



DEFENDERS

Winter 2021

SANCTIONS



- **The Humanitarian Gap in the Global Sanctions Regime**
- **We Who Are Not as Others: Sanctions and (Global) Security Governance**
- **Humanitarian Impacts of Economic Sanctions on Iran and Syria**
- **Economic Sanctions and Protection of Fundamental Human Rights: A Review of the ICJ's Ruling on Alleged Violations of the Iran-U.S. Treaty of Amity**
- **Iran, Sanctions, and the COVID-19 Pandemic**
- **For Tourism in Iran, It Wasn't Supposed to Be Like This**

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Editor's Note

Economic coercive measures are not considered acts of war, but they can inflict significant suffering on the population of the targeted states. Economic sanctions—generally understood as coercive mechanisms to disrupt or restrict trade and economic exchange in order to achieve a desired end (Drezner, 2003)—have become an important part of the repertoire of control employed by the United States, the European Union, and the United Nations. In recent years, escalating sanctions against Iran, Venezuela, Syria, and Cuba, among others, have become subjects of political debates.

Over the past year, the ongoing public health emergency has made the disastrous impacts of economic sanctions on their targets more pronounced. Iran, for instance, is among the hardest-hit countries by the COVID-19 pandemic in the Middle East. Public health scholars and practitioners have established the destructive public health implications, particularly on access to vital medicine and medical equipment in Iran in violation of the fundamental human right of Iranians. As such, new rounds of economic sanctions by the United States have exacerbated the already devastating impacts of the “maximum pressure” campaign against Iranians, and significantly hindered the country’s ability to respond to this global emergency.

The present Special Issue brings together a collection of critical articles and opinion pieces published on the matters broadly related to economic sanctions as coercive mechanisms in international law (Section I), and their impact on Iran during the COVID-19 pandemic (Section II).

Section I contains collections of academic articles that respectively engage with existing humanitarian gap in the global sanction regimes and consider sanctions within the global security governance context. Section II, compiles articles and opinion pieces that provide discussions on the various impacts of economic sanctions on Iran. The aim of this section is to provide timely discussions on the impact of sanctions during the COVID-19 outbreak in Iran.

The Special Issues, thus, presents the readers, on the first section, with critical analysis on the construction and mechanisms of sanctions regime. That includes discussions on how economic sanctions function and fail in their operation to account for humanitarian concerns; coupled with a critical reflection on their logic of security. The second part offers the readers with insights from various commentators located in and outside of Iran, on how sanctions have materialized on the ground and assess the harms and violence inflicted upon peoples’ lives. This Special Issue is part of the Organization for Defending Victims of Violence’s ongoing efforts to shed light on and challenge the militarized and violent nature of sanctions regimes against Iran and their systematic human rights violations of the most vulnerable population in the country. Raising awareness through critical knowledge production and reflecting on the experiences of peoples under sanctions, are important ways to challenge the enforcement of sanctions regimes against countries located at the Global South and unsettle the conventional narrative that characterizes these measures as “peaceful alternatives to war”.



Part I

**how sanctions
work**



The Humanitarian Gap in the Global Sanctions Regime

Assessing Causes, Effects, and Solutions

Grégoire Mallard,¹ Farzan Sabet,² Jin Sun³

** This article was originally published on Brill publication, in the Global Governance: A Review of Multilateralism and International Organizations.*

Abstract

Since the late 1990s, targeted sanctions and general humanitarian sanctions exemptions have aimed at avoiding the disastrous humanitarian consequences of comprehensive sanctions. In parallel, global banks in charge of administering the international trade of vital goods (food and medicine) have received guidance on how to implement risk-based approaches to avoid completely blockading sanctioned jurisdictions. But these efforts have failed. This article asks: Why has the governance of sanctions and sanctions exemption failed, and what can be done to fix the problem? It argues that a hybrid form of governance in the field of sanctions is responsible for current humanitarian problems. Based on more than eighty interviews with treasury officials, sanctions experts, compliance officers, and others, and taking the international trade of vital goods in Iran as an example, this article assesses various fixes to the governance failures and solutions to address the payment problems that exporters of vital goods in sanctioned jurisdictions face.

Keywords: financial sanctions – targeted sanctions – anti-money laundering (AML) – counterproliferation financing (CFP) – humanitarian exemption – Iran – United Nations Security Council (UNSC) – U.S. Foreign Policy

¹ * All articles appear in their original citation styles.

^{**} All articles solely reflect the views of the author.

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1. Introduction

The debate around the humanitarian consequences of economic sanctions is, by now, an old one.⁴ It first arose in the context of the increased post-Cold War willingness to sanction states that violated basic norms of international relations. The humanitarian consequences of these sanctions of the 1990s and associated corruption scandals like the one surrounding the United Nations' Oil-for-Food Programme in Iraq,⁵ created the impetus for the international community to move from the concept of "comprehensive sanctions" toward "targeted" or "smart" sanctions.⁶ Since the terrorist attacks of September 11, 2001, the United States, European Union (EU), and UN have adopted targeted sanctions against militant nonstate actors involved in terrorist activities, specific branches of governments that provide financial or other assistance to terrorists, and the financiers who move illicit money across international borders through charities, local banks, and hawala systems (i.e., clearing mechanisms widely used in Islamic finance).⁷ In all these initiatives, the sanctioning authorities claim to exclusively target the individuals, firms, banks, and state entities directly implicated in well-established criminal activities: terrorism, participation in armed groups, or nuclear proliferation, among others.⁸ Indeed, since 2006, proliferators' deceitful behavior, as illustrated by Iran and North Korea for decades, convinced the international community to also adopt targeted sanctions against nuclear proliferators. In all these cases, there should be, in theory, no humanitarian consequences of targeted sanctions, as they should not affect the trade in food, medicine, or other basic goods.

However, the paradigm of targeted sanctions has been applied since the mid-2000s in an increasingly comprehensivized manner, as illustrated in the cases of North Korea, Iran, Syria, and Venezuela. In the case of Iran, this shift from targeted to comprehensivized sanctions took place from 2006, when a new round of limited proliferation-related sanctions were first decided by the UN Security Council, until 2015–2016 when the Joint Comprehensive Plan of Action (JCPOA) negotiated between Iran and the UN Security Council's five permanent members plus Germany (P5+1) was implemented. During that time, Western sanctions gradually became more comprehensive in scope, especially as the United States and the EU decided in the early 2010s that Iran's oil



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4 Many scholars have participated in this debate; for a short list, see Hufbauer, Schott, and Elliott 1990, 309; Pape 1997; Cortwright and Lopez 2000, 274; Drezner 1999, 372.

5 Weiss et al. 1998, 320.

6 Biersteker and Eckert 2008, 333; Brzoska 2003; Biersteker et al. 2016, 405.

7 Zarate 2015, 488.

8 Solingen 2012, 403.



A November 2018 analysis by the Society to Support Children Suffering from Cancer (MAHAK), the only charity organization dedicated to children with cancer in Iran, revealed shortages and large prices increases for oncology drugs that “will inevitably lead to a decrease in survival of children with cancer,” to the point that MAHAK would no longer be able to support the treatment of the 3,500 children with leukemia that they treat every year

exports served to fund its nuclear program, and Iran’s oil exports, the shipping companies that carried oil out of the country, and the banks that managed oil-related payments deserved to fall within the scope of targeted and sectoral sanctions. As a result of Iran’s dependence on oil exports, the impact of such sanctions has grown to cover virtually every aspect of the economy. Still, today the consequences of the comprehensivization of targeted sanctions in the 2010s on the trade of vital and humanitarian goods have only just started to be understood.

From scattered but consistent evidence, we can no longer assume

that the current system of sanctions does not interfere with the international trade of vital goods, especially after the US decision to end the JCPOA-related sanctions relief for Iran⁹ and the escalation of sanctions against Venezuela,¹⁰ Syria,¹¹ and North Korea,¹² to cite just a few examples. After the US resumption of sanctions against most Iranian banks and the May 2019 decision to sanction all Iranian oil exports, there is good reason to believe that US sanctions against Iran will severely affect the flow of vital goods. Reports from the previous round of sanctions against Iran showed that comprehensivized targeted sanctions created shortages of medical supplies, including in cancer and multiple sclerosis treatments, in a sector in which imported medical supplies accounted for 30 percent of Iran’s \$ 3 billion pharmaceutical sector.¹³ With the US reimposition of sanctions in May 2018, this story is once again playing out.¹⁴ For example, a November 2018 analysis by the Society to Support Children Suffering from Cancer (MAHAK), the only charity organization dedicated to children with cancer in Iran, revealed shortages and large prices increases for oncology drugs that “will inevitably lead to a decrease in survival of children with cancer,”¹⁵—to the point that MAHAK would no longer be able to support the treatment of the 3,500 children with leukemia that they treat every year.¹⁶ Shortages and cost

9 Motevalli and Nasseri 2018.

10 Kurmanaev and Krauss 2019.

11 McDowell 2018.

12 World Food Programme 2019.

13 Given that sanctions were only recently reimposed, and take time to play out, there are as yet few studies of this impact. Batmanghelidj and Hellman 2018.

14 National Iranian American Council 2018.

15 Kheirandish et al. 2018.

16 Qiblawi, Pleitgen, and Otto 2019.

increases not only affect pharmaceuticals, but also medical equipment, such as radiation treatments in Iranian hospitals,¹⁷ as well as food imports such as meat, eggs, and milk¹⁸—not to mention a vast range of other goods and services falling under the broader categories of “humanitarian trade,” and “humanitarian finance,” that are important for issue areas from access to water to airline safety, to environmental conservation and disaster relief, which are key in the postflooding context in Iran.¹⁹ The international community must act to find a solution if it is to avoid the risk of severe humanitarian crises in sanctioned jurisdictions, whether in Iran or elsewhere, and the migration flows and related consequences that can result.

In all sanctioned jurisdictions, the mismanagement and corruption of local governments contribute to the deterioration of humanitarian conditions, but the evidence clearly points to a steadily worsening humanitarian situation due to the comprehensivization of sanctions, the scenario that targeted sanctions were precisely designed to prevent.²⁰ Such negative effects, we show, are largely due to global banks’ reluctance to conduct repeated risk analyses for each transaction involving individuals or companies in sanctioned jurisdictions—the “risk-based approach” to sanctions implementation. In the Iranian case, as repeatedly mentioned by many sanctions experts and compliance officers who we interviewed for our research,²¹ banks have largely abandoned the risk-based approach in favor of a “zero-risk” approach to Iranian payments, including those related to the humanitarian trade. Banks’ demonstrated aversion to administer payments from Iran has created a bottleneck in the trade in vital goods, which has disrupted the supply chain from foreign manufacturers to patients, particularly for the most advanced medicines. Such risk aversion is due to multiple factors such as the increasing complexity of determining which entities are legitimate and which are not in a sanctioned jurisdiction, the unwillingness demonstrated by public regulators to share the burden of responsibility with regard to sanctions implementation, and the fact that most Tier 1 and Tier 2 banks in Europe do not want to risk being fined by US authorities and being excluded from the US market.

Another, complementary, explanation points to the lack of consensus among regulators over the scope of sanctions exemption and the vagueness of the notion of “humanitarian exemption” for most public authorities, in particular the US government. Indeed, “humanitarian goods” can be restricted to food or medicine, or include goods that fall under sanctions lists such as oil or steel, if they are used to alleviate civilian suffering in humanitarian crises. But for some experts, it is entirely the context—for example, the existence of a large-scale

17 Ghalibafian, Hemmati, and Bouffet 2018, e580.

18 Saul 2018.

19 Sregantan 2018.

20 Farzanegan et al. 2016.

21 This article is based on about eighty interviews with compliance officers in global banks, US and European sanctions specialists, and financial regulators working in international organizations, as well as participation in six multistakeholders conferences on the topic of Iran’s financial hurdles in the post-JCPOA era (from 2016 to 2018), and on other countryspecific cases of sanctioned jurisdictions.

humanitarian disaster—rather than the nature of the product—food, medicine, or other—that determines whether the good falls under the category of humanitarian, so that there exists no good whose trade can be safely authorized at all times by public regulators. This trend toward a restricted definition of “humanitarian exemption,” as remarked by Sue Eckert, can be witnessed in recent US executive orders imposing targeted sanctions against terrorists, which typically revoke broad humanitarian exemptions.²² Along similar lines, in the case of Iran sanctions, top US leaders expanded the list of illegitimate business with Iran, as they acknowledged their desire to create “maximum pressure”²³ or inflict “maximum pain”²⁴ on the country.

With this background in mind, in this article we ask: What is the main source of this humanitarian gap in the global sanctions regime, and how can it be addressed? We argue that reasons for the emergence of this gap are manifold, but can be mostly accounted for by the hybrid and contradictory nature of the present governance of sanctions and sanctions exemption, which combines elements from the transnational form of governance—well articulated by scholars such as Anne-Marie Slaughter or Marie-Laure Djelic²⁵—and other aspects that point to a much less discussed hegemonic form of governance.²⁶ This hybridity in the governance regime in the field of sanctions has a strong bearing on the policy prescriptions formulated to fix the humanitarian gap: indeed, the latter go in a different direction if the governance arrangement is purely transnational or purely hegemonic, or if it is hybrid (see Table 1). As we explain, if governance was mostly transnational, solutions would mainly seek to help banks reduce the costs of compliance when following risk-based approaches to sanctions implementation. If the governance arrangement was clearly hegemonic, prescriptions would seek to increase the transparency and efficiency of the hegemonic rules; for instance, by asking the US government to transparently formulate the scope of licenses as well as to consider applications to humanitarian licenses from all over the world (see Table 1). But as the governance arrangement of sanctions is hybrid, so we argue, the main threat is the fragmentation of the rules of global trade and the creation of potentially unworkable alternatives, as for instance those formulated in Europe with the Instrument in Support of Trade Exchanges (INSTEX). The creation of INSTEX in January 2019 was intended to prevent the European food or medical trade with Iran from being blocked or falling into the hands of shady financial intermediaries in Europe or Turkey, which usually extract incredibly high fees from the transacting parties and contribute to the sustained opacity of global financial networks.²⁷

22 This has led the Treasury Department and other departments in charge of implementing US sanctions to grant “case-specific [humanitarian] licenses in each sanctions program.” Eckert 2017, 17. See also Charity and Security Network 2012

23 Wroughton and Holland 2018.
24 Nephew 2018, 238.

25 Slaughter 2004; Djelic and Andersson 2006.
26 Mallard 2019.

27 Other factors contribute to civilian hardships, such as hard currency deficits resulting in

In this article, we call for an urgent examination of new proposals to facilitate global payments related to trade of vital goods in sanctioned jurisdictions. This is the right time to do so, as most proposals emerging from the policy field are still in their infancy, and sanctions are an increasingly popular tool of economic statecraft seen as a middle ground between and complementary to diplomacy and war. This article contributes to the present policy discussion by assessing the strengths of current proposals in relation to the governance issues they try to solve. We argue that most policy initiatives lack sufficient unity of purpose and scope, and that new solutions should be grounded on a more thorough analysis of the specific problems they try to solve. We thus call for a urgent consideration by all governments of the predicaments encountered by global private banks, which cannot by themselves be left to interpret how sanctions exemptions will be administered because they lack the legal skills and political authority necessary to make decisions affecting the laws of economic warfare and the lives of innocent people in sanctioned jurisdictions. In this context, we call on policy communities to reflect about a new multilateral system for exemptions and new payment technologies.



