

## SYMPOSIUM ON UNILATERAL TARGETED SANCTIONS

### UNFINISHED BUSINESS OF INTERNATIONAL LAW: THE QUESTIONABLE LEGALITY OF AUTONOMOUS SANCTIONS

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Enforcement by way of unilateral economic sanctions has been described as “one of the least developed areas of international law.”<sup>1</sup> The term “sanctions” is notoriously difficult to define and does not itself appear in the key international instruments. With economic sanctions regularly referred to as President Trump’s “weapon of choice,” and with opposition to such measures growing, greater certainty is needed in this area of law if the legitimacy and effectiveness of sanctions are to be preserved. This essay distinguishes UN-authorized sanctions from three types of “autonomous” sanctions (collective corrective sanctions, unilateral corrective sanctions, and unilateral coercive sanctions) and argues that many uses of unilateral sanctions are either unregulated or based on questionable legality.

Over thirty years ago, Prosper Weil recognized that states employ international law “to ensure the coexistence and cooperation of basically disparate entities composing a fundamentally pluralistic society.”<sup>2</sup> This description captures a juxtaposition that remains at the heart of international law. International law aims to achieve coexistence and cooperation among sovereign states, while acknowledging that one of the fundamental attributes of sovereignty is the right to differ. It is only natural that this juxtaposition creates something of a structural weakness in the international legal order.

It is at the point where there is the most pressure to “resolve” this juxtaposition that we reach international law’s weakest point, namely its enforcement. At best, international law’s enforcement structures remain rudimentary. The UN Charter vests primary enforcement responsibility in the UN Security Council. Yet in the many circumstances in which the Security Council is either unavailable or ineffective, we are left with Chapter VI of the UN Charter, which provides that the solution for disputing states rests with a vague recipe of “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”<sup>3</sup>

The “peaceful settlement of international disputes” is an area of international law that rarely steals the spotlight. Yet it is somewhere in this largely unmapped terrain that we locate the question of the legality of unilateral sanctions. While many international lawyers would acknowledge a degree of legal ambiguity surrounding unilateral sanctions, it was nevertheless surprising when President Trump invoked the authority of HBO over that of international law in announcing the restoration of U.S. sanctions against Iran in November of last year. Posting a mocked-up *Game of Thrones* poster on his Twitter account, President Trump declared that “Sanctions are

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<sup>1</sup> Nigel D. White & Ademola Abass, *Countermeasures and Sanctions*, in INTERNATIONAL LAW 537 (Malcolm Evans ed., 2014).

<sup>2</sup> Prosper Weil, *Towards Relative Normativity in International Law?*, 11 AJIL 413, 418 (1983).

<sup>3</sup> [UN Charter](#) art. 33(1).

coming.”<sup>4</sup> Who knows how far he intended us to take the meme’s message. Emerging from the mist, the President cosplays as a sort of Donald Lannister, head of the wealthiest family in the realm, and rightful claimant to rule the world. Is he entitled to see the world as akin to Westeros, governed not by international law but by deal-making, power battles, and broken treaties?

Regrettably, there is less legal authority than an international lawyer might hope to distinguish between the Westphalian and the Westeros account. Certainly, U.S. domestic law appears to leave the President with impressive latitude. The most common domestic legal basis for U.S. sanctions programs is the International Emergency Economic Powers Act (IEEPA), which grants the President power that has been described by the U.S. Supreme Court as “sweeping and unqualified.”<sup>5</sup> Sanctions are commonly implemented by executive orders under which the President declares a national emergency justifying the imposition of sanctions measures. President Trump is not the first President to deploy this power liberally. In a *Lawfare* post on President Trump’s executive actions related to the Mexican border,<sup>6</sup> Jack Goldsmith noted an old article by the “improbable but credible team” of Harold Koh and John Yoo, who recognized that “Presidents have regularly [gained] access to IEEPA’s broad grants of authority with almost no congressional opposition, ... [declaring] national emergencies with little regard to whether a real emergency had actually existed.”<sup>7</sup>

While use of economic sanctions is hardly a new foreign policy tool, international actors are (perhaps understandably) showing more concern about a President who is exhibiting somewhat pareidolic tendencies in his capacity to identify emergencies. In the President’s first year in office, Secretary of the Treasury Steven Mnuchin estimated that he spent “probably over 50 per cent” of his time on national security issues and sanctions.<sup>8</sup> Law firm Gibson Dunn reported that 2017 was “a year of historic growth in the use of sanctions—and one in which sanctions played a greater role in both foreign and domestic policy in the United States.”<sup>9</sup> 2018 was described as an “extraordinary year in sanctions development and enforcement” with a total of 1500 persons designated (50 percent more than the number added to the Specially Designated Nationals and Blocked Persons List in any prior year).<sup>10</sup>

