

## SYMPOSIUM ON UKRAINE AND THE INTERNATIONAL ORDER

### A WATERSHED MOMENT FOR SANCTIONS? RUSSIA, UKRAINE, AND THE ECONOMIC BATTLEFIELD

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Russia's invasion of Ukraine has triggered an unprecedented wave of sanctions targeting every facet of the Russian economy. In the early months of the conflict, the sheer scope, speed, and coordination of this response to Russia's aggression instills hope that economic pressure may yet play a decisive role in this conflict.<sup>1</sup> But the massive scale of the effort is also cause for concern.<sup>2</sup> In particular, it highlights the relative lack of legal constraints governing economic warfare, even in the face of potentially grave harms to third parties and the global economy. While these concerns have provoked no shortage of proposals for reform, the fragmented institutional landscape and a lack of political will are likely to frustrate any attempts at far-reaching transformation.

#### *International Sanctions Against Russia*

The Russian invasion of Ukraine has opened the sanctions floodgates. A trickle of preexisting sanctions that the United States, the European Union, and others had imposed against Russia over its annexation of Crimea, malicious cyber activity, and human rights violations has turned into a tsunami of increasingly severe economic measures.<sup>3</sup> The Russia sanctions regime continues to evolve daily, but the sanctions imposed to date can be divided into roughly six categories.

The first category of measures taxes the Russian leadership and elites through "blocking" sanctions, that is, full asset freezes. Such sanctions have been imposed individually against Russia's President Putin and other members of the Russian business and political elite. In late March 2022, the United States announced it was also considering imposing secondary sanctions, which would prohibit foreign companies that do business with sanctioned Russian entities from accessing the U.S. market.<sup>4</sup> The United States also convened a taskforce to hunt down assets of Russian designated individuals and entities, recognizing that sanctions may not be effective because those assets are difficult to reach.<sup>5</sup>

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<sup>1</sup> Scott R. Anderson, Damon L. Burman, Austin Fraley, Bryce Klehm, Eden Lapidor & Emma Svoboda, *What Sanctions Has the World Put on Russia?*, LAWFARE (Mar. 4, 2022); Chad P. Bown, *Russia's War on Ukraine: A Sanctions Timeline*, PETERSON INST. INT'L ECON. (Mar. 24, 2022).

<sup>2</sup> See, e.g., Daniel W. Drezner, *What Is the Plan Behind Sanctioning Russia?*, WASH. POST (Mar. 1, 2022).

<sup>3</sup> See, e.g., Dan Roberts & Ian Traynor, *US and EU Impose Sanctions and Warn Russia to Relent in Ukraine Standoff*, GUARDIAN (Mar. 6, 2014).

<sup>4</sup> Jeff Stein & Jeanne Whalen, *Biden Aides Explore Rarely Used Sanctions Weapon Against Russia*, WASH. POST (Mar. 24, 2022).

<sup>5</sup> White House Press Release, *Joint Statement on Further Restrictive Economic Measures* (Feb. 26, 2022).

The second category of measures targets the Russian financial system. This includes blocking sanctions against major Russian banks and financial institutions, limitations on transactions with others, and the removal of certain financial institutions from the Swift financial messaging system. Importantly, the United States and the European Union have banned all transactions with the Central Bank of the Russian Federation. This measure is designed to prevent Russia from undermining the impact of sanctions by accessing its sizable foreign reserves or trading in sovereign debt in the primary and secondary markets.<sup>6</sup> These sanctions have impaired Russia's ability to pay its debts using overseas foreign currency reserves, raising the specter of default.<sup>7</sup>

The third category is energy. At first, the United States appeared to leave the energy market out of sanctions by creating express exceptions. The rationale was to maintain stability in energy markets, and to protect Europe, which is highly dependent on Russian energy products. Nevertheless, the United States soon banned the import of Russian oil, liquefied natural gas, and coal, as well as any new U.S. investment in Russia's energy sector.<sup>8</sup> The EU was reluctant at first. But in early April 2022, as evidence of atrocities in the Ukraine mounted, it began to contemplate energy sanctions, despite internal opposition from member states that rely on Russian energy supplies.<sup>9</sup>

A fourth category captures other controls on international trade. The United States and other countries have imposed export controls designed to curtail Russian access to necessary commodities and technologies and to hinder Russia's military buildup.<sup>10</sup> In March 2022, the United States, Canada, the EU, and other G7 countries committed to revoking Russia's most-favored-nation status with respect to tariff treatment, which would effectively erase the benefits of Russia's World Trade Organization (WTO) membership with respect to trade in goods.<sup>11</sup> These measures were coupled with restrictions on investment, with Germany suspending certification of the Nordstream 2 gas pipeline, and the United States setting up further restrictions on investment in Russia.<sup>12</sup>

The fifth category is transportation. Among other restrictions, Russian airlines are now banned from large swathes of the world. And the United States and EU have required leasing companies to repossess planes lent to Russian airlines. In retaliation, the Russian government has moved to seize commercial jets owned by Western leasing companies.<sup>13</sup>

Finally, these measures have been accompanied by an exodus of private actors. BP, Apple, McDonald's, Mastercard, and Visa, among others, have suspended operations in Russia. Some of these actions may reflect "overcompliance" with sanctions, as firms reason that the cost of managing sanctions-related legal risk is not worth the benefit of doing business with Russia.<sup>14</sup> A mixture of market factors, state pressure, and principle may also be driving these actions.