In this article, we call for an urgent examination of new proposals to facilitate global payments related to trade of vital goods in sanctioned jurisdictions.

This article is divided into three parts. First, we explain why risk-based approaches have been advanced in the field of sanctions implementation, and why banks have largely failed to implement the latter in high-risk jurisdictions. Then, we examine a range of solutions that have been discussed over the past year or so to help global banks process payments associated with humanitarian trade in sanctioned jurisdictions in less costly ways. We find these solutions inspired by risk-based approaches to sanctions exemption are at best ad hoc solutions that face a number of serious challenges in terms of their long-term viability. Finally, we show why governments need to engage with the US regulatory authorities in charge of sanctions exemption, and that such a political approach is better when embedded in a multilateral rather than bilateral framework. We lay out a blueprint for a new multilateral governance of humanitarian exemptions to sanctions, buttressed by the existence of a new type of nonbanking, digital currency-based, payment mechanism we name Safecor coin. The term Safecor coin reflects the underlying ambition of establishing a safe corridor for humanitarian-related payments in sanctioned jurisdictions and beyond.

the collapse of the domestic currency—here the rial (IRR)—which can lead to a rise in the price of domestically produced generics that rely on imported ingredients. But that kind of problem will inevitably affect all sectors in any sanctioned jurisdiction.



At the same time, from 2006 to 2018, we can only be struck by how much global banks departed from the best practices and other risk-based approaches of sanctions implementation that the UNSC and FATF have consistently recommended

2. The Limits of Transnational Governance: Global Banks' De-risking Strategies in the Context of US Regulatory Hegemony

The global fight against criminal financial activities is conventionally traced back to a myriad of anti-money laundering (AML), counterterrorism financing (CTF) and counterproliferation financing (CPF) initiatives taken by the UN Security Council, Financial Action Task Force (FATF), and International Monetary Fund (IMF), among others.²⁸ To many scholars,

the strong implication of issue-specific, expert-driven, and voluntary-based international bodies in charge of codifying and diffusing best practices aimed at circumventing financial criminality illustrates the turn from multilateralism to “transgovernmental” or “transnational governance,” in which regulation is characterized “by a blurring of the distinctions between public and private actors, states and markets.”²⁹ For these international organizations (IOs), financial regulators and bankers need to defend the “integrity” of the financial system by the adoption of many new prudential measures that aim at insulating global banks from opaque banks operating in high-risk jurisdictions, especially in territories under sanctions. For the past decade, the FATF produced guidelines in the fields of AML, CTF, and CPF, and conducted country audits, which resulted in the attribution of color-coded grades to national banking legislations that can help guide foreign investors and banks to comply with sanctions rules. In this type of governance arrangement, not only are the private banks co-opted into the making and implementation of the rules and the detection of violations, but the IOs in charge of codifying best practices for regulators also place themselves at the service of the industry and law enforcement agencies. From this transnational form of governance of finance, a new order, both legitimate and efficient, is supposed to emerge.

At the same time, from 2006 to 2018, we can only be struck by how much global banks departed from the best practices and other risk-based approaches of sanctions implementation that the UNSC and FATF have consistently recommended. Instead, after the United States took a series of actions aimed at forcing compliance among global banks that violated US sanctions and committed massive fraud to hide this fact, incriminated European banks completely left any business tied to high-risk jurisdictions such as facilitating payments related to humanitarian trade with sanctions jurisdictions. The United States, and its Office of Foreign Assets Control (OFAC), clearly frightened

²⁸ Serrano and Kenny 2003.

²⁹ Djelic and Andersson 2006, 5.

global banks out of sanctioned jurisdictions such as Iran, especially during the period leading up to the 2015 Iran nuclear agreement.³⁰ For over twenty-seven banks investigated by OFAC, the Justice Department and New York State Department of Financial Services (DFS), most of them were European banks involved in violations of Iran-related sanctions. Fines skyrocketed over the period; namely, US\$ 1.92 billion for HSBC,³¹ \$ 1.4 billion for Société Générale, \$ 1.1 billion for Standard Chartered,³² and \$ 8.9 billion for BNP Paribas (see Table 2).³³

The worldwide regulatory power that the US government has gained from 2005 to 2015 in the field of sanctions enforcement can be explained by two key characteristics of the relations between global banks and the US government. First, the banking sector is directly and indirectly under US regulations due to the centrality of the US dollar to international trade. A transaction can enter US jurisdiction for just milliseconds when a dollar-denominated trade is cleared in New York and becomes subject to this authority. Since 2008, according to an OFAC ruling, this situation gives US regulators and judicial authorities territorial authority to apply US sanctions law, even to transactions related to trade not taking place on US soil and not involving US entities or persons.³⁴ Second, because most human activities depend on banking to facilitate payments or finance new projects, and because so much of the world's banking activities take place in the United States, any US threat to cut a bank from accessing the US financial market because of the maintenance of a tie with a US-designated entity—the US power to impose “secondary sanctions”—can be devastating. For these reasons, the United States, and OFAC, have gained disproportionate responsibility in the administration of sanctions and sanctions exemption.

Global banks' culture of “overcompliance” with sanctions is in large part the outcome of their entanglement with US financial authorities and the lack of clarity of US rules governing sanctions exemptions. Even though the US government insists that it observes a broad humanitarian exemption, all payments in the field of medicine or food that would go to an entity even remotely controlled by a designated entity (for instance, the Iranian Revolutionary Guards) would constitute a violation of US sanctions law.³⁵ Confronted with the risk that due diligence procedures would fail to detect a connection to a US designated entity, global banks have preferred to massively “de-risk” rather than apply uncertain Know Your Customer (KYC), Know Your Customer's Customers (KYCC), and Know Your Transaction (KYT) procedures mandated in the transnational governance of sanctions. Instead, they have dropped customers from Iran and other sanctioned jurisdictions en masse, or not facilitated transactions with correspondent banks of banks located in Iran, even in the humanitarian field.

30 Congressional Research Service 2019.

31 Proress and Silver-Greenberg 2012.

32 Crow 2019.

33 Department of Justice 2014.

34 Mallard 2019.

35 World Bank 2016.

Risk aversion has increased since 2010 because of three other reasons. First, those global banks that made a deferred prosecution agreement with the US Department of Justice in the early 2010s are still under strict supervision and monitoring obligations and, in some instances, have explicitly agreed not to transact with sanctioned jurisdictions. Second, global banks quickly saw the risk of high US fines if they engaged with the wrong client in Iran, compared to the lower cost of losing an Iranian client. Banks are, after all, for-profit organizations. Third, US citizens, even when working for a global bank in Europe or Asia, are always under the purview of US law, which means that they would be liable for criminal offenses should they personally provide services to finance Iranian activities without having first obtained the proper license, which banks worldwide do not (and cannot) seek if they are outside the United States. And one cannot but notice that former US governmental sanctions officials, especially those with prior work experience at the Treasury Department, have come to work in the compliance teams of global banks on a large scale worldwide since 2010. These three additional factors explain why the new policy of banks vis-à-vis sanctioned jurisdictions such as Iran is not to conduct risk analysis, but to refrain from any commercial relationship with any entity in that jurisdiction. Overcompliance has not been limited to global banks. Global banks have also increasingly pressured small and medium local European banks, as well as correspondent banks in the Middle East region, to cut ties with Iranian clients and other clients in high-risk jurisdictions.³⁶ This pressure is due to global banks' US exposure and fear of the imposition of secondary sanctions if smaller European, Asian, or Arab banks with whom they have banking relations are sanctioned as a result of relationships with US-sanctioned Iranian clients. This outcome is again the result of Europe's global banks' near exclusive concern with maintaining good credit in the eyes of the United States and near certainty that there will be no penalty for not engaging in Iran or other sanctioned jurisdictions, despite recent calls by the European Union to adopt "blocking statutes" that would prevent European banks from privileging US law over EU sanctions law. The spread of de-risking practices has been so strong that, as documented by the IMF,³⁷ the FATF,³⁸ the World Bank,³⁹ and the Financial Stability Board (FSB), new measures are needed to curb this trend, which is widely impacting the humanitarian conditions in many countries where remittances serve as an important source of income.⁴⁰ Indeed, the number of active correspondent banking relationships, which reflect demands by local banks typically from the Global South that ask global banks to clear their payments in foreign currencies (typically, US dollars or euros), "declined by 6 % across all currencies between 2011–2016" according to recent data from SWIFT (Society for Worldwide

36 Due to lack of space, we did not mention all of the times our analysis was based on reporting by interviewees, but these kinds of assertions were repeated many times by interviewees during our fieldwork.

37 Erbenová et al. 2016.

38 Financial Action Task Force 2015.

39 World Bank 2015.

40 Corazza 2016.

Interbank Financial Telecommunication).⁴¹ This complex situation can lead the trade of vital goods to simply stop or enter through the black market at significantly inflated prices that line the pockets of shady middlemen or criminals.⁴² This is why risk-based approaches to sanctions implementation will not be enough to fix the humanitarian gap, and new solutions are needed. Indeed, this new situation has made trade, not to mention investment, in sanctioned jurisdictions highly unlikely. In the case of Iran, even though the JCPOA promised to offer an economic solution to Iran's financial hurdles, between the implementation of the JCPOA and President Donald Trump's decision to leave it, global banks' aversion to risk prevented Iran from reaping many of the benefits of the sanctions relief agreement. Though European companies were supposed to return to the Iranian market and modernize oil production, the Iranian government observed with great worry the problems faced, for instance, by Total, which eventually ended its participation in Iran when President Trump resumed sanctions against the Iranian oil sector.⁴³ When, on 5 November 2018, the US government completed the process of reimposing pre-JCPOA sanctions on Iran, including on all Iranian oil, gas, and shipping companies, and forced SWIFT, the international interbank messaging service, to block transfers to most Iranian banks, save a few exceptions, it publicly exposed the fact that the European Union, Russia, and China have been unable to change the calculus of global banks in a highly uncertain policy environment.⁴⁴ Even if the Iranian government passes a set of bills inspired by FATF recommendations through the Iranian parliament to increase the confidence of international banking clients that money coming into their accounts from Iranian banks does not originate from an illicit deal five or six steps prior, it would be surprising if the banking sector changes its attitude toward Iranian payments in the short or medium term, especially considering the recent escalation of the conflict between the US and Iranian governments.⁴⁵

3. Current Mitigation Strategies Aimed at Strengthening Risk-Based Approaches to Sanctions Exemption

A range of solutions have been proposed with the goal of addressing some aspects of the payments problems encountered by importers of vital goods in sanctioned jurisdictions. Every country seems to agree on the need for continued trade of vital goods with sanctioned states. OFAC has a general exemption license for trade of food, medicine, and goods used for humanitarian purposes. But as said, the devil is in the details, and the difficulties in assessing the ownership structure of companies in Iran and other sanctioned jurisdictions make it hard for

41 Financial Stability Board 2017.

42 Borger and Dehghan 2018.

43 Hafezi 2018.

44 An additional problem is that Iran generates foreign exchange reserves mostly by selling its oil abroad, which OFAC forbid all but seven countries (five Asian and two European) from purchasing from November 2018 to May 2019—an exemption that had not been renewed as of May 2019.

45 Sharafedin 2019.

a banking compliance manager to safely claim that even payments for medicine will not violate US sanctions, which is why most banks have stopped accepting payments from countries like Iran, Syria, and Venezuela.⁴⁶

European authorities have tried to provide political support for technical solutions that seek to address the humanitarian gap and solve the problem of de-risking. A first array of solutions simply sought to reduce the compliance costs for the banking sector, so that the latter can at long last adopt the risk-based approach advocated by the FATF and IMF. Emerging from various multistakeholders conferences organized on problems encountered by humanitarian nongovernmental organizations (NGOs) in administering payments to sanctioned jurisdictions, which have been organized for instance by the World Bank Group,⁴⁷ multiple stakeholders have called for stronger information-sharing and cost-sharing measures. Building on the work of experts,⁴⁸ World Bank reports point to measures that could reduce the costs of KYC procedures: for instance, banks could pool complementary information and avoid running parallel and redundant costly KYC procedures by creating national registries of customers. Although problems would still exist, as the latter may violate privacy laws, these solutions have the advantage of avoiding the politically costly creation of new multilateral institutions aimed at balancing the worldwide hegemony of US sanctions law (see Table 1). Additionally, states could help humanitarian actors by including the costs of enhanced KYC procedures in state-funded aid programs. States could also directly lessen compliance costs by adopting softer punishments in case of banking self-disclosure when inadvertent sanctions violations are reported by banks, in contrast to what presently occurs in the United States. The solutions under discussion also routinely mention moving toward “business-to-business payments,”⁴⁹ in an effort to cut costs and intermediaries, which could even use new financial technologies such as new blockchain-based digital currencies. In addition to such measures, a much more ambitious attempt to address the humanitarian gap in sanctioned jurisdictions has come from the three European countries (EU-3, or, France, Germany and the UK), which in January 2019 created a special purpose vehicle (SPV), the Instrument in Support of Trade Exchanges (INSTEX). The mission originally attributed to INSTEX was to protect both European economic sovereignty and the JCPOA from US attacks, although the mandate of INSTEX is now much more limited as it is simply meant to facilitate the trade of vital goods. INSTEX is a clearing mechanism that can be used by banks in Europe and Iran to avoid administering any direct payment from European private companies to private or public entities from Iran.⁵⁰ INSTEX does not send payments from European importers of Iranian

46 As some of our interviewees acknowledged, the mere fact of raising this issue may convince

bank managers not to move into Iran-related trade.

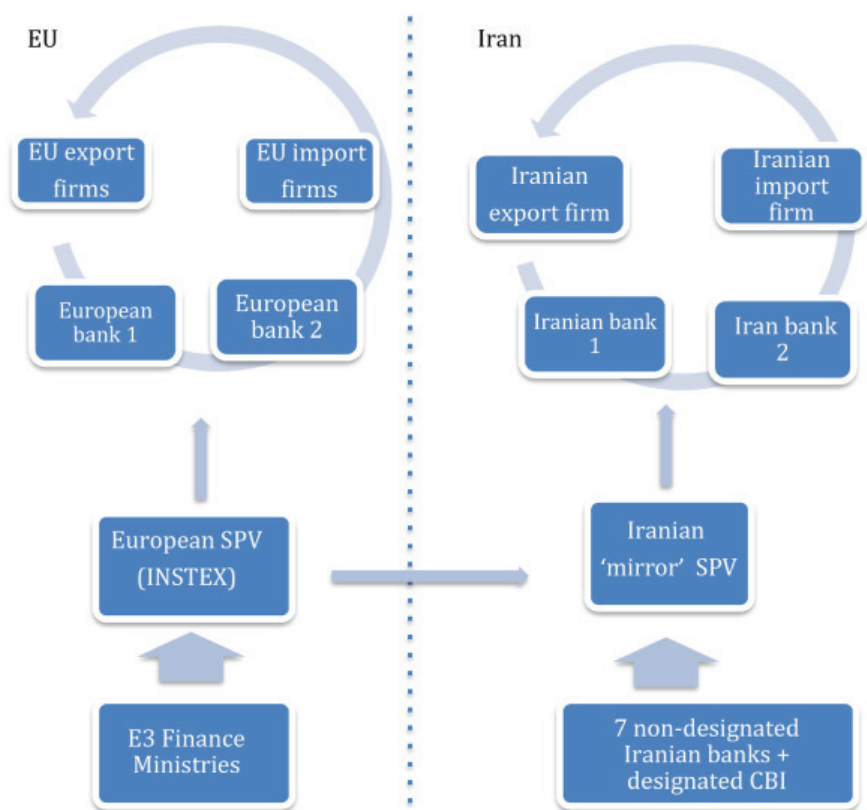
47 International Stakeholder Dialogue 2018, 7.