This White House not only uses sanctions more widely, but also shows a greater tendency to deploy them unilaterally. As will be explained below, there is a legally relevant difference between UN-authorized sanctions and “autonomous” sanctions, with the latter term denoting sanctions either lacking or exceeding authorization by the UN Security Council. The distinction between UN-authorized and autonomous sanctions is not one the United States clearly draws. While the EU website clearly sets out the source of sanctions in either UN, EU, or combined acts,<sup>11</sup> the Office of Foreign Assets Control (OFAC) declines to provide information explaining the degree of convergence between U.S. sanctions programs and those authorized by the United Nations. Of the thirty active sanctions programs currently listed on the OFAC website, only eleven appear to relate to sanctions regimes currently authorized by the Security Council, though even then it is difficult to assess whether the scope of U.S. sanctions differs from those authorized by the United Nations.

<sup>4</sup> [@realDonaldTrump](#), TWITTER (Nov. 2, 2018, 11:01 AM).

<sup>5</sup> [Dames & Moore v. Regan](#), 453 U.S. 654 (1981).

<sup>6</sup> Jack Goldsmith, [What Is and Isn't a Big Deal in Trump's Executive Actions Related to the Border](#), LAWFARE (Feb. 16, 2019).

<sup>7</sup> Harold H. Koh & John Yoo, [Dollar Diplomacy / Dollar Defense: The Fabric of Economics and National Security Law](#), 26 INT'L LAW. 717, 744 (1992).

<sup>8</sup> Angela Keane, [Pro Policy Summit: Live Updates and Highlights](#), POLITICO (Sept. 14, 2017).

<sup>9</sup> Gibson Dunn, [2017 Year-End Sanctions Update](#) (Feb. 5, 2018).

<sup>10</sup> Gibson Dunn, [2018 Year-End Sanctions Update](#) (Feb. 11, 2019).

<sup>11</sup> [EU Sanctions Map](#).

Opposition to U.S. autonomous sanctions is not new.<sup>12</sup> Since 1992, the General Assembly has annually passed a resolution urging all states to “refrain from promulgating laws and measures” such as the U.S. Helms-Burton Act imposing autonomous sanctions against Cuba and those trading with Cuba, “the extraterritorial effects of which affect the sovereignty of other states, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation.” The latest resolution passed by 189 votes to 2 (the United States and Israel voting against).<sup>13</sup> Russia and China have also long chafed at the autonomous sanctions tool,<sup>14</sup> as have the main targets of U.S. sanctions. Yet, in more recent times, long-standing U.S. allies have joined the opposition. After President Trump announced his intention to withdraw from the Joint Comprehensive Plan of Action (JCPOA) and reimpose sanctions against Iran, the European Union announced its intention to remain compliant with the JCPOA and to reinvigorate the “EU Blocking Statute,” designed as a countermeasure to what the European Union considers to be the unlawful effects of extraterritorial sanctions on EU operators.

The problem for these newer “voices of opposition” is that international law does not provide a neat point of distinction between U.S. autonomous sanctions and their own. The European Union is a key player in the autonomous sanctions game, with twenty-five of its forty-three sanctions regimes imposed on non-EU member states without UN authorization. One might query where the difference between U.S. and EU practice lies.<sup>15</sup> Why should the United States (with its population of 325 million) not be competent individually to have recourse to the same autonomous economic measures as the European Union (with its predicted post-Brexit population of 450 million)?

Greater certainty is needed in this area of law. The remainder of this essay distinguishes between four different types of sanctions programs. In drawing these distinctions, I regard “sanctions” as measures that are otherwise inconsistent with the sanctioning state’s international obligations, which therefore require some form of separate legal justification. Separated out are measures known in international law as “retorsions,” that is, measures of discourtesy or unfriendliness that fall short of violating a rule of international law and which are therefore lawful.

