctions—most particularly, questions as to whether economic sanctions may constitute unlawful intervention, how economic sanctions implicate human rights obligations, and even whether some otherwise unlawful sanctions may at times be justified as countermeasures—remain very much unsettled.<sup>187</sup> Nonetheless, an understanding of these issues, and an appreciation of where the fault lines are in the debates surrounding each of these questions, remains important. As indicated in the Introduction, the primary purpose of this examination has been to provide Canadian law and policy decision-makers with a guide—one that might assist in their assessment of the lawfulness of the different options that they may be considering in the development of Canada’s sanctions policy. As unsettled as some of the legal terrain may be, having a good sense of the landscape will be essential to the decision-making process.

There are, of course, different ways in which law and policy makers might think about the indeterminacy explained in this review of the law. A cynical approach might be to view such uncertainty as a circumstance to be exploited, providing an opportunity to push the envelope and test the uncertain limits of the law by imposing aggressive sanctions regimes. Some might even object that there is nothing cynical about such an approach, but rather suggest that it is simply taking full advantage of the law in order to realize beneficial foreign policy objectives, such as enforcing human rights compliance abroad. There are many jurists and scholars who believe that sanctions are a tool for good in enforcing international law.

An alternative view, however, would suggest that this indeterminacy calls for caution in considering the scope of Canadian sanctions policy. Such decision-making ought to be informed by the broader legal, and indeed ethical, values that Canada espouses, both at home and in the international arena. The marginal foreign policy benefits of shaping sanctions in a manner that pushes the boundaries of these unsettled areas of law, may be more than outweighed by the risk that doing so will undermine Canada’s own efforts to champion international human rights and the international rule of law. There is not just the risk that a contradiction between policy and espoused values and principles could give rise to highly

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<sup>187</sup> To be clear, most forms of sanctions regimes that we have suggested might be unlawful, could not satisfy the conditions for countermeasures – but there remain unsettled questions over whether any unlawful sanctions could be justified as countermeasures. See text associated with, and sources in, notes 156-159, *supra*.

negative perceptions of hypocrisy, which exact their own strategic costs; but Canada must also be mindful of the role that it plays in the shaping of international law. Customary international law in particular is formed by state practice, and Canadian policy makers need to consider carefully the nature of the legal regime that they are helping to develop. They need to think normatively about what they want the law to look like in the future. Pushing the limits of unsettled areas of the law may actually help to solidify that law in a form that is not entirely consistent with Canadian ideas about human rights, respect for sovereignty, or the primacy of the international rule of law.

Finally, it bears emphasizing that the legal limits are only one of a number of imperatives to be considered in shaping economic sanctions regimes. There are, of course, strategic and tactical foreign policy objectives, and even domestic political considerations. But there should also be serious and informed contemplation of the considerable research that has been done in other disciplines on the effectiveness of sanctions, the humanitarian harm that they can cause, and the host of other counterproductive unintended consequences that can arise from sanctions. These factors give rise to important ethical imperatives. Understanding the legal landscape helps inform what the limits of possible action are, but in that sense the law only provides the floor, not the ceiling, for deciding on sanctions regimes that best express the nations values while also realizing its foreign policy objectives.

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