48 Eckert 2017.

49 International Stakeholder Dialogue 2018, 5.

50 Batmanghelidj 2019.

food (e.g., pistachios) to European exporters of medicine and food, but merely sends information to European Importer A (of food) that it will send to European Exporter B (of medicine) the money that Importer A owes to Iranian Exporter C (of pistachios). In parallel, INSTEX will also notify the Iranian mirror SPV to instruct Iranian Exporter C (of pistachios) to receive payments from the same amount from Iranian Importer D (of medicine). For INSTEX to work properly, it will always need its Iranian counterpart to also identify Iranian partners capable of clearing payments between Iranian importers and Iranian exporters for the same amounts. According to this logic, the European banks of European importers and exporters dealing with Iran will not be required to make or receive payments from Iran (see Figure 1). Thus, trade will proceed, with payments indirectly coordinated by two coordinated clearinghouses, in the hope that such a system would reduce the compliance costs for banks that follow with risk-based approaches to the humanitarian trade.



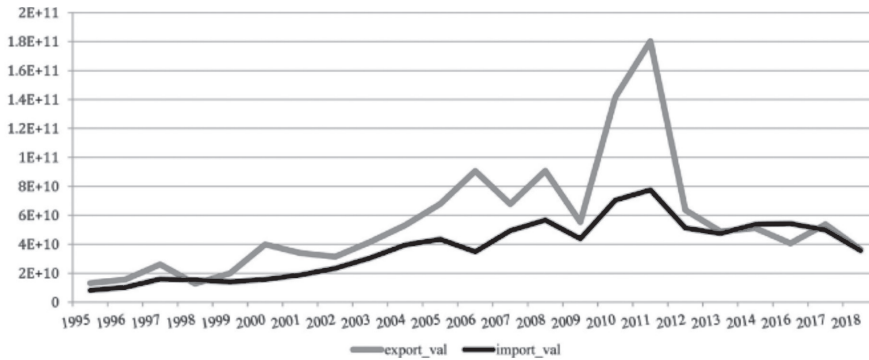
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INSTEX may to some degree insulate EU-Iran trade from US sanctions in the short or medium term, but shortcomings exist with the E3's current approach. First, a lack of coordination between the major powers across the Atlantic will inevitably raise the question of trust between regulatory superpowers. The European states involved have claimed that only European firms involved in the trade of vital goods (and not in the oil trade) will use INSTEX to avoid seeing INSTEX become a US sanctions target. Still, without a binding process that would tie the hands of OFAC to one commonly accepted definition of what constitutes humanitarian exemption, it remains an open question whether the United States will not target INSTEX and the European companies that use INSTEX to export vital and humanitarian goods. Second, even at the technical level, it is not clear whether INSTEX will solve the main problem for banks administering payments. The triangulation of payments organized by INSTEX will complicate the administration of KYC and KYCCs for European exporters of medicine (and their banks), who will need information not only on the Iranian importers of medicine to whom they send products (information they usually have), but also on the Iranian exporters of food whose deals with European importers will generate the money that will be sent to their accounts (information they lack). Furthermore, the mere fact that the Iranian "mirror SPV" has been created by the seven Iranian banks not designated by the US OFAC and the Central Bank of Iran (the latter a US-designated Iranian entity since late 2018) may doom the whole mechanism in the eyes of the US government, and thus for the European banks that may be tempted to use it. US Treasury undersecretary for terrorism and financial intelligence Sigal Mandelker has already expressed doubt about the ability of the Iranian side of the SPV to meet the norms of legitimate finance.⁵¹

Third, it is unclear how INSTEX will address the likely long-lasting trade imbalances between Europe and Iran that will result from the latest restrictions imposed by OFAC on all European imports of Iranian crude oil—with no more waivers extended to Italy and Greece after May 2019. A clearing mechanism works best over time if trade between each side is more or less balanced. The implication from the Iranian trade imbalance⁵² is that the Iranian trade firms will not be able settle the trade deficit with any European country or the EU without receiving loans from European countries, or using the proceeds gained from oil trade with other Asian countries, especially China. (See Figure 2 for details.) Thus, although it gives the appearance of a technical solution, INSTEX fails to rise to the political challenges of the times.

51 Murphy 2019.

52 Observatory of Economic Complexity, Massachusetts Institute of Technology 2019.



4. Facing the Power of OFAC: Toward a Myriad of Bilateral Solutions or a Coherent Multilateral Framework?

Considering the shortcomings of present solutions to the humanitarian gap, some countries could be tempted to engage in a coordinated effort with the United States by seeking to tightly associate OFAC with their licensing procedures for all their exports of food and medicine to sanctioned jurisdictions. To the extent that non-US companies in the medical and food sectors depend on global banks to process their payments, and the latter look almost exclusively at OFAC’s licensing regulations, OFAC’s traditional practice of granting licenses only to companies exporting from the United States but not from elsewhere means giving US food and pharmaceutical companies an unfair advantage. Compared to European companies, the latter can petition OFAC to obtain a humanitarian license, which may (or may not) reassure a bank to then authorize payments, whereas the process was, until November 2019, out of reach for non-US companies that then found themselves incapable of reassuring their own banks on the conformity of payments coming from sanctioned jurisdictions with US law. In Europe, the Swiss government has opted in favor of such a direct bilateral approach with the United States and has thus far unsuccessfully requested an explicit waiver from OFAC for certain activities planned by Swiss companies in the fields of food and especially medicine, which represented about 60 percent of all Swiss exports to Iran in 2017.⁵³ But the Swiss government has yet to obtain any authorization for specific exports, and Swiss companies may run into problems of giving too much information to a foreign power that has no specific reason to be involved in the administration of Swiss exports.⁵⁴

Instead of granting Swiss companies a particular status under the US licensing scheme, OFAC has recently moved to open its exemption to all non-US companies in the vital trade sector in Iran, effectively claiming the role of global hegemon in the field of sanctions exemption.⁵⁵ But the move may appear purely symbolic, and geared toward fending off criticisms that the US licensing system is the only one that matters for banks although it was, until November 2019,

53 “Swiss Humanitarian Payment Channel with Iran ‘Ready,’ Awaits Capital” 2019.

54 Bozorgmehr 2018.

55 US Department of Treasury 2019.

closed to non-US companies. Indeed, having OFAC approve every humanitarian transaction with Iran worldwide, screen monthly statements of financial entities involved in the transaction, and check the identity of the customers' customers, as required by the envisioned process of continued monitoring, will be a time-consuming and impractical task. OFAC exemptions can already take more than a year to obtain for US companies, so adding this new burden may over-burden the OFAC administration and may not even be sufficient to reassure non-US exporters and their banks that they do not risk legal consequences or commercial retaliation on their US operations, as sudden US policy shifts have occurred in the past, and the transparency requirement asked from Iranian importers of vital goods are much more intrusive than usually required even for "enhanced due diligence."

More importantly, from the political point of view, such a model, when scaled to the whole world, means that OFAC claims to be the sole authority in charge of administering a global oil for food and medicine program by which the Iranian economy and other sanctioned jurisdictions would obtain sanctions relief for their trade in vital goods. It is not clear if the US government will even support that hegemonic solution in the long-term, although precedents exist in other fields than sanctions law. As Adam Tooze aptly demonstrates, US financial regulators (in particular, the US Central Bank) endorsed global responsibilities when, in the middle of the 2008 crisis, the Fed effectively acted as the lender of last resort for European banks in distress and in desperate need of US dollars, which the Fed provided them either through domestic central banks or directly by exchanging bad securities against US Treasury bonds. As Tooze concludes, "What happened in the fall of 2008 was not a relativization of the dollar, but the reverse, a dramatic reassertion of the central role of America's central bank."⁵⁶

The possibility that US financial authorities would agree to formally extend their jurisdiction from global central banking to global humanitarian licensing not only for humanitarian trade in Iran but in all sanctioned jurisdictions is thus not outside the bounds of possibility. But would other governments agree to let their private companies submit themselves to the authority of OFAC? Since the beginning of the Trump presidency, the EU and China have chafed under perceived US infringement on their economic sovereignty, and they are not likely to endorse such a hegemonic form of governance by encouraging their private companies to apply to the new OFAC humanitarian mechanism.

In this context, a multilateral approach to sanctions exemption seems to be the only acceptable and effective solution to the humanitarian gap. A multilateral panel of Treasury officials of the Group of 20 (G-20; or G20+, if a few exporters of medicine like Switzerland are to join) in which OFAC would be just one voice, would indeed help increase the acceptability of submitting the global trade in vital goods in Iran to a form of US screening, and eliminate the uncertainty over judicial litigation in the United States for non-US exporters of food and medicine trading in other sanctioned jurisdictions than Iran. Furthermore, one of its positive spin-offs would be to help G20+ states to make progress

⁵⁶ Tooze 2018, 219.

in the harmonization of licensing codes. Licensing experts face hard questions, for example, whether medicine or Xray machines can be exported to sanctioned countries like Syria, independent of whether they might fall into the hands of designated governmental authorities, or whether such medical products can be exported only if exclusively used to treat civilians who are the victims of state repression. Not all nations see eye to eye on this issue. A new multilateral licensing organization would build consensus on these hard issues.

The US government may never agree to enter such a multilateral institution, especially in the present context marked by President Trump's general criticism of multilateralism. After all, the US Treasury plays this role without formally acknowledging it, thereby avoiding responsibility for negative humanitarian outcomes that can be traced back to its actions. Yet the United States' unwillingness to be more transparent about how it regulates global trade through sanctions is already accelerating desire among many states around the world to circumvent the US financial system and accelerate the process of de-dollarization. Furthermore, US sanctions experts may see the creation of such a robust system as the only way to avoid breaking the US weapon of choice: targeted sanctions. For sanctions to remain targeted, and in a context of the comprehensivization of sanctions, there needs to be a multilateral institution capable of efficiently administering a global sanctions exemption program, either under a UN or G20+ framework. This proposal would thus take away one of the main critiques of current US sanctions.

Still, it remains to be seen how banks would assess this proposal, and whether such a multilateral licensing authority would need to engage in the administration of payments as well, either in an indirect fashion like INSTEX, or in a more direct manner, to address the problem of banks' overcompliance with US sanctions. Considering present global uncertainties, global banks may stick to a zero-risk approach even after a G20+ licensing organization is set up to regulate the global humanitarian trade. The latter could then also encourage "business-to-business payments" that rely, among other possibilities, on new digital financial technologies (FinTech), by creating a public-private partnership to process payments in the humanitarian trade. In fact, we argue that the creation of a blockchain-based Safecor coin would work to address other issues not tackled by other proposals.

The main idea behind the introduction of Safecor coins administered, for instance, by a G20+ public-private partnership is that for those transactions between an entity located in a sanctioned jurisdiction and the outside world, if transactions were locked in a circuit of exchange denominated in the Safecor coin, that



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Created as a single-purpose digital currency (SPDC), a Safecor coin, would facilitate the essential task of establishing a clean economic circuit when money flows in and out of a country under sanctions

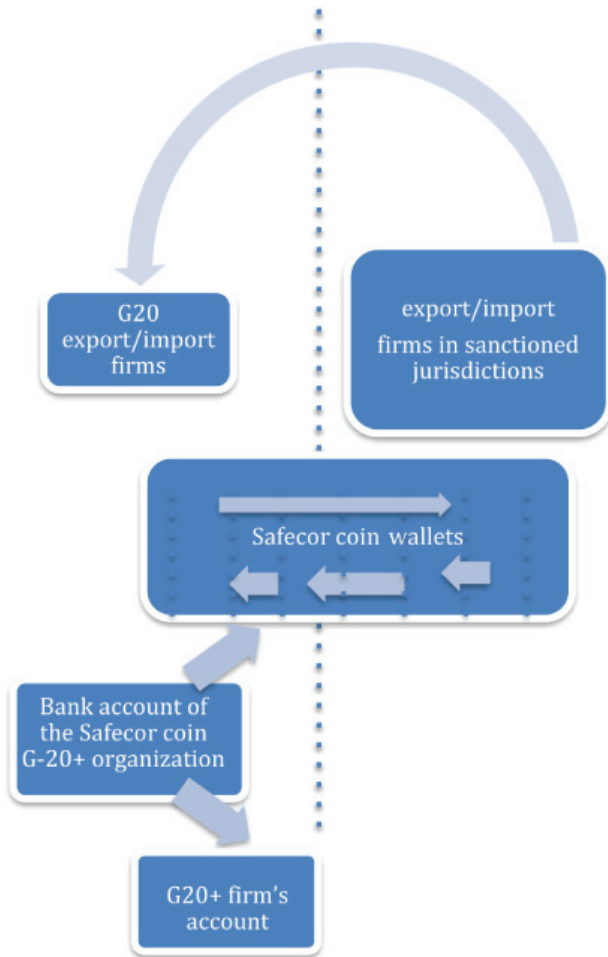
could only be used to buy vital goods abroad and that could be convertible only outside the sanctioned territory; for this lock-in feature, the management of KYC and KYT procedures in the Safecor coin would be much less costly than that denominated in a universal currency (like US dollar or Euro) and administered by multiple layers of banks. There is indeed an essential difference between non-fiat digital currencies and fiat currencies that is of primary relevance to the task at hand (see Appendix). Fiat currencies, such as the US dollar, euro, or Iranian rial, serve as a universal means of exchange and can thus be characterized as “dual-use”:

they can be used to buy anything and are found to circulate in the hands of good and bad actors alike. Sorting out whether euros or dollars come from OFAC-approved businesses means that global banks administering their circulation need to engage in costly KYC, KYCC, and KYT screening before authorizing each transaction.

Created as a single-purpose digital currency (SPDC), a Safecor coin, would facilitate the essential task of establishing a clean economic circuit when money flows in and out of a country under sanctions. The main task of the organization administering the Safecor coin would then be to authorize the new entities at the point of entry into the circuit, based on the decisions of the G20+ licensing authority, and perform frequent but random controls on the payments patterns that are traceable on the digital ledger.⁵⁷ The authorized entities would then exchange value by sending Safecor coins to one another according to the business-to-business payments scheme in accordance with the prescriptions of the World Bank Group.

In the case of Iran, it would mean that only the value generated by Iran’s past OFAC-approved oil sales and future food and medicine sales would be locked in the circuit of Safecor coin exchange. Only Iranian entities authorized by the G20+ licensing organization would be able to use the Safecor coin for buying food and medicine to approved entities. Compared to INSTEX, the adoption of such a Safecor coin would present many advantages (see Figure 3). First, it would create an economic circuit that is, by definition, limited to the trade of vital goods (see Table 4). Second, the circulation of Safecor coins would reassure all users of the coin that their transactions are preapproved ex ante by the OFAC and global regulators working in a G20+ multilateral framework. Third, in line with the discussion above, it would create a balanced trade circuit.