#### *UN-Authorized Sanctions: The International Community’s Enforcer*

The UN Charter grants the Security Council broad power to decide what nonforcible measures shall be taken to maintain or restore international peace and security, which may include economic sanctions. On account of the combined effect of Articles 25 and 103 of the UN Charter (together with Article 2(6), which seeks to extend such measures to nonmember states), the Security Council has a “supranational competence” not possessed by any other international actor to compel states to enforce economic sanctions against targeted entities over and above their other legal obligations. Notwithstanding this claim to supremacy, significant pressure on the Council over a number of decades, including through the *Kadi* litigation,<sup>16</sup> has led the Council to acknowledge the need for the Council and member states to incorporate respect for due process rights of targeted individuals into the implementation of UN sanctions regimes.<sup>17</sup>

<sup>12</sup> Alexandra Hofer, *The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?*, 16 CHIN. J. INT’L L. 175 (2017).

<sup>13</sup> [G.A. Res. 73/8](#) (Nov. 5, 2018).

<sup>14</sup> See, e.g., *Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law* para. 6 (June 25, 2016).

<sup>15</sup> Tom Ruys, *Sanctions, Retorsions and Countermeasures: International Concepts and International Legal Framework*, in RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW 19 (Larissa Van den Herik ed., 2017).

<sup>16</sup> Devika Hovell, *Kadi: King-Slayer or King-Maker? The Shifting Allocation of Decision-Making Power Between the UN Security Council and Courts*, 79 MOD. L. REV. 147 (2016).

<sup>17</sup> James Cockayne et al., *Fairly Clear Risks: Protecting UN Sanctions Legitimacy and Effectiveness Through Fair and Clear Procedures* (2018).

*Collective Corrective Sanctions: The Multilateral Enforcer*

In drawing a distinction between U.S. and EU sanctions, much has been made in political and scholarly discussion of the distinction between the questionable “unilateral” action of the United States and the “multilateral” action of other actors.<sup>18</sup> However, the legal gulf between unilateral and multilateral sanctions is not as broad as scholars have sometimes claimed. A distinction needs to be drawn between sanctions imposed by an international organization against member states and sanctions imposed against non-member states. As confirmed by the International Law Commission (ILC) in its Commentaries to the Articles on the Responsibility of International Organizations, states can agree between themselves to establish an organization with the power to impose sanctions against member states to the organization. However, in terms of sanctions against non-member states, a different source of legal authority is required.

The European Union is the only regional organization with a sanctions policy directed at non-member states. Though the European Union puts stock in the fact that its restrictive measures must always accord with international law,<sup>19</sup> it cannot locate legal justification for sanctions against non-member states simply in the “multilateral” status of these sanctions. As is well known, treaties—including constituent instruments of international organizations—cannot create rights or obligations for third states without their consent.<sup>20</sup> Instead, such sanctions derive legality from the idea that an organization may do collectively what the individual states making up the collective may do singly.

As discussed below, the chief justification for states to impose autonomous sanctions is found in the law of countermeasures. In this respect, Marco Gestri has described the European Union as “a trailblazer” in implementing the doctrine of “collective countermeasures.”<sup>21</sup> The idea of collective countermeasures remains controversial. A clear hurdle (elaborated upon below) is the need for states collectively to establish that they fit the qualification of “an injured state.” As long as they are able to do so, the capacity for states acting collectively through an international organization to impose countermeasures is arguably no more controversial than is the case for an individual state.<sup>22</sup>

*Unilateral Corrective Sanctions: The Maverick Enforcer*

The main basis for the legality of autonomous sanctions derives from the law relating to countermeasures. The ILC’s Articles on State Responsibility clarify and refine the scope of a state’s right to deploy countermeasures, setting out a number of conditions. These include:<sup>23</sup>

- (1) The targeted state must have committed an internationally wrongful act.
- (2) The sanctioning state must establish it is an “injured state.”

<sup>18</sup> Inken von Borzyskowski & Clara Portela, *Sanctions Cooperation and Regional Organizations*, in *INTERORGANIZATIONAL RELATIONS IN INTERNATIONAL SECURITY: COOPERATION AND COMPETITION* (Stephen Aris et al. eds., 2018).

<sup>19</sup> Council of the European Union, *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy* (June 15, 2012).

<sup>20</sup> *Vienna Convention on the Law of Treaties* art 34., May 23, 1969, 1155 UNTS 331.

<sup>21</sup> Marco Gestri, *Sanctions Imposed by the European Union: Legal and Institutional Aspects*, in *COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW* 99 (Natalino Ronzitti ed., 2016).