<sup>6</sup> See, e.g., Patricia Cohen & Jeanna Smialek, *The West's Plan to Isolate Putin: Undermine the Ruble*, N.Y. TIMES (Feb. 28, 2022).

<sup>7</sup> Eshe Nelson & Lananh Nguyen, *Russia Pays Dollar-Denominated Debt in Rubles, Risking Default, After U.S. Blocks Payment*, N.Y. TIMES (Apr. 6, 2022).

<sup>8</sup> [Executive Order on Prohibiting Certain Imports and New Investments with Respect to Continued Russian Federation Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine](#) (Mar. 8, 2022).

<sup>9</sup> Anna Cooban, *Russian Energy Exports in Focus as Europe Plans New Sanctions*, CNN (Apr. 4, 2022).

<sup>10</sup> See, e.g., [Implementation of Sanctions Against Russia Under the Export Administration Regulations](#), 87 Fed. Reg. 12226 (Mar. 3, 2022).

<sup>11</sup> Canadian Dep't of Fin. Press Release, [Canada Cuts Russia and Belarus from Most-Favoured-Nation Tariff Treatment](#) (Mar. 3, 2022); White House Press Release, [United States, European Union, and G7 to Announce Further Economic Costs on Russia](#) (Mar. 11, 2022).

<sup>12</sup> [Executive Order 14068 Prohibiting Certain Imports, Exports, and New Investment With Respect to Continued Russian Federation Aggression](#), 87 Fed. Reg. 14381 (Mar. 11, 2022); Sarah Marsh & Madeline Chambers, *Germany Freezes Nord Stream 2 Gas Project as Ukraine Crisis Deepens*, REUTERS (Feb. 22, 2022).

<sup>13</sup> Chris Isidore & Chris Liakos, *Russia Moves to Seize Hundreds of Planes from Foreign Owners*, CNN (Mar. 17, 2022).

<sup>14</sup> Edoardo Saravalle, *Bargaining Chip?*, PHENOMENAL WORLD (Mar. 9, 2022).

*Economic Sanctions Unrestrained*

The overwhelming response, in the short term, reaffirms the central role of sanctions as a tool of the post-1945 legal order, and reaffirms a “*laissez faire*” approach to their application. Today, sanctions are a widely recognized pressure valve in international relations—an ostensibly non-violent measure that can be applied to influence state and increasingly individual behavior and punish violations of the law. This is a break with the older law of neutrality, in which the decision to restrain trade with only one party to a conflict could be considered a hostile act.<sup>15</sup> The legal distinction between economic force and war is widely accepted today, and it is reaffirmed in contemporary commentary that treats the allies’ sanctions as wisely avoiding, rather than contributing to, military escalation.

The “pressure valve” view has become coupled with a relative absence of strong legal constraints on a state’s decision on *whether* to deploy sanctions. The International Court of Justice’s finding that even a comprehensive embargo does not breach customary international law, though it may violate an applicable commercial treaty, remains the point of departure.<sup>16</sup> In practice, rules of general international law that might have constrained a state’s decision to use sanctions—such as non-intervention or limits on national jurisdiction—often seem to be at best a minimal constraint.<sup>17</sup> If sanctions do not violate a primary norm, then rules governing countermeasures, such as notice and proportionality, do not apply.<sup>18</sup>

Domestic legal institutions in key sanction-imposing jurisdictions have also acquiesced in the practice and the fundamental legitimacy of sanctions as a tool of statecraft. In the United States in particular, a series of Supreme Court decisions in the 1980s “freed the president . . . to conduct widespread economic warfare merely by declaring a national emergency with respect to a particular country,” while sidelining congressional oversight.<sup>19</sup>

In principle, economic treaties—such as investment treaties and the WTO agreements—might play a constraining role, but contemporary treaties are also often designed to leave space for economic sanctions. Thus, while sanctions may implicate various liberalizing and non-discrimination requirements of trade and investment treaties, many such agreements contain security exceptions that allow a state to take “any action which it considers necessary for the protection of its essential security interests” in time of war or emergency.<sup>20</sup> In the present context, this exception is sufficient to justify the decision to suspend normal trade relations with Russia and Belarus.