⁵⁷ Of course, Safecor coins would have to not be plagued by high volatility (see Appendix).



There are at least three technical reasons to favor a Safecor coin administered by a G20+ authority over the creation of a new SPDC run by one government only, like the US government. First, new blockchain-based digital ledger technologies (DLT s) allow remote and traceable peer-to-peer transfer of electronic value in the absence of trust between transacting parties, by greatly enhancing transparency, as illustrated by its applications in global value chains, or in humanitarian camps.⁵⁸ Second, as all payments are recorded in a constantly updated decentralized ledger that protects anonymity of its users, issues of privacy and limits to the information for governments could be addressed in a way that the creation of a centralized ledger cannot. Third, a decentralized ledger would ensure greater defense against hacking and disruption than a centrally located ledger.

58 55 Hempel 2018.



Taking the example of Iran, our article has focused on identifying the source of problems encountered by global banks in the trade of humanitarian and vital goods with sanctioned jurisdictions

5. Conclusion

Taking the example of Iran, our article has focused on identifying the source of problems encountered by global banks in the trade of humanitarian and vital goods with sanctioned jurisdictions. We argue that the creation of a new multilateral organization in charge of administering such payments using new digital currencies (the Safecor coin) within a network of strictly authorized entities can provide a technically feasible, politically acceptable, and economically sustainable solution to the main problems that countries under sanctions face when

trying to import vital goods. This political and technical solution addresses the general problem of coordination between actors who are all ostensibly committed to the continuation of trade of vital goods in sanctioned jurisdictions, but take contradictory approaches. Unlike the SPV like INSTEX or any universal currency like the US dollar or Euro, the creation of the new SPDC also resolves the problems of trust, trade balances, and transaction costs. This latter point is particularly important.

Our article aims to initiate dialogue between the diplomatic, humanitarian, and financial technology communities to develop FinTech solution(s) that address the problems of humanitarian finance and resolve pressing policy issues. The diplomatic community stands to gain through the availability of more tools to formulate solutions to policy problems. Meanwhile, the humanitarian sector will be less constrained to fulfill its mission in sanctioned jurisdictions if new solutions that move beyond the hegemonic solution proposed by the US government in the case of Iran are tested. If blockchain and other digital payment systems can enable creative solutions to the most pressing problems plaguing the international trade of vital goods today, it is urgent to bring these insights to the policy-makers who are responsible for the implementation of sanctions.

TABLE 1 Models of governance in the field of sanctions and sanctions exemption

Type of governance arrangements	Diagnosis of the main problem	Recommended policy solutions falling within each paradigm	Anticipated obstacles
<p>Transnational governance: Sanctions exemption jointly governed by public and private actors in transnational expert bodies</p>	<p>Difficulties faced by global banks when applying risk-based approaches to sanctions compliance:</p> <ul style="list-style-type: none"> - Difficulties in accessing information and preventing fraud from companies in the vital trade sector 	<p>Reduction of compliance costs by exemption, leading to:</p> <ul style="list-style-type: none"> - Creating national registries of "suspicious" clients shared by banks at the national level - Enhancing cooperation rather than suspicion between banks and public authorities (on issues such as how to improve compliance procedures) 	<p>Legal obstacles:</p> <ul style="list-style-type: none"> - Privacy laws that prevent banks from sharing data about customers - "Strict liability" of private actors under US law that discourages private banks from being too transparent about compliance failure before public authorities
<p>Hegemonic governance: Sanctions exemption solely governed by one public authority acting as an uncontested hegemon (here, the US government)</p>	<p>Inefficiencies in US exemption system:</p> <ul style="list-style-type: none"> - Broadness and vagueness of the category of "humanitarian exemption" in US sanctions law - Impossibility for non-US private actors to obtain specific humanitarian exemption from US public authority (except since Nov. 2019 for Iran) - Frequent US policy shifts 	<p>Clarify and open the US exemption system globally:</p> <ul style="list-style-type: none"> - Clarify in a transparent manner the category of "fictit" humanitarian trade - Open the US humanitarian exemption procedure to non-US companies in humanitarian trade, as recently done by OFAC in the case of Iran 	<p>Political and legitimacy issues:</p> <ul style="list-style-type: none"> - US public authorities may not want to claim the role of hegemon in the vital trade sector beyond the case of Iran, for fear of becoming the sole nation responsible for humanitarian disasters due to sanctions - Opening the US exemption procedure to global firms may flock the system, which already works inefficiently for US companies

TABLE 1 Models of governance in the field of sanctions and sanctions exemption (cont.)

Type of governance arrangements	Diagnosis of the main problem	Recommended policy solutions falling within each paradigm	Anticipated obstacles
<p>Hybrid governance: Sanctions exemption governed by a variety of actors according to multiple and contradictory logics, with no authority reigning supreme and uncontestated</p>	<p>Fragmentation in the global trade rules and sanctions exemption, leading to:</p> <ul style="list-style-type: none"> - Multiplication of instruments to circumvent hegemonic powers with no clear hierarchy and harmonization between definitions - Multiplication of contradictory sources of authority and oversight reigning over private actors 	<p>Clarify the lines of authority between states and public-private actors</p> <ul style="list-style-type: none"> - By creating a Gao+ multilateral institution in charge of sanctions exemption globally - By empowering such Gao+ organizations with specific financial tools (Safecor coins) that can reduce risks for global banks 	<p>Political obstacles:</p> <ul style="list-style-type: none"> - Lack of courage by Gao+ leaders to denounce humanitarian failures and harmonize their understanding of humanitarian exemption - Lack of support for multilateral solutions in an increasingly nationalistic world

TABLE 2 Examples of global banks fined by the US government for Iran-related sanction evasion

Period	Global bank	Type of violations of Iran-related US sanctions
2009–2010	Credit Suisse	Iran, Libya, Cuban, and Sudan sanctions
2009–2010	Barclays	Iran, Libya, Cuban, and Sudan sanctions
2009–2010	JP Morgan	Iran, Libya, Cuban, and Sudan sanctions
2009–2010	Royal Bank of Scotland Group (ABN Amro Holding)	Iran, Libya, Cuban, and Sudan sanctions
2010–2012	HSBC (mainly in Mexico)	Drug-cartels, but also Iran, Cuban, and Sudan sanctions
2010–2012	ING	sanctions
2012–2015	BNP Paribas	Iran and Sudan sanctions
2010–2012	Standard Chartered	Iran and Sudan sanctions
2012–2015	Commerzbank	Iran, Libya, Cuban, and Sudan sanctions
2017	Citigroup (Banamex USA in Mexico 2017)	Iran and Sudan sanctions
Nov. 2018	Société Générale	Iran sanctions
Nov. 2018	Standard Chartered	Iran sanctions

TABLE 4 The advantages of the Safecor coins versus special purpose vehicle (SPV)

Special purpose digital currency or Safecor coin	Special purpose vehicle (INSTEX)
<p>Locking-in effects: Ensures that uses of the proceeds of oil for medicine and food programs are exclusively used for importing vital goods, lowering transaction costs and times</p>	<p>No locking-in effects: Does not ensure that the fiat money used to buy vital goods comes from Office of Foreign Assets Control (OFAC)-approved transactions, thus requiring the most costly Know Your Customer (KYC), anti-money laundering (AML), and counterterrorism financing (CTF) compliance and due diligence procedures for each transaction</p>
<p>Low extraterritorial jurisdiction (ETJ) risks: The users do not worry about any future penalty by OFAC, as it is preapproved by OFAC,</p> <ul style="list-style-type: none"> – Either by OFAC only if the coin is administered by OFAC only – Or by OFAC and other treasuries if the coin is administered by a multilateral organization 	<p>High contingent ETJ risks: Today's users are fully exposed to such contingent penalty risks from the trade settlements, now presumed to be compliant by the European Union (EU) standard, but later possibly considered as a violation by OFAC or New York Dept. of Financial Services</p>
<p>Balanced trade: Combines trade flows from many participating states and sanctioned jurisdictions thereby ensuring greater sustainability</p>	<p>Trade imbalance: Fewer participants and mismatch between import and export flows result in chronic deficits and decrease sustainability</p>
<p>Cybersecurity:</p> <ul style="list-style-type: none"> – If it uses a centralized ledger, then more prone to hacking and disruption – If it uses the blockchain, a decentralized digital ledger technology (DLT) ensures greater defense against hacking and disruption 	<p>Cyber vulnerability: Centralized ledger means it is more prone to hacking and disruption</p>

TABLE 4 The advantages of the Safecor coins versus special purpose vehicle (SPV) (*cont.*)

Special purpose digital currency or Safecor coin	Special purpose vehicle (INSTEX)
<p>Global standard for vital goods trade:</p> <ul style="list-style-type: none"> <li data-bbox="486 924 662 1561">– If it is administered by OFAC, then it will unify the field around US views on humanitarian exemptions, which may lead to contestation <li data-bbox="683 924 860 1561">– If it is administered by a multilateral organization, it can create convergence around basic compliance standard for vital goods trade with positive humanitarian outcomes 	<p>Fragmented standard vital goods trade:</p> <ul style="list-style-type: none"> <li data-bbox="486 220 615 875">Promotes conflict and competition and politicizes trade in vital goods with negative humanitarian outcomes

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We Who Are Not as Others: Sanctions and (Global) Security Governance

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1. Introduction

The concept of security is inextricably linked with the concept of threat. Security is needed to protect from something ‘external’, from some existential threat.² In that, it is a defining and inherent, if non-legal, characteristic of the State. ‘The fact that every people feels itself threatened by the others gives the state its definite unifying power; it depends upon the instinct of self-preservation of society itself; the latent external crisis enables it to get the upper hand in internal crises’.³ In that, any threats to the status quo are simply externalised and presented as an ‘other’—and security serves to protect from that ‘other’.⁴ In the context of a self-organising society based on voluntary cooperation rather than coercion, however, ‘security’ ought to be seen either as attained, or, more likely, as redundant: there ought to be no existential threat to protect from, either

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2 cf Keith Krause/Michael Williams, ‘Security and “Security Studies”’: Conceptual Evolution and Historical Transformation’ in Alexandra Gheciu/William C Wohlforth (eds), *The Oxford Handbook of International Security* (OUP 2018) 14, 21–22 (discussing securitisation).

3 Martin Buber, ‘Society and the State (1951)’ in Maurice Friedman (ed & tr), *Pointing the Way: Collected Essays by Martin Buber* (Routledge and Kegan Paul, 1957) 161, 172.

4 Carl Schmitt, *Der Begriff des Politischen* (Hanseatische Verlaganstalt 1933) 28–29.

external or externalised.⁵

The global outbreak of SARS- CoV-2, the coronavirus that causes the Covid-19 disease, which could be seen as such an external existential threat,⁶ demonstrates the point. Here the ‘other’ is not some group of people, but a faceless, non-sentient entity, a virus. And yet even in that context, some states sought to give a face to that non-sentient ‘other’—the face of children, our neighbours, our colleagues and friends, or in some states the face of refugees and migrants or that of another state constructing the virus or allowing it to spread.⁷ Everyone became an ‘other’ in the event. Measures to curb

the spread of the virus, entailing serious limitations of rights, such as the right of movement, were adopted nationally, not globally, and were voluntarily complied with by large numbers of people around the world. This was a choice, a national choice—a choice which was made against the background of chronic underfunding of public health, a choice combined with the decision by some states not to ‘test, test, test’ as recommended by the WHO,⁸ and a choice that some states did not even make. This led Agamben to note, in a piece that provoked strong reactions, that ‘we ... accepted without too many problems, solely in the name of a risk that was not possible to specify, limiting to an extent that had never happened before ... our freedom of movement’.⁹

This means that the concept of security in the highly centralised –and exclusive– method of organisation that is the State is a sine qua non. In contrast, the loose, decentralised, international community should have no or little need for the concept. What external existential threat is there for the world to protect itself from?¹⁰ Global warming and the climate emergency



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5 *ibid.*, 35–36.

6 In the sense that ‘the object of immune defence is the foreign as such. Even if it has no hostile intentions, even if it poses no danger, it is eliminated on the basis of its Otherness.’ See Byung-Chul Han, *The Burnout Society* (Erik Butler tr, Stanford University Press, Stanford 2015) 2 [emphasis in original].

7 See eg Daniel Trilling, ‘Migrants Aren’t Spreading Coronavirus – But Nationalists Are Blaming Them Anyway’ [2020] *The Guardian* (28 Feb); Maanvi Singh Helen Davidson and Julian Borger, ‘Trump Claims to Have Evidence Coronavirus Started in Chinese Lab But Offers No Details’ [2020] *The Guardian* (1 May).

8 ‘We have a simple message for all countries: test, test, test.’ WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19, 16 March 2020 <<https://www.who.int/dg/speeches/detail/who-director-general-sopening-remarks-at-the-media-briefing-on-covid-19---16-march-2020>>.

9 Giorgio Agamben, ‘Una domanda’ [2020] *Quodlibet* (13 April). English translation by Adam Kotsko.

10 Schmitt (n 3) 36.



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we did well to create for ourselves, as we did in the case of the coronavirus crisis, which, in its iteration was really nothing but the result of targeted disinvestment in public health in late capitalism, whether due to privatisation or poverty. Neither of those crises can be adequately dealt with by recourse to ‘global security’ measures, by the way. And no such measures were taken in the coronavirus example. Beyond that, and short of asteroids, solar flares, the arrival of locust-like alien species, or the death of our sun (the latter still a few billion years away) the world is not currently under any external threat—it is only

under threats from itself, ie threats of self-destruction.

And yet we treat threats that are internal to (parts of) the world as somehow being external to it and we unite to defeat them through the tools of global security. This is because the international community is primarily an international community of States, no matter what terminological or conceptual gloss we might try to put on it.¹⁰ And states as the (prime) members of that community and its lawmakers will naturally project their own unifying characteristic upon that community. National security becomes international (or global) security if only to allow for the use of more effective tools for its attainment—never mind that ‘security’ may in fact be ultimately unattainable precisely because it is meant to be unattainable.¹¹

Law is an obvious tool for ‘security governance’, and ‘sanctions’ are but an inextricable element of law. This chapter thus deals with sanctions as a (global) security governance tool. Section II discusses the terms—the meaning of sanctions and (global) security. Sections III and IV trace the historical trajectory in the use of collective and unilateral sanctions in the service of security. Section V concludes. The point that the chapter makes is relatively simple: global security is nothing but national security projected onto the international plane. When a hegemonic concept of security, that is to say, of the existential threats ‘we’ need to protect against is imposed and accepted,¹² and for as long as it is accepted, collective sanctions rule supreme, and can be particularly effective.¹³ When there is fragmentation and antagonism as to what the threats are, when there is no hegemonic national security accepted as synonymous to international security, there is a return to unilateral sanctions and a concomitant side-lining of

11 Schmitt (n 3) 36: plena securitas in hac vita non expectanda.

12 According to Krause/Williams (n 1) 21, ‘in securitization theory, security represents a “speech act”, involving the naming of particular phenomena as “existential threats”, and having that declaration accepted by a relevant audience’.