<sup>22</sup> Those who cite *Nicaragua* as authority against the legality of collective countermeasures ignore the fact that the Court was there referring to “collective countermeasures involving the use of force.” *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, 1986 ICJ REP. 165, 167 (June 27).

<sup>23</sup> Int’l Law Comm’n, *Articles on the Responsibility of States for Internationally Wrongful Acts* arts. 49-54, 2 Y.B. INT’L L. COMM’N 31, 75 (2001).

- (3) The measures must aim to induce the targeted state to comply with its obligations.
- (4) The measures must be proportionate to the injury suffered.
- (5) The measures may not affect fundamental human rights norms or *jus cogens* norms. These include the due process rights of individuals or entities targeted by sanctions measures.<sup>24</sup>
- (6) The measures must be terminated when the wrongful act has ceased.

Uncertainty remains as to the definition of “injured state.” This is relevant as many of the violations that U.S. sanctions, and indeed EU sanctions, seek to redress could be said not to affect U.S. or EU citizens directly, although they would fall within the category of violations of an obligation that protects the collective interest of the group (e.g., a multilateral disarmament regime, as in the case of Iran) or of an erga omnes obligation owed to the international community as a whole (e.g., grave human rights violations, as in the case of Syria or Myanmar). The ILC expressly reserved its position on this question, leaving “resolution of the matter to the further development of international law.”<sup>25</sup>

### *Unilateral Coercive Sanctions: The Rogue Enforcer*

At the end of the day, the key difference between lawful and unlawful autonomous sanctions is that the former serve the *corrective* purpose of bringing wrongdoing states back into line with their treaty or customary international law obligations. The idea is that sanctions should not cross the line from *inducing* a state to comply with legal obligations it has accepted to *coercing* a state to do something it is not bound to do under international law.<sup>26</sup> Unilateral acts “become especially contentious where they are associated with one community imposing its values on another, where that other community has not consented to the imposition of such values.”<sup>27</sup> Sanctions should not be a wager on a state’s weakness, but on its wisdom to conform with agreed principles of international law.<sup>28</sup>

There is a growing movement of states arguing for the illegality of unilateral coercive measures. The United Nations created the office of Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on Human Rights, with the current office-holder defining such measures as “unlawful measures imposed by a state to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights with a view to securing advantages of any kind,” including “some specific change in its policy.”<sup>29</sup> Problematically, however, until states declare themselves willing to agree on defined legal parameters, the precise line between lawful and unlawful autonomous measures remains a matter of debate rather than law.

### *Conclusion*

Powerful states continue to deploy autonomous sanctions. The problem is that a great deal of this practice remains unregulated or based on questionable legality, with obvious implications for the legitimacy and effectiveness of otherwise valuable sanctions measures. In particular, controversy continues to surround the lawfulness of “collective countermeasures” and “unilateral coercive sanctions.” Iran commenced proceedings challenging U.S. sanctions in the International Court of Justice, and Venezuela initiated similar proceedings in the World Trade

<sup>24</sup> Devika Hovell, *Due Process in the United Nations*, 110 AJIL 1 (2016).

<sup>25</sup> Int’l Law Comm’n, *Commentaries to ILC Articles on State Responsibility*, in Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10, at 139 (2001).

<sup>26</sup> Antonios Tzanakopoulos, *The Right to be Free from Economic Coercion*, 4 CAMBRIDGE INT’L L.J. 616, 617 (2015).

<sup>27</sup> Philippe Sands, *Unilateralism, Values and International Law*, 11 EJIL 291, 293 (2000).

<sup>28</sup> *Case Concerning the Air Services Agreement of 27 March 1946*, Arbitral Award of 9 December 1978, 54 ILR 304, [91] (1979).

<sup>29</sup> *UN Doc. A/HRC/30/45*, at para. 13 (Aug. 10, 2015).

Organization, providing an opportunity for these bodies to clarify legal qualifications to the imposition of unilateral sanctions. However, the capacity of these bodies to determine the legal framework is limited by the narrow terms in which the claims have been formulated. The issue is clearly ripe for some form of comprehensive resolution by states or, in the meantime, the invisible college of international lawyers under the auspices of the ILC, the International Law Association, the Institut de Droit International, or other codification or research bodies.<sup>30</sup> Until then, sanctions will be the dubious source of a great deal of unfinished business, in both legal and economic terms.

<sup>30</sup> See also [Ruys](#), *supra* note 15, at 50.