International and domestic law are, however, starting to play a greater role in governing *how* sanctions are imposed. In past years, national and regional courts, as well as international bodies such as the United Nations and the WTO, have engaged in increasingly searching review of unilateral and multilateral sanctions and economic security measures.<sup>21</sup> The law governing sanctions and other forms of economic statecraft in each of these forums

<sup>15</sup> See generally NICHOLAS MULDER, [THE ECONOMIC WEAPON: THE RISE OF SANCTIONS AS A TOOL OF MODERN WAR](#) (2022).

<sup>16</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), [Judgment](#), 1986 ICJ Rep. 14, 126, 140 (June 27).

<sup>17</sup> See, e.g., Tom Ruys & Cedric Ryngaert, [Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses to, US Secondary Sanctions](#), BRIT. Y.B. INT’L L. (2020).

<sup>18</sup> [Articles on Responsibility of States for Internationally Wrongful Acts](#), Arts. 51–52, GA Res. 56/83, Annex (Dec. 12, 2001).

<sup>19</sup> HAROLD HONGJU KOH, [THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR](#) 47–48 (1990).

<sup>20</sup> [General Agreement on Tariffs and Trade](#), Art. XXI, Oct. 30, 1947, 55 UNTS 194.

<sup>21</sup> See, e.g., [Russia — Measures Concerning Traffic in Transit](#), WTO Doc. WT/DS512/R (adopted Apr. 26, 2019); *Comm’n v. Kadi*, Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, [Judgment](#), EU:C:2013:518 (Eur. Ct. Just. July 18, 2013); [TikTok Inc. v. Trump](#), 50 F. Supp. 3d 92, 111–12 (D.D.C. 2020); Devika Hovell, [Due Process in the United Nations](#), 110 AJIL 1, 22–29 (2016).

remains unsettled, evolving, and largely uncoordinated. But the trend is toward the embrace of due process norms such as reason-giving, non-arbitrariness, and good faith.<sup>22</sup>

On its surface, the war in Ukraine presents an apparent argument for the status quo. The United States, EU, and their allies have been able to act swiftly, with an immediate goal “to stop the killing spree by raising the price of financing the war and the overall cost of not reaching a peace settlement.”<sup>23</sup> After years of retreating from multilateralism, a relatively broad international coalition managed to put up a robust, coordinated response to a clear international law violation. Sanctions were the key vehicle for enforcing the international order and reiterating its foundational norm against aggressive use of force. In this vein, mounting evidence of Russian atrocities in formerly occupied territory is generating calls for still further economic pressure.<sup>24</sup> If this war does end with the preservation of an independent Ukraine, it would likely bolster the argument in some quarters that sanctions law is best when it *enables* states to respond to emerging threats, rather than constraining them.

Beyond that best-case scenario, however, the picture starts to change. The pain that could be borne by ordinary Russians as the result of long-term sanctions is well-known and familiar from experiences in Iran, Iraq, and Cuba, among others.<sup>25</sup> Despite the enthusiasm for sanctions among European and NATO countries, much of the world—including all of Central and South America, Africa, and most of Asia—remains on the sidelines, and populations there are likely to suffer greatly from a prolonged, sanctions-induced recession.<sup>26</sup> Commentators have argued that sanctions are being applied by powerful Western countries selectively out of political expediency, complicating the claim that sanctions have expressive value reinforcing the international order.<sup>27</sup> Western interests, too, might start to lose patience with prolonged sanctions if the cost of “decoupling” from Russia seems to outweigh the strategic benefits obtained by isolating the country economically.

### *Toward a Working Sanctions Regime Complex?*

Calls for closer regulation of economic sanctions are nothing new. In recent years, we have both argued that the increasing reach of the national security state—and the variability of security threats—is generating pressure for closer scrutiny of sanctions by courts and tribunals, with mixed results.<sup>28</sup> The current round of sanctions may add to that pressure. But it is not clear where such regulation would take place, much less who would carry it forward. The legal rules governing international sanctions are less a clear international regime than a “regime complex”—a loose and overlapping collection of largely domestic institutions, marked by disaggregated decision making and the potential for normative conflict.<sup>29</sup>

When it comes to sanctions, the current moment points to any number of disparate, overlapping, and potentially conflicting ways forward. The international system’s current focus on demanding due process and good faith in

<sup>22</sup> Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063 (2020); J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020 (2020); Elena Chachko, *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, 44 YALE J. INT’L L. 1 (2019).

<sup>23</sup> Carla Norrlöf, *The New Economic Containment*, FOR. AFF. (Mar. 18, 2022).