13 Schmitt (n 3) 37, also paraphrasing P-J Proudhon in writing the (in)famous line ‘wer Menschheit sagt, will betrügen’ (‘whoever invokes humanity wants to cheat’).

collective security mechanisms.

2. Terms and Concepts

For the lawyer, a ‘sanction’ is not primarily a tool to govern security,¹⁴ but rather one of the necessary elements of a legal rule. That is, if we are to accept the definition of a legal rule as provided by Kelsen, namely a command backed by a coercive sanction.¹⁵ Commands backed by coercive sanctions, legal rules, aim to achieve something. It may be difficult to generalise what legal rules aim to achieve; and it may be even more difficult to agree on what they aim to achieve were we to generalise it successfully. But there can be little doubt that overall they aim to achieve some political goal, to secure a particular status quo, to put their subjects into a particular line so as to maintain order.

The political ends that legal rules aim to achieve are basically determined by the dominant mode of production, and essentially refer to the ‘constant reproduction’ of its ‘fundamental relations’.¹⁶ Law is part of the superstructure; the base (‘structure’) is the relations of production, and it is this base that determines (and is reflected in) the superstructure.¹⁷ In that sense, the proximate function of the sanction is to ensure compliance with a command, but the more distant or remote function is essentially to ‘secure’ that the dominant mode of

14 Though of course it is so if one approaches the concept of ‘sanctions’ beyond the law, as a matter of international relations: e.g., David S Cohen/Zachary K Goldman, ‘Like It Or Not, Unilateral Sanctions Are Here to Stay’ (2019) 113 AJIL Unbound 146, where the first section of the work is entitled ‘A Flexible Security Tool For All’ (emphasis added).

15 Hans Kelsen, Introduction to the Problems of Legal Theory: A Translation of the First Edition of the *Reine Rechtslehre* or Pure Theory of Law (Bonnie Litschewski Paulson & Stanley L Paulson trs, OUP 1997) 29–30 on the ‘reconstructed legal norm’.

16 Karl Marx, *Capital – An Abridged Edition* (David McLellan ed, OUP 1995) 461: ‘here as always it is in the interest of the ruling section of society to sanction the existing order as law and to legally establish its limits given through usage and tradition. Apart from all else, this, by the way, comes about of itself as soon as the constant reproduction of the basis of the existing order and its fundamental relations assumes a regulated and orderly form in the course of time. And such regulation and order are themselves indispensable elements of any mode of production, if it is to assume social stability and independence from mere chance and arbitrariness.’

17 Karl Marx, *A Contribution to the Critique of Political Economy* (Nahum Isaac Stone tr, Charles H Kerr & Company 1904) 11–12 (Preface): ‘In the social production which men carry on they enter into definite relations that are indispensable and independent of their will; these relations of production correspond to a definite stage of development of their material powers of production. The sum total of these relations of production constitutes the economic structure of society—the real foundation, on which rise legal and political superstructures and to which correspond definite forms of social consciousness. The mode of production in material life determines the general character of the social, political and [intellectual] processes of life. It is not the consciousness of men that determines their existence, but, on the contrary, their social existence determines their consciousness. At a certain stage of their development, the material forces of production in society come into conflict with the existing relations of production, or—what is but a legal expression of the same thing—with the property relations within which they had been at work before. From forms of development of the forces of production these relations turn into their fetters. Then comes the period of social revolution. With the change of the economic foundation the entire immense superstructure is more or less rapidly transformed.’

production remains what it is and continues to operate effectively. To provide security for the system through coercion. To thwart threats to the system. All this may seem trite to some and, equally, provoke violent objections in others. The point is that understanding sanctions in this manner sheds some light on their function as security tools, and allows for their assessment both in terms of their unilateral and their collective format in international law. This section now turns to this matter.

In international law, the traditional sanctions before the advent of the UN Charter were, simply put, reprisals and war.¹⁸ They were (or ought to have been) legal tools available to each State to attain national security from external threats by enforcing basic rules of the legal order— primarily non-interference. This was before the emergence of any notion of ‘collective’ or global security.

Even the creation of the League of Nations did not alter this structure. The League of Nations Covenant merely subjected war to procedural requirements and put decentralised reprisals under the umbrella of an ‘obligation’ of member States to take them in the event of violations of the Covenant rules regarding these procedural requirements.¹⁹ There was however no collective organ to determine the existence of a violation of these requirements, and no collective organ to decide on the reprisals to be adopted. Up to this point the sanctions of international law are simply being put to the service of the national security of each State.

The paradigm shift came in the aftermath of the Second World War with the adoption of the UN Charter. International peace and security became the first purpose of the new organisation,²⁰ to be secured through collective action for the removal of ‘threats’ to the peace. Even the organ that in the League of Nations was simply called the ‘Council’ became the ‘Security’ Council, a detail that is important beyond semantics. The ICJ in *Certain Expenses* proclaimed international peace and security as the ‘natural’ priority in the UN Charter, ‘since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition’.²¹

First, it must be noted that there is nothing ‘natural’ about this priority at all. International peace and security are made into a primary purpose by those drafting the Charter and designing the UN system because this was their political priority. It is not a natural priority but a political decision and a political priority like any other, and as such it is a child of its time. One could easily imagine food and shelter and work (ie the well-being of individuals), or the environment (ie the well-being of the planet), as the basic condition upon which the attainment of international peace and security is dependent.

But the United Nations was the organisation of the victorious allies after a world war. The threats they wanted to guard against were those that had just plunged them into that war. The ‘other’ was there, and was clear, though now

18 Kelsen (n 15) 119; Hans Kelsen, *Reine Rechtslehre* (2nd edn, Franz Deuticke 1960) 324–328.

19 League of Nations Covenant 225 CTS 195, art 16(1).

20 UN Charter 1 UNTS XVI, art 1(1).

21 *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, 168.

defeated. The new organisation was meant to ensure that it would not rise again, though of course it could not possibly be foreseen what other ‘others’ may emerge or be constructed. As the product of a wartime alliance, the UN’s principal purpose of international peace and security was understood as security of one alliance of States from the threat posed by another, now defeated alliance.²² The only problem is of course that such a set-up requires two things to function: (a) a coherent alliance characterised by solidarity and consensus; and (b) an enemy (or many).

Sections III and IV in this chapter discuss how the set-up actually worked over the many decades that the UN has been in existence. In this section, however, it must still be clarified what the understanding of sanctions in international law ought to be. In pursuit of their principal (if not natural) priority to maintain and restore international peace and security, the drafters of the UN Charter sought, to a considerable extent, to emulate the centralised structure of domestic legal orders with respect to the monopoly of coercion. This had considerable repercussions on the understanding of the traditional coercive sanctions of international law, reprisals and war.

The first move was to emulate domestic legal orders with respect to physical coercion, to wit: war. The UN Charter flat out prohibits States from resorting to the threat or use of force in Article 2(4), and seeks to completely centralise recourse to force to the Security Council under Chapter VII. It is the Security Council that has sole²³ power to determine the existence of threats to the peace under Article 39,²⁴ and it is the Security Council that has the monopoly of the use of force under Articles 42 ff (however that may have played out in practice, in view of the lack of Article 43 agreements). What remains for States is a limited



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22 Hence also the UN Charter (n 16) provisions on ‘enemy’ States: arts 53, 107.

23 UN Charter, *ibid*, art 24(1) provides that the Security Council has ‘primary responsibility’ for the maintenance of international peace and security, the implication being that the plenary organ, the General Assembly has residual authority in this respect, subject to the restriction in Article 12 as interpreted through the practice of the General Assembly: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 148–149 [26]. However, it is the UNSC alone that can act under Chapter VII, and this is what is meant by ‘sole’ here.

24 Also ‘breaches of the peace’ and ‘acts of aggression’, though the UNSC has very rarely determined the existence of a ‘breach of the peace’ and never that of an ‘act of aggression’—which makes sense; this is a political organ which has the exact same powers under Chapter VII whatever determination it makes under Article 39. Achieving consensus over ‘threat to the peace’ is easier, and enough for the UNSC to act under Chapter VII: Dapo Akande/ Antonios Tzanakopoulos, ‘The International Court of Justice and the Concept of Aggression’ in Claus Krefß/Stefan Barriga (eds), *The Crime of Aggression – A Commentary* (CUP 2016) 214, 219.



The UN Charter preserves the power of States to resort to such measures unilaterally, given that there is no prohibition of any other form of ‘force’ in the UN Charter other than armed force

power to resort to force unilaterally in cases of self-defence, under Article 51. The second move was to partially centralise the power to resort to reprisals, or rather what since 1945 ought to be called countermeasures (and retorsion).²⁵ Countermeasures are breaches of international obligations by one State towards another in response to the latter State’s previous breach of an international obligation injuring the reacting State, and aiming to induce compliance.²⁶ The fact that they are taken in response to such a previous violation precludes their wrongfulness. In that, countermeasures are decentralised reactions to illegality,²⁷

the only means available to States in the decentralised legal order to seek to induce compliance with secondary international obligations of the responsible State, and thus to implement the responsibility of that State and enforce international law. They are thus means of exercising lawful coercion, politely called inducement. Relatedly, acts of retorsion are unfriendly but perfectly lawful acts²⁸ resorted to in order to put pressure on a State with a view to ‘inducing’ it to change its position or policy on some matter. They are meant to signify displeasure, but, being lawful, they can be resorted to any time and not solely in response to some previous internationally wrongful act by the target State (though they are sometimes referred to as ‘sanctions’ as well, especially by lay people).

Essentially all references to unilateral ‘sanctions’, whether by international lawyers or others, are to be qualified legally: either (a) as lawful (if unfriendly) acts (such as severance of diplomatic relations or trade relations when there is no obligation to maintain such trade relations);²⁹ or (b) as countermeasures (when they are wrongful acts whose wrongfulness is excluded because they qualify as countermeasures); or finally (c) simply as internationally wrongful acts (when they are breaches of international law that cannot be otherwise justified).

The UN Charter preserves the power of States to resort to such measures unilaterally, given that there is no prohibition of any other form of ‘force’ in the UN Charter other than armed force. It does however partially centralise the

25 This is because ‘reprisals’, according to the ILC, has forcible overtones, which makes it an inapposite term in the context of an international legal order that prohibits recourse to force except in self-defence. ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’ (2001) II(2) Ybk ILC 31, 75 (para 3) and 128 (para 3).

26 This is a much-simplified definition. Generally on countermeasures, *ibid*, 128 ff.

27 Linos Alexandre Sicilianos, *Les réactions décentralisées à l’illicite : des contre-mesures à la légitime défense* (LGDJ 1990).

28 ILC Commentary (n 25) 128 (para 3).

29 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v US*) (Merits) [1986] ICJ Rep 14, 126 (para 245) and 138 (para 276).

use of retorsions³⁰ and countermeasures in response to threats to the peace: this is what is customarily (though non-technically) called ‘UN sanctions’. They are ‘measures not involving the use of armed force’ adopted by the Security Council in response to a threat to the peace, in accordance with Articles 39 and 41. The taking of such measures constitutes an obligation for all member States of the UN in accordance with Article 25 of the UN Charter. And being an ‘obligation under the UN Charter’, the obligation to take such measures prevails over obligations of the member States under ‘other’ international agreements in the event of a conflict, in accordance with Article 103 of the Charter.³¹

In that sense, Article 41 measures are centralised, collective reactions to illegality (the breach of international law in the instance being that an entity is posing a threat to the peace).³² These ‘collective sanctions’ taken by the Security Council have far more coercive potential than decentralised sanctions taken unilaterally by a State. This is because UNSC Article 41 measures are to be implemented by every UN member State, whereas unilateral measures are obviously only implemented by the State that decides to resort to them. According to the ILC, the term ‘sanctions’ ought to be reserved for such collective reactions, and the term countermeasures (along with retorsion) is to be used for unilateral reactions.³³

Sections III and IV will survey the use of ‘sanctions’ in governing security as discussed in this section. The use of the term ‘collective or UN sanctions’ is meant to indicate measures not involving the use of armed force under Article 41 UN Charter (or proper ‘sanctions’ as per the ILC), while the term ‘decentralised or unilateral sanctions’ is used to indicate essentially countermeasures.

3. The Use of Collective Sanctions (as a Projection of Specific State Interests)

The ‘alliance’ that was the United Nations at its inception quickly splintered: the advent of the Cold War and the antagonism of the two superpowers, the United States and the Soviet Union, quickly consigned the ‘collective security’ part of the UN Charter to irrelevance, if not quite to the proverbial dustbin of history.³⁴

30 UN Charter (n 16) art 41 contains an indicative (thus clearly non-exhaustive) list of such measures, some of which constitute acts of retorsion: the severance of diplomatic relations for example (as there is no obligation to maintain diplomatic relations with any State).

31 E.g., Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v UK) (Provisional Measures) [1992] ICJ Rep 3, 15 (para 39); Antonios Tzanakopoulos, ‘Collective Security and Human Rights’ in Erika de Wet/Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012) 42, 63–66.

32 Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (OUP 2011) 76–79, 176.

33 ILC Commentary (n 25) 75 (para 3); ILC, ‘Report of the Commission to the General Assembly on the work of its thirty first session’ (1979) II(2) Ybk ILC 121.

34 A phrase that is used often and in many variations but famously attributed to Trotsky during the October Revolution in 1917, referring to the Mensheviks: Bertrand M Patenaude, ‘Trotsky and Trotskyism’ in Silvio Pons/Stephen A Smith (eds), *The Cambridge History of Communism: Volume I: World Revolution and Socialism in One Country* (CUP 2017) 189, 195 with further references. He was quite wrong on this one, as is the case with many who do not shy away from the hubris that is the attempt to declare the end of someone else’s significance

For almost 45 years, between 1945 and 1990, the Security Council managed to agree to sanctions only twice, and that with great difficulty and on a matter on which agreement should not have been that hard to procure if the benchmark was as low as basic decency: racial segregation. The Security Council managed to impose sanctions on Rhodesia in 1966,³⁵ and on South Africa in 1977,³⁶ in the aftermath of the Soweto uprising. The Council did not even manage to agree on more stringent mandatory economic sanctions against South Africa, with Resolutions 558 (1984) and 591 (1986) using ambivalent language. The end of the Cold War and the concomitant collapse of the Soviet Union and the Eastern Block may have signalled to some the ‘end of history’,³⁷ perhaps prematurely. What it certainly did do was to usher in a period of hegemonic consensus, with the United States-led ‘West’ now reigning supreme. In that context, the Security Council became the focal point of security, now ‘collective’ security, and UN sanctions saw unprecedented proliferation.³⁸ The 1990s were called, and rightly so, ‘the sanctions decade’.³⁹ In that decade alone, sanctions were imposed in over a dozen situations involving Iraq,⁴⁰ the former Yugoslavia,⁴¹ Somalia,⁴² Libya,⁴³ Liberia,⁴⁴ Haiti,⁴⁵ Angola,⁴⁶ Rwanda,⁴⁷ Sudan,⁴⁸ Sierra Leone,⁴⁹ Afghanistan,⁵⁰ Eritrea and Ethiopia,⁵¹ and responding to threats to the peace as diverse as classical invasion and annexation, terrorism, human rights violations, and defence of democracy.⁵² More sanctions followed in the

in the course of history, let alone the end of the course of history itself—see text at n 37.

35 UNSC Res 232 (1966). For contemporary comment: Charles Rabinowitz, ‘UN Application of Selective, Mandatory Sanctions Against Rhodesia: A Brief Legal and Political Analysis’ (1967) 7 *Virginia Journal of International Law* 147; Rosalyn Higgins, ‘International Law, Rhodesia, and the UN’ (1967) 23 *The World Today* 94.

36 UNSC Res 418 (1977).

37 Francis Fukuyama, ‘The End of History?’ (1989) 16 *The National Interest* 3

38 Chesterman and Pouligny note, somewhat euphemistically, that the increased recourse to sanctions ‘appears to have had less to do with a consensus on their utility than with the more general political consensus that emerged within the Council after the Cold War’: Simon Chesterman/Béatrice Pouligny, ‘Are Sanctions Meant to Work? The Politics of Creating and Implementing Sanctions Through the United Nations’ (2003) 9 *Global Governance* 503, 504 (emphasis added). Chesterman is less restrained in his ‘The Security Council as World Legislator? Theoretical and Practical Aspects of Law-making by the Security Council’ (Institute for International Law and Justice, 2004), where section 2 is entitled ‘The Imperial Security Council’ accessed 24 April 2020

39 David Cortright/George A Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Lynne Rienner 2000)

40 UNSC Res 661 (1990).

41 E.g. UNSC Res 713 (1991).

42 UNSC Res 733 (1992).

43 UNSC Res 748 (1992).

44 UNSC Res 788 (1992).

45 UNSC Res 873 (1993); UNSC Res 917 (1994).

46 UNSC Res 864 (1993)

47 UNSC Res 918 (1994).

48 UNSC Res 1054 (1996).

49 UNSC Res 1132 (1997).

50 UNSC Res 1267 (1999).

51 UNSC Res 1298 (2000).

52 Chesterman/Pouligny (n 38) 504.

2000s, most prominently against North Korea,⁵³ and Iran,⁵⁴ but also against Lebanon.⁵⁵

This ought to come as little surprise. At the time when superpower antagonism left little space for ‘consensus’ (meaning essentially domination of the interests of one State or bloc of States over all others), everyone just went off and did as they always did: they employed unilateral sanctions (in the guise of either acts of retorsion or countermeasures) whenever there was a ‘security need’ (in the sense of some political objective to deal with a perceived threat), while the Security Council lay dormant. Examples abound: from the UK taking measures against

Iran in response to the nationalisation of the Anglo-Iranian Oil Company in the 1950s,⁵⁶ to the US taking measures against Cuba in the 1960s,⁵⁷ and then Nicaragua,⁵⁸ among others, to the Arab boycott of Israel,⁵⁹ and other measures. From among the many UN sanctions regimes that were imposed during this period of flourishing of collective sanctions, some examples are discussed here in order to demonstrate three aspects. First, how hegemonic consensus was at work in the Security Council. Second, how awesomely powerful UN sanctions can be in such cases. And third, how this awesome power might in fact scare States into reacting to UN sanctions and to seek to reassert their position in a hegemonically homogenous international environment.

The sanctions imposed on Libya in the aftermath of the Lockerbie incident serve as a glaring example of the hegemonic use of sanctions during the period under discussion. The explosion of a bomb on board a TWA flight out of Heathrow while the aircraft was flying over Lockerbie in Scotland led to the deaths of all passengers and crew. Two Libyan nationals (who were also claimed to be Libyan agents) were accused, primarily by the US and the UK, as being responsible for placing the bomb on the aircraft, and the US and the UK demanded that Libya extradite them. Eventually the two States got the Security Council to demand the handover of the agents, essentially echoing the demand of the US and the UK, and to impose sanctions on Libya in 1992.⁶⁰ For a number of years Libya,



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53 UNSC Res 1718 (2006)

54 UNSC Res 1737 (2006).

55 UNSC Res 1636 (2005).

56 Makio Miyagawa, *Do Economic Sanctions Work?* (Palgrave Macmillan 1992) 30–33.

57 Margaret P Doxey, *Economic Sanctions and International Enforcement* (2nd edn, Macmillan Press 1980) 35ff.

58 *Military and Paramilitary Activities in and against Nicaragua* (n 29) 14.

59 Preston L Greene, ‘The Arab Economic Boycott of Israel: The International Law Perspective’ (1978) 11 *Vanderbilt Journal of Transnational Law* 77.

60 UNSC Res 748 (n 39); UNSC Res 883 (1993)

through the mediation of the (then) Organisation of African Unity (now African Union), sought to bring this situation to an end, suggesting various arrangements that would lead to the two accused facing justice, but not in the US or the UK, where—to be fair—an unbiased trial would have been about as possible as it would have been in Libya. The recalcitrance of the US and the UK, viz the Security Council, in agreeing to any of the many proposals, led in June 1998 to a decision by the OAU, at the time counting 53 member States, to stop complying with the UN sanctions with effect from September 1998.⁶¹ A few days before the expiry of that deadline, in late August 1998, the suggestion of the OAU for the trial of two suspects by a Scottish court sitting in the Netherlands had been miraculously accepted and the UNSC had provided for the suspension of the sanctions.⁶²

This is not to say that all instances of imposition of UN sanctions during this period were as glaringly one-sided as the Lockerbie debacle. But all of them did reflect primarily the perceived national interest of the US and its allies, many other States being simply unable or too weak to raise serious objections. The sanctions on (and subsequently intervention in) Haiti is yet another example of an essentially US/western agenda being pushed globally under the guise of defence of democracy,⁶³ especially with the events in Grenada and Panama having taken place within the decade prior to the Haiti situation. The irony and hypocrisy are particularly evident when one considers that a number of shockingly undemocratic States are close allies of those very same States pushing the particular agenda. Already at that early stage commentators were noting the dangers of exclusive western control of the Security Council, even foreboding a ‘return to the veto-induced paralysis of the Cold War’.⁶⁴

The terrorist attacks of 11 September 2001 gave new impetus (or at least a new lease of life) to the hegemonic consensus of the 1990s. Terrorism, undefined as it is,⁶⁵ became the new threat to which the collective security system needed to respond. For the West, it was Islamic terrorism that needed to be targeted by the collective measures, and so it was. The 1267 sanctions regime against Osama Bin Laden, Al Qaida, and the Taliban introduced in 1999 was strengthened after the 2001 attacks and is still in operation some 20 years later, though now split into two regimes, one targeting the Taliban and one targeting ISIS.⁶⁵ A related anti-terrorism regime was introduced by the Security Council in Resolution 1373 (2001).⁶⁶ These sanctions regimes allowed States to pursue, whether

61 OUA, ‘The Crisis between the Great Socialist People’s Libyan Arab Jamahiriya and the United States of America and the United Kingdom’ (8-10 June 1998) Doc AHG/Dec.127 (XXXIV), paras 1–2.

62 UNSC Res 1192 (1998). The sanctions were suspended a few months later, in April 1999, upon notification by the UN Secretary-General that the two accused had arrived in the Netherlands for trial, as provided for in UNSC Res 1192. The sanctions were finally lifted only in 2003: UNSC Res 1504 (2003).

63 Justin Morris, ‘Force and Democracy: UN/US Intervention in Haiti’ (1995) 2 *International Peacekeeping* 391.

64 *ibid.*, 408–409 with further references.

65 UNSC Res 1988 (2011); UNSC Res 1989 (2011) and UNSC Res 2253 (2015).

66 For a discussion Stefan Talmon, ‘The Security Council as World Legislature’ (2005) 99

through the Security Council or autonomously, all kinds of objectives that had little to do with fighting terrorism, as discussed below.

As White and Davies-Bright argue in their chapter in this Handbook, terrorism, though lacking a universally accepted definition, has a unifying function: ‘all states can identify threats from groups that can be labelled as terrorist’.⁶⁷ This of course also works the other way around: all States can label as terrorist any groups from which they identify threats (and they do).⁶⁸ Thus, the ‘general consensus that terrorism is a threat that must be countered’⁶⁹ comes as little surprise: it is entirely self-serving and akin to almost blank cheque when viewed against the background of the lack of an accepted definition.⁷⁰ And as White and Davies-Bright rightly go on to suggest, this means that States ‘securitising terrorism’ simply include ‘any socio-political element that ... threatens to disturb the status quo under the banner of terrorism’.⁷¹ Given the status quo that is considered protection-worthy, however, and given the identity of those that get to decide it, this is not only unsurprising, but indeed the whole point of ‘(global) security’.

This is evident when considering in particular the 1267 sanctions regime and, to a somewhat lesser extent, the 1373 sanctions regime. Under the 1267/ (1988)/1989/2253 regime it is the Security Council, through the relevant Sanctions Committee(s) that identifies persons and entities associated with Osama Bin Laden (until his death), the Taliban, Al Qaida, and since 2011 also ISIS (/ISIL/Da’esh), who are then put on a ‘blacklist’, and who are subject to asset freezes, travel bans, and arms embargoes by all member States of the UN. But the process of putting such an entity on the list was initially completely obscure and based on nefarious evidence besides the will of particular States on the Council (sometimes acting on information provided by other States) that an entity should be subjected to sanctions.⁷² Needless to say, the motives of States for including entities in the blacklist were not always the purest. To add insult to injury, there was also no process for getting a blacklisted entity removed from the list up until the establishment of the Office of the Ombudsperson.⁷³

Under the 1373 sanctions regime, UN member States were made to subject

AJIL 175.

67 See White/Davies-Bright in this volume, section 3.1.

68 E.g., during the Apartheid struggle, Nelson Mandela and the African National Congress had been variously labelled as ‘terrorist’ by the white minority government of South Africa: in fact Mandela in his autobiography recalls how his wife Winnie was arrested and detained for some time under the 1967 Anti-Terrorism Act: Nelson Mandela, *Long Walk to Freedom* (Abacus 2013) 529. Beyond that, however, the ANC had been famously characterised by UK Prime Minister Margaret Thatcher a ‘typical terrorist organisation’: HC Deb 13 November 1987, vol 122, cc701, 719.

69 White/Davies-Bright (n 68) section 3.1.

70 Robert Skidelsky, ‘The Terrorism Paradox’ (Project Syndicate, 20 January 2020) accessed 25 March 2020.

71 White/Davies-Bright (n 68) section 3.1.

72 Antonios Tzanakopoulos, ‘Transparency in the Security Council’ in Andrea Bianchi/ Anne Peters (eds), *Transparency in International Law* (CUP 2013) 372 – 373 with further references.

73 UNSC Res 1904 (2009).

to sanctions similar to those of the 1267 regime any entities associated with terrorism writ large. While the Security Council would not identify the entities to be sanctioned under this regime, it did ‘authorise’ States to do so, allowing them to impose sanctions on various entities without necessarily following the processes required under domestic law for adopting such far-reaching restrictive measures against individuals or legal entities.

After some years of operation, both regimes started coming under attack—though not from State executives, which were not too bothered about wielding such a powerful tool against their enemies, real or imagined, but by domestic (and regional international) courts to which individuals and legal entities subjected to sanctions under these regimes sought recourse. A detailed analysis of the developments that followed has been undertaken elsewhere.⁷⁴ Suffice it here to say that domestic (and regional international) court decisions such as *Kadi* in the Court of Justice of the European Union,⁷⁵ *Ahmed* in the UK Supreme Court,⁷⁶ and others, forced States to choose between disobeying the Security Council or forcing it to adopt at least some review mechanisms at the UN level. In other decisions, such as *OMPI*,⁷⁷ courts required evidence and guarantees as prescribed in domestic legal orders for those sanctioned under the 1373 regime. The sanctions practice of the UN Security Council under the dominance of the United States and its allies during that period was not the only worrying development. It was coupled with the abuse of Council authorisations of the use of force, be it in Haiti or Libya, and with an increased assertion of unilateral power to use force in the name of the international community by the hegemonic powers of the era, be it in Kosovo or Iraq. All this served as an alarm bell for States like Russia and China, who would question the consensus in an organ they could scarcely control, and opt for a return to unilateral action—action that would no longer have any mantle of acting in the name of the international community by virtue of emanating from a collective organ. This would leave every State powerful enough to try to act unilaterally, all the while maintaining that it is fighting against some global threat.

4. The Resurgence of Countermeasures

While a good number of sanctions regimes introduced by the Security Council in the late 1990s and the early- to mid-2000s remain in force, there is a notable tapering off of new UN sanctions towards the end of the 2000s and the 2010s. This, as foreshadowed in the last section, was not due to disenchantment with UN

74 Antonios Tzanakopoulos, ‘Domestic Court Reactions to UN Security Council Sanctions’ in August Reinisch (ed), *Challenging Acts of International Organisations before National Courts* (OUP 2010) and ‘The Solange Argument as a Justification for Disobeying the Security Council in the *Kadi* Judgments’ in Matej Avbelj et al (eds), *Kadi On Trial: A Multifaceted Analysis of the *Kadi* Trial* (Routledge 2014).

75 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] EU:C:2008:461.

76 *HM Treasury v Mohammed Jabar Ahmed and ors* [2010] UKSC 2.

77 *Organisation des Modjahedines du peuple d’Iran v Council of the European Union* [2006] EU:T:2006:384

sanctions because of any of their inherent features. If anything, collective sanctions are far more effective than unilateral sanctions, even if the latter are taken by a superpower. Rather, the problem was precisely the fact that hegemonic consensus in the Security Council started crumbling right around the mid- to late-2000s, with the resurgence of Russia, the rise of China, and the general crisis of the ‘new world order’ of the early 1990s. These events were also coupled with increasing (legal) challenges to UN sanctions starting in the early- to mid-2000s and culminating in the early 2010s, which in fact revealed themselves as an awesomely powerful but ill-regulated tool at the hands of States happy to evade domestic and international legal constraints in taking such far-reaching action.

The natural corollary of the dip in the ability of the Security Council to achieve consensus and to operate effectively in a climate of renewed, and indeed multipolar, antagonism, was of course the resurgence of countermeasures, of unilateral sanctions, which had never really gone away, but had just receded in the background. This is nicely captured in the following excerpt from an article by Cohen and Goldman, pointing out the relevant policy considerations:

The fact that sanctions are a core foreign policy tool has two important implications for the relationship between multilateral and unilateral sanctions. First, different countries will perceive a need to impose sanctions in different situations because they perceive their national security interests differently. Second, even when several countries agree on the need to impose sanctions, they will often differ on the targets, types, and duration of sanctions that need to be imposed. If countries were forced to abandon this tool for use exclusively through a multinational mechanism, they would surrender the flexibility sanctions provide to address different kinds of risks, not to mention an important aspect of sovereignty.⁷⁸

States may perceive their national security interests differently. But when they are too weak to project them onto the international plane, they just fall into line with what the powerful States consider to be the appropriate security interests. And when the powerful States disagree on that, then the collective sanctioning system is cast aside in favour of everyone pursuing their own interests, globally or regionally. So, indeed, collective and unilateral sanctions exist side-by-side: both in legal reality (as described in section II) and in actual reality. In actual reality however, collective sanctions completely overshadow unilateral ones in cases where consensus can be achieved, while unilateral sanctions are resorted



If anything, collective sanctions are far more effective than unilateral sanctions, even if the latter are taken by a superpower

⁷⁸ Cohen/Goldman (n 14) 147 (emphasis added).