<sup>24</sup> See, e.g., Laurence H. Tribe & Jeremy Levin, *Opinion: \$100 Billion. Russia’s Treasure in the U.S. Should Be Turned Against Putin*, N.Y. TIMES (Apr. 15, 2022).

<sup>25</sup> See, e.g., JOY GORDON, *INVISIBLE WAR: THE UNITED STATES AND THE IRAQ SANCTIONS* (2010).

<sup>26</sup> Adam S. Posen, *The End of Globalization?*, FOR. AFF. (Mar. 17, 2022).

<sup>27</sup> See, e.g., Jonathan Guyer, *How the Left Is Reckoning with Russia’s War*, VOX (Mar. 9, 2022).

<sup>28</sup> Note 22 *supra*.

<sup>29</sup> See generally Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277 (2004).

economic statecraft is a salutary development, and it could tame sanctions at the margins. But this kind of procedural review will do little to dent their overall appeal and macroeconomic impacts.

To some, harder limits on economic warfare are necessary. One response is to insist that the present situation reaffirms a line between military security matters, which justify extreme responses, and ordinary policy matters, which should not. This approach would have to confront deeply held divisions over the appropriate scope of national and international security policy and over whether such policies override the international system's commitments to liberalized trade and the rule of law.<sup>30</sup>

Another response is to tighten loose domestic restrictions on the resort to sanctions. In the United States, Congress's role in sanctions policy has been primarily escalatory—imposing measures by law that remain on the books and are difficult to fully remove.<sup>31</sup> The present moment offers an opportunity to revisit Koh's suggestion of a “national security charter” to promote power sharing, deliberation, and even de-escalation by Congress.<sup>32</sup> Today, however, Congress may be more focused on expanding, rather than constricting, the president's powers to conduct economic warfare.<sup>33</sup>

Beyond these approaches lie more transformative visions that seek to build on the impact of sanctions as a launching pad for long-needed reform. On one view, the difficulty of hunting down the assets of Russian oligarchs points to broader problems of tax evasion, regulatory arbitrage, and financial secrecy, aided by the lack of transparency in the global financial system. The revelations contained in the Pandora Papers and similar leaks of offshore financial arrangements have shown how Western elites use the same tools to hide their assets that Putin's inner circle are using to evade sanctions. On this view, the present sanctions offer an opportunity to push for greater financial transparency worldwide, including through the adoption of mandatory disclosure laws.<sup>34</sup> For others, the sanctions on Russian oil and gas are a wakeup call to finally transition to renewable energy in the name of both climate and national security.<sup>35</sup>

Another left-leaning critique of sanctions contends that the speed and scope of these measures must be matched by an equally bold, state-led effort at economic stabilization, including through investment, grants, loans, subsidies, and, if necessary, price controls.<sup>36</sup> This argument points to the current mismatch between the legal regime for sanctions—which often rely on discretionary emergency powers—and the broader political coalitions that may be needed to sustain more positive forms of aid.

### Conclusion

Going forward, the question is whether this high-profile economic war heralds any significant legal change. We are skeptical that the international legal order stands at the precipice of any kind of grand regulatory moment for economic sanctions, though legal reform is a worthy long-term goal. The present moment, instead, offers a set of overlapping and competing narratives, which are likely to be refracted through the overlapping and competing institutions that purport to govern economic warfare.<sup>37</sup> If there is any call for optimism today, it is the hope that the renewed public focus on economic conflict will generate an ethic of responsibility around sanctions, along with a toolbox of ideas that might be combined and experimented with as international politics lurches from crisis to crisis.

<sup>30</sup> See J. Benton Heath, *Making Sense of Security*, 116 AJIL 289 (2021).

<sup>31</sup> Eduardo Saravalle, *Why Congress Should Stay Out of U.S. Sanctions Policy on Russia*, JUST SECURITY (Mar. 21, 2022).

<sup>32</sup> *KOH*, *supra* note 19, at 196–97.

<sup>33</sup> See, e.g., *H.R. 6930*, 117th Cong., 2d Sess. (Mar. 3, 2022).

<sup>34</sup> Thomas Piketty, *The Western Elite Is Preventing Us from Going After the Assets of Russia's Hyper-Rich*, GUARDIAN (Mar. 16, 2022).

<sup>35</sup> Céline Charveriat, et al., *Russia's War in Ukraine: Why Doubling Down on the Green Deal Is the Best Strategy*, IISD NEWS (Mar. 10, 2022).

<sup>36</sup> Nicholas Mulder, *The Toll of Economic War*, FOR. AFF. (Mar. 22, 2022).

<sup>37</sup> Cf. ANTHEA ROBERTS & NICOLAS LAMP, *SIX FACES OF GLOBALIZATION: WHO WINS, WHO LOSES, AND WHY IT MATTERS* (2021).