Despite Russia's interest in exercising any influence that it may have in the Security Council, the intervention in Libya authorised by the Security Council in 2011

to when antagonism and balance of power considerations prevent the use of collective mechanisms.

Russia can be seen as receiving the first wakeup call with the Kosovo intervention in 1999.⁷⁹ Its strategy of promoting action through the Security Council by occasionally making painful concessions while it was still reeling from the dissolution of the Soviet Union worked for it to maintain some disproportionate semblance of power for a while.⁸⁰ But the moment its interests diverged sharply (or insufferably) from those of the West in a matter of supreme national importance, an intervention in its old back yard

against a close ally, it was not taken seriously by its partners in the Security Council: the whole Council was merely circumvented in the end.

Despite Russia's interest in exercising any influence that it may have in the Security Council, the intervention in Libya authorised by the Security Council in 2011,⁸¹ was yet another nail in the coffin of its (and China's) consensual approach. The way the use of force, authorised to 'protect civilians and civilian areas under imminent threat of attack',⁸² played out, leading to regime change and the plunging of Libya into chaos to this day, served as an excellent excuse not only for Russia to withhold consensus over Syria,⁸³ but even purportedly to undertake its own unilateral action against Ukraine in Crimea, all the while 'trolling' the West. It cannot escape us that the language used by Russia with respect to Crimea is heavily reminiscent of the arguments used by NATO for its intervention in Serbia in 1999 over Kosovo.⁸⁴

The US and the EU imposed then unilateral sanctions on Russia over Crimea,⁸⁵

79 On the different eras of Soviet/Russian practice in the Security Council: Antonios Tzanakopoulos, 'La Russie et le Conseil de sécurité des Nations Unies : les trois époques de la pratique' (2019) 123 *Revue générale de droit international public* 91.

80 Nico Krisch, 'The Great Powers and the Security Council' in Vaughan Lowe et al (eds), *The United Nations Security Council and War* (OUP 2008) 141–144.

81 UNSC Res 1973 (2011).

82 *ibid*, para 4.

83 E.g., the statement by Russia in the Security Council: UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627, 4: 'The situation in Syria cannot be considered in the Council separately from the Libyan experience. The international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect. It is easy to see that today's "Unified Protector" model could happen in Syria'.

84 President of the Russian Federation, 'Address' (Kremlin, 18 March 2014) <<http://en.kremlin.ru/events/presi-dent/news/20603>> accessed 24 March 2020.

85 Ukraine-/Russia-related Sanctions' (US Department of the Treasury) <<https://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx>> accessed 24 April 2020 and 'EU restrictive measures in re-sponse to the crisis in Ukraine' (European Council/Council of the EU) <<https://www.consilium.eu-ropa.eu/en/policies/sanctions/ukraine-crisis/>> accessed 24 April 2020.

seeing as how the Security Council would not be available for action against a Permanent Member. To the extent that such measures constitute breaches of international obligations owed by the US and the EU (or its member States) to Russia, they would need to be qualified as countermeasures for the reacting entities to escape international responsibility. And given that the violation claimed on their part is essentially the invasion and annexation of Crimea, the argument would be that these are countermeasures ‘in the general interest’, ie countermeasures against the violation of an erga omnes obligation taken by ‘States other than the injured State’ in the sense of Article 48 of the Articles on State Responsibility.

The resurgence of unilateral sanctions in the face of the loss of consensus in the Council is not solely due to the recalcitrance of Russia and increasingly China. The United States can be seen as taking the same route under President Trump. Its ‘withdrawal’ from the Joint Comprehensive Plan of Action (JCPoA),⁸⁶ which led to the suspension of UN sanctions against Iran, was swiftly followed by the (re-)imposition of unilateral sanctions against that State. Iran of course did challenge a number of these measures as breaches of the 1955 Treaty of Amity between itself and the US before the International Court of Justice.⁸⁷ But the most problematic part of such unilateral sanctions is, in the practice of the US at least, who is also the State most frequently resorting to significant such sanctions, their purported extraterritorial effects. These extraterritorial sanctions, often branded ‘secondary sanctions’ or ‘secondary boycotts’, aim at universalising the effects of a sanctions regime by seeking to avoid the flouting of the unilateral sanctions by States and entities not bound by the sanctioning State’s law: in essence, such sanctions regimes aim at emulating the effect that collective sanctions would have.⁸⁸ This makes it clear that unilateral sanctions can never achieve results similar to collective sanctions without exorbitant claims to jurisdiction. But it also makes it clear that when consensus is not present, powerful States will not shy away from adopting such sanctions in the interest of ‘security’.

5. Conclusion

When there were still (only) two superpowers around, and indeed two with competing and contrasting politico-economic systems, international (peace and) security was just not a ‘thing’—beyond avoiding ‘mutually assured destruction’. The whole debate was about the security of each and every State and the maintenance of its internal status quo. Since the end of the Cold War however, the concept of international security, and the process of ‘securitisation’, has taken off. For a while this operated under the unchallenged dominance of the United States and its allies, all others being (or feeling) too weak to offer anything except occasional (and rather muted) opposition.

Once States like Russia and China started asserting themselves more forcefully

⁸⁶ UNSC Res 2231 (2015).

⁸⁷ Alleged Violations of the Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America) (Application Instituting Proceedings) (16 July 2018) accessed 25 March 2020.

⁸⁸ Antonios Tzanakopoulos, ‘State Responsibility for “Targeted Sanctions”’ (2019) 113 AJIL Unbound 135, 138–139 with further references.

in the international scene, the process of securitisation did not stop—having been given a mantle of propriety by the almost two decades of UN sanctioning practice. What did prove elusive though was any further consensus at the international level, with States now returning to pursuing their own interests through unilateral sanctions, while still purporting to some extent to act in the pursuit of global security from superficially accepted, but in reality ill-defined threats, such as ‘terrorism’. This makes sense: in the vacuum left once again by the Security Council, the powerful appoint themselves as the protectors of all against real or perceived or even imaginary threats.

But despite the recurrence of big power struggles we have not returned to the same situation as we were in during the Cold War in all respects: while antagonism is back, no real alternative political configuration is on offer. Whatever the differences in the perception of threats to security, we are now operating under an absolutely dominant economic model, prevalent in almost all States even if with local adjustments and minor differences. We are thus witnessing a hegemonic mode of production, with the concomitant ‘pariahisation’ of the few that do not conform. This allows the national security of each powerful State to lay claim to global radiance, under accepted ‘categories’, such as primarily terrorism. Security, national or global, thus becomes nothing other than the security of the current, hegemonic, and ultimately deadly, mode of production. To end, as I began, with a quote: ‘Threat is urgent! Existential! With patience wearing thin. But the danger’s elemental; it’s chaos from within’.⁸⁹

⁸⁹ Greg Graffin/Brett Gurewitz, ‘Chaos from Within’ in *Bad Religion, Age of Unreason* (Epitaph 2019)



Part II

**how sanctions
harm**



Humanitarian Impacts of Economic Sanctions on Iran and Syria

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Abstract

International sanctions against Iran and Syria have been tightened to unprecedented levels since 2012, particularly in the case of the European Union's (EU's) restrictions on the countries' energy and finance sectors. Marking a departure from the EU's carefully targeted sanctions policies of recent decades, they represent de facto comprehensive measures widely associated with negative humanitarian impacts. This paper analyses semi-structured interviews, official discourse and case studies to explore early reports of negative impacts on the health of ordinary citizens in Iran and Syria and examines associated policy responses, particularly in the EU context. The author outlines why a shift towards broader-based sanctions could be problematic for the EU and outlines constraints currently preventing more efficient risk mitigation. This paper suggests ways that sanctions, representing an increasingly vital, albeit contested, tool of EU foreign and security policy, could be used in a more prudent manner if a worsening humanitarian situation is to be avoided.

Keywords: economic sanctions; humanitarian impacts; European Union; Iran; Syria

Introduction

Economic sanctions on Iran and Syria have been tightened and broadened to unprecedented levels by a range of international actors since 2012, particularly in the case of the European Union's (EU's) restrictions on the countries' energy

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and finance sectors (Bassiri Tabrizi and Hanau Santini 2012, Portela 2012). This marks a departure from the carefully targeted sanctions policies favoured by many governments in recent decades, especially that of the EU. Although they remain targeted in technical terms – as it is still possible to engage in commerce with both countries in specific areas – selective trade bans and oil embargoes are now so broad that they can be considered de facto comprehensive sanctions, widely associated in the past with negative humanitarian consequences.

As reports of the detrimental impacts of broadened international sanctions on the health and well-being of ordinary citizens in Iran and Syria begin to surface with increasing frequency in academic studies and in the press, policy-makers thus far appear reluctant to acknowledge responsibility for the damage the measures may be causing, be it directly or indirectly. While the situation is still in its infancy, ignoring such reports in the longer term could lead the international community to contribute inadvertently to a worsening humanitarian situation in the region.

While international sanctions impact on both countries as a cumulative effect, this paper narrows its focus to examine EU restrictive measures in more detail. The EU is an interesting case given the significant former weight of shared trade with Iran and Syria (BBC 2012a, 2012b, Friberg Lyme 2012), lending current EU sanctions the ability to exert considerable damage on both economies. The EU is also interesting in that it has only ever employed targeted sanctions to date (Eriksson 2010). As such, a seemingly normative shift towards more comprehensive measures appears to sit in contrast to the EU's self-proclaimed commitment to foreign policy values marked by keen humanitarian concerns (De Vries and Hazelzet 2005) representing an interesting avenue for future study. A focus on the EU can also serve as a useful case to better inform other sanctions regimes, including those employed by the United Nations (UN; Eriksson 2005). This paper is based on a combination of primary and secondary research, including the analysis of official discourse and semi-structured interviews conducted between November 2012 and January 2013 with representatives of the EU, EU member state governments, the UN and humanitarian non-governmental organisations (NGOs) working in Brussels, Damascus, Geneva and Beirut (conducted on an anonymous basis to allow for freer discussions). After providing a background to comprehensive and targeted sanctions in the international and EU contexts, the author explores whether measures that impose more suffering on an entire country can lead to better chances of meeting stated foreign policy aims. This paper draws on case studies from past and ongoing comprehensive sanctions regimes to highlight potential humanitarian impacts



The detrimental impacts of broadened international sanctions on the health and well-being of ordinary citizens in Iran and Syria begin to surface with increasing frequency in academic studies and in the press, policy-makers thus far appear reluctant to acknowledge responsibility for the damage



This paper draws on case studies from past and ongoing comprehensive sanctions regimes to highlight potential humanitarian impacts of broader measures. It also describes recently tightened rounds of sanctions on both Iran and Syria and explores early reports of negative impacts on civilians

of broader measures. It also describes recently tightened rounds of sanctions on both Iran and Syria and explores early reports of negative impacts on civilians. The author proceeds to examine EU responses and outlines reasons why EU policy-makers may wish to pay more attention to potential humanitarian ramifications. This paper highlights challenges encountered at the EU level in better monitoring and addressing such affects and concludes by advocating a return to more strictly targeted sanctions and the strengthening of mechanisms to counter the negative effects of already-implemented measures.

From comprehensive to targeted sanctions

Comprehensive sanctions are characteristically broad in scope and focused on entire states and societies. They have been employed in a series of complex emergency situations throughout history with varying degrees of success (Hufbauer et al. 2007). Their use has been described as a ‘deadly weapon’ or ‘blunt instrument’ (Hufbauer et al. 2007, p. 138) that inflicts ‘collective punishment and suffering’ (Eriksson 2010) on civilians living under sanctions regimes. Authoritarian leaders frequently escape unaffected, particularly when they hold their assets in multiple foreign bank accounts (Hufbauer et al. 2007). Comprehensive sanctions have been shown to impact primarily on vulnerable sectors of society – namely children, women, the elderly, the infirm and the underprivileged (Gottermoeller 2007) – and can also negatively affect those residing in neighbouring countries (Weiss et al. 1997). Although sometimes employed with the expressed rationale of avoiding the so-called more inhumane effects of war, the humanitarian consequences of comprehensive sanctions can sometimes be as damaging as military force, if not more so (Weiss et al. 1997). As such, they are seen as less ethical and harder to justify on legal and moral grounds (Eriksson 2010).

Targeted sanctions centre on individual actors and activities (such as terrorism) and are considered more adaptable than comprehensive alternatives. They are used with the aim of inflicting damage only on those individuals or entities – including companies, criminal networks or rebel groups – directly linked to causes deemed unacceptable to sanctioning powers and to prevent them from accessing vital resources (Eriksson 2005). They include trade restrictions on particular services or goods (arms, oil, timber, gems); travel restrictions (visa and travel bans); diplomatic, cultural and sports restrictions; air traffic constraints; and financial/banking sanctions (bans on financial transactions, asset freezes, restrictions on investments).

The UN and EU, alongside their member states, have favoured targeted over

comprehensive sanctions since the 1990s (Biersteker et al. 2005),³ due in large part to mounting concerns over the humanitarian impacts of measures employed in the cold war period (Hubfauer et al. 2007). In 1995, the ambassadors of the five permanent members of the United Nations Security Council (UNSC) wrote that sanctions ‘should be directed to minimise unintended adverse side effects ... on the most vulnerable segments of targeted countries’ (UN Report S/1995/300). Some argue that the UN only began to take these concerns more seriously from 2000, however (Hawkins and Lloyd 2003).

For the EU, targeted sanctions represent one of a number of tools that can be used in pursuit of EU Common Foreign and Security Policy (CFSP) aims to maintain and restore international security and peace in accordance with the UN Charter. These measures are employed alongside others that include mediation, dialogue, peacekeeping, crisis management and conflict prevention. A key text outlining official EU sanctions policy, *Basic Principles on the Use of Restrictive Measures (Sanctions)* (Council document 10198/1/04), calls for the use of targeted sanctions in order to reduce negative impacts on civilians and maximise effects on those held responsible for perceived misdeeds. A 2007 UK parliamentary report denounced the use of comprehensive sanctions given the severe suffering they can inflict on ordinary civilians (House of Lords 2007), a stance mirrored throughout much of the EU.

Although the switch to targeted sanctions has helped to overcome many humanitarian concerns, various studies have continued to place a valuable spotlight on the subject. A recent review of the West’s pressure on Myanmar, for example, linked combined effects of targeted sanctions by the EU, the USA, Australia and Norway to intensified impoverishment among the general population (Bunte and Portela 2012). There are also indications that targeted sanctions on North Korea have caused the humanitarian situation to deteriorate significantly, particularly through cuts in food aid and fertiliser supplies (Taylor 2010).

The effects of targeted sanctions can sometimes be comparable to those of comprehensive measures due to heightened interconnectivity of world economies in recent decades (Biersteker et al. 2005), particularly in the case of measures that seriously interrupt financial flows (Elliott 2005). Targeted measures are also extremely complicated to implement and monitor and are not always able to achieve their stated aims (Eriksson 2010). This can result in a number of unintended consequences, which can include what Jentleson (2000) has termed ‘backfiring’ (enforcing the will of the target), ‘misfiring’ (negative humanitarian consequences), ‘cross-firing’ (placing strain on relations with allies) and ‘shooting in the foot’ (costs that are self-inflicted). As such, sanctions have been described as one of the most contentious topics in the international relations literature (Jentleson 2000), with some suggesting that only through their careful targeting can some of these problems be avoided (Wallensteen and Staibano 2005).

A return to broad-based sanctions: more pain for more gain?

In 1967, Johan Galtung critiqued prevailing assumptions on sanctions of the

time which predicted that the more marked the economic pain caused, the higher the likelihood of political compliance by the targeted regime. This led to later works which argued there was no observable causal relationship between the broadness of a given sanctions regime and the degree of resulting political change in the target country (Cortright 1995, Tostensen and Bull 2002).⁴ Earlier assumptions continued to prevail until the 1990s, however (Cortright 1995, Eriksson 2010), and were partly responsible for the stringent sanctions regimes enforced by the UN on Iraq, the former Yugoslavia and Haiti, and by the USA on Cuba.

While Iraq sanctions are credited by some for persuading the Iraqi regime to modify its behaviour in some areas (House of Lords 2007), later studies have found only a modest relationship between economic deprivation and a willingness to change on a political level, particularly when target countries are stable, strong, hostile and autocratic (Eriksson 2010). The past two decades have seen widespread acknowledgement by sanctions scholars and policy-makers alike that the civilian pain caused by comprehensive sanctions outweighs any political gain that may be achieved (Weiss et al. 1997, Weiss 1999, Eriksson 2010). This has resulted in a normative and practical shift towards targeted measures deemed necessary by the international community to ensure sanctions remain a viable instrument of foreign policy (Biersteker et al. 2005).

Drawing lessons from the past

Separating the effects of sanctions from other factors is a complex and sometimes impossible task as they do not work in isolation (Eriksson 2005, Sitt et al. 2010). As such, debate remains over the exact nature of impacts that different types of sanctions can have on civilian health (e.g. Spagat 2013) or, indeed, on a target country's economy (Hufbauer et al. 2007). Nevertheless, a raft of publications by medical professionals, sanctions specialists, international institutions and NGOs emerged throughout the 1990s and 2000s attempting to detail links between comprehensive sanctions and a decline in the health and well-being of populations living in targeted countries.

Most widely known is the case of UN sanctions on Iraq (1990–2003) described as the 'Mount Everest of sanctions in the post-Cold War era' (Hubfauer et al. 2007, p. 132). Early studies on the humanitarian impacts of Iraq sanctions included those conducted by various UN bodies and a range of papers published in *The Lancet*. Widely circulated claims held that by late 1995 some 500,000 Iraqi children had died due to malnutrition and disease resulting from sanctions (e.g. Zaidi and Fawzi 1995); a figure that was later refuted (Eriksson 2010).

Also widely cited on Iraq sanctions are studies by nursing professor Richard Garfield, who detailed a causal link between measures in place and a rise in childhood mortality and drop in the successful treatments of childhood cancers (1999) and philosophy professor Joy Gordon (2010), who used a range of sources to show how critical humanitarian goods were prevented from entering the country under US sanctions. Other observers linked sanctions to a steep rise in tuberculosis, measles and typhus in Iraqis of all ages (Morin and Miles 2000) and a return of formerly under-control diseases at epidemic levels, including

cholera and typhoid (McCarthy 2000). A rise in malaria was also reportedly exacerbated by sanctions alongside an increase in deaths from common bacterial and fungal infections and a curtailed ability to control infection, pain, nausea and vomiting linked to a range of ailments (Ali and Shah 2000, Akunjee and Ali 2002).

The USA's stringent and long-standing embargo on Cuba (1960–present) has been linked by international observers to a sharp rise in malnutrition, particularly among children (Garfield and Santana 1997, Barry 2000), an increase in waterborne disease morbidity and mortality (AAWH 1997), and heightened vulnerability to toxic factors (Kirkpatrick 1996). Others have noted a sharp increase in anaemia in pregnant women and a rise in typhoid fever, viral hepatitis, scabies, childhood diseases and hospital infections (AAWH 1997). In the case of UN comprehensive sanctions on the former Yugoslav states of Serbia and Montenegro (1992–2001), reported impacts included a rise in tuberculosis, measles and typhus alongside an increase in hospital deaths from both chronic and routine conditions (Garfield et al. 1995). Observers monitoring UN and US sanctions on Haiti (1991–1994) reported that difficulties procuring sufficient food and basic goods, caused in large part by sanctions, impacted negatively on childrearing, child nutrition and breastfeeding, and was also linked to a rise in prostitution (Gibbons and Garfield 1999).

These examples, while difficult to compare and remaining inconclusive in some areas, suggest that common trends occurred across a spectrum of cases in the field of health despite heterogeneous geopolitical, economic and social contexts. Studies also indicate that sanctions with the most significant effect on civilian health were financial and sectorwide embargoes (McCarthy 2000). Restrictions that led to sharp economic decline and caused a lack of available capital appeared to have a particularly marked humanitarian impact (Garfield et al. 1995).

These cases also indicate that comprehensive sanctions can impact on civilian health through a variety of channels, both direct and indirect. Bureaucratic and economic barriers linked to sanctions were associated with problems in the production, import and distribution of medicines, food and related products (WHO 1998, UNSC 1999, Akunjee and Ali 2002). They also led to increased fuel costs (Popal 2000) and a rise in the cost of basic commodities (Akunjee and Ali 2002). A decline in sanitation and diminished access to clean water was also widespread across cases, including, in some instances, through restrictions on the import of chlorination and sanitation products (Gordon 2010, Choonara 2013). Deterioration of Iraqi water treatment systems, for example, occurred



Other observers linked sanctions to a steep rise in tuberculosis, measles and typhus in Iraqis of all ages (Morin and Miles 2000) and a return of formerly under-control diseases at epidemic levels, including cholera and typhoid



Deterioration of Iraqi water treatment systems, for example, occurred due to barriers to the import of spare parts included in sanctions legislation, due in part to restrictions on chlorine imports linked to controls over the manufacture of chemical weapons

due to barriers to the import of spare parts included in sanctions legislation, due in part to restrictions on chlorine imports linked to controls over the manufacture of chemical weapons (McCarthy 2000). Factors such as insurance and reinsurance bans, restrictions on shipping and docking, and interruptions to electrical supplies were also seen to have a negative impact on civilian health (Akunjee and Ali 2002, Cortright and Lopez 2002). Cuts to welfare and remittances and disruptions to social stability and education also played a key role. The erosion of health care knowledge – including through curtailed access to the latest medical research and

the withdrawal of health workers from sanctioned countries – also contributed to the detrimental effect of sanctions (Garfield et al. 1995). The humanitarian impact of sanctions regimes was often accentuated when combined with factors such as civil unrest, war, infrastructure collapse, breakdown in the rule of law, refugee movements and environmental destruction (McCarthy 2000).

In sum, the literature on humanitarian impacts of comprehensive sanctions suggests that impacts on civilian health can be severe, multifaceted, complex, long term and 124 E.S. Moret frequently indirect in nature, even when food and medicine is exempted from legislation (Weiss et al. 1997, Morin and Miles 2000).

Iran sanctions

Economic sanctions on Iran have been tightened by a range of global actors in numerous rounds in recent years, including the USA, the EU, Canada, Switzerland, Japan and Australia (BBC 2012a). This has been principally in response to developments in the country's nuclear and missile programmes developed in breach of the Nuclear Non- Proliferation Treaty alongside reported human rights abuses. The EU has intensified what it terms its 'comprehensive restrictive measures'⁶ against Iran in various rounds since 2007 (European Council 2012).⁷ Implemented both within the UN framework and autonomously, they are the strictest and most far-reaching restrictions used against the country so far by the EU (Bassiri Tabrizi and Hanau Santini 2012).

EU officials were formerly reluctant to align EU policy on Iran with the stance of the US government whose sanctions against the country are particularly extensive (Gottermoeller 2007, Taylor 2010). A 2010 report prepared for US Congress, for example, described concerns held by EU officials that stringent measures against Iran's Central Bank represented 'an extreme step with potential humanitarian consequences' (Katzman 2010, p. 15). The EU has since approved restrictions on the country's Central Bank, however, alongside an oil embargo, trade bans on natural gas and metals, and other measures that complicate

business deals between Europe and Iran.

Like other sanctioning powers, the EU provides exemptions in sanctions legislation to allow for the continued trade with Iran in certain goods, including those required on humanitarian grounds (Council of the European Union 2012). The EU also seeks to make clear its intent to avoid contributing to a deterioration in citizens' well-being: 'restrictive measures ... are aimed at affecting Iran's nuclear programme and revenues of the Iranian regime used to fund the programme and are not aimed at the Iranian people' (Council of the European Union 2012). The UK Foreign and Commonwealth Office (FCO) employs a similar stance: 'financial sanctions against Iran are not intended to affect humanitarian goods and payments. That's why the UK government argued for and secured specific exemptions to allow humanitarian transactions to take place' (Dehghan 2012). In a similar vein, French President François Hollande stated: 'nous sommes prêts à prendre de nouvelles sanctions, non pas pour punir le grand peuple iranien, mais pour dire à ses dirigeants qu'il convient de reprendre la négociation avant qu'il ne soit trop tard' (Hollande 2012).

Unravelling cause and effect

Iran has suffered sharp economic decline since 2012 (Kanter et al. 2012). While economic mismanagement and investor unease surrounding talks of military action are likely key causes, international sanctions also appear to be having a significant impact. They have been blamed in part for contributing to acute inflation and a weakened currency that has seen at least an 80 per cent drop in the value of the rial against the dollar throughout 2012 (BBC 2012a). They have also contributed to a reduction in Iranian daily oil production to the lowest levels recorded since 1988 and a drop in petroleum exports by over 40 per cent since early 2012 (BBC 2012). The EU's oil embargo is considered particularly significant as European trade formerly accounted for around 20 per cent of Iran's oil exports; European companies have also been prevented from underwriting Iranian shipping, formerly accounting for some 90 per cent of insurance agreements (BBC 2012).

The need for international companies to apply for special licences to sell exempted merchandise, including medicine, has reportedly started to discourage many companies from engaging in trade with Iran (Chaffin 2012, Financial Times 2012). Confusing bureaucracy, risks of lengthy delays in payments and reluctance among major banks to facilitate financial transactions have also been cited as factors contributing to Iran's economic woes (Erdbrink 2012, Borger and Dehghan 2013). Restrictions on Iranian ports and shipping companies, including insurance bans, have led to a reported drop in cargo traffic (Heydarian 2012) and increased transport costs, as many importers have been forced to resort to more costly financial channels and the use of middlemen to circumvent potential problems with sanctions legislation (Financial Times 2012).

Restrictions on Iran's Central Bank have reportedly impacted on Iran's ability to import drugs, raw materials, pharmaceutical and hospital machinery, sterilising machines and other equipment required to treat serious diseases (Financial Times 2012, Borger and Dehghan 2013). Press reports have cited



Press reports have cited ordinary Iranians who complain of mounting difficulties obtaining basic goods, including clothing, medicine and agricultural products; leading the Iranian government to purchase emergency food provisions

ordinary Iranians who complain of mounting difficulties obtaining basic goods, including clothing, medicine and agricultural products; leading the Iranian government to purchase emergency food provisions (Heydarian 2012). *Le Monde* (2012) cites a sharp rise in the price of locally produced medicines since early 2012 resulting in a mounting dependence on smuggled goods from Turkey and elsewhere. This can be problematic as medicines risk being counterfeit, contaminated, spoiled by climatic extremes or subject to sharp price increases (Borger and Dehghan 2013).

Discerning the impacts of sanctions-associated macroeconomic changes and bureaucratic constraints in Iran is not straightforward and it highlights the pressing need for further study. Press reporting on the subject has proliferated since early 2012, though it often fails to cite much in the way of evidence and frequently employs a highly emotive stance. Various sources focus on the risk to the lives of ordinary Iranians (and children in particular); centring on the human rights angle of current sanctions legislation (Dehghan 2012, Salami 2012a, Sahimi and Sadeghi-Boroujerdi 2013). Some draw comparisons between developments in Iran and humanitarian outcomes of former UN sanctions on Iraq (e.g. Hussain 2012).

Other press reports seek to demonstrate direct, observable impacts, such as reductions in the availability of particular drugs or medical equipment. One article in the *Financial Times*, for example, argues that a drop in petrol revenues impacts not only on government spending (including welfare), but also affects the well-being of the Iranian population indirectly, where petrol is considered a vital commodity in strategic terms because so many depend on it to carry out their jobs (Bozogmehr and Blas 2010). A report on Iranian government-controlled Press TV suggests that negative impacts are being felt most strongly in the fields of toxicology, chemotherapy, nanotechnology and biotechnology (Salami 2012b). Other articles cite rising problems in the treatment of diabetes, haemophilia, cancers, thalassaemia, HIV/AIDS and multiple sclerosis alongside those requiring organ transplants or kidney dialysis (Erdbrink 2012, *Financial Times* 2012, Borger and Dehghan 2013).

Academic studies on the impacts of Iran sanctions on health remain largely absent from the literature at the time of writing; not entirely surprising given the short amount of time that has passed since the adoption of tightened measures. Nevertheless, some 126 E.S. Moret political science studies (e.g. Bassiri Tabrizi and Hanau Santini 2012) warn that the EU's move towards comprehensive restrictive measures on Iran may bring about a 'humanitarian catastrophe' reminiscent of Iraq. Studies conducted in an official capacity are also rare or poorly publicised; though a recent statement by UN Secretary General Ban-Ki

Moon, issued on 5 October 2012, suggests mounting concern on the subject:

The sanctions imposed on the Islamic Republic of Iran have had significant effects on the general population, including an escalation in inflation, a rise in commodities and energy costs, an increase in the rate of unemployment and a shortage of necessary items, including medicine ... The sanctions also appear to be affecting humanitarian operations in the country ... Even companies that have obtained the requisite licence to import food and medicine are facing difficulties in finding third-country banks to process transactions. (Nichols and Charbonneau 2012).

An FCO spokesperson, quoted in mid-October 2012, relayed a perspective widely held among the EU and member state policy-makers interviewed for this paper which places much of the blame for a worsening humanitarian situation on the Iranian government:

Whilst it is true that sanctions are having an impact on the Iranian population, this is compounded by the Iranian government's economic mismanagement. Iran's leaders are responsible for any impact on their people and can make the choices which would bring sanctions to an end (Dehghan 2012).

US Treasury spokesperson, John Sullivan, employed a similar stance:

Financial sanctions against Iran are in place because of the Iranian government's refusal to address the international community's well-founded concerns about its nuclear programme ... If there is in fact a shortage of some medicines in Iran, it is due to choices made by the Iranian government, not the US government. (Borger and Dehghan 2013).

Coverage of comments made by other US officials on the recent tightening of Iran sanctions has served to divert public interest away from more considered approaches employed elsewhere by policy-makers. US Republican Senator, Mark Kirk, a leading figure in the US sanctions policy on Iran, said about the country in October 2011 that it was 'okay to take the food out of the mouths of the citizens from a government that's plotting an attack directly on American soil'. He added his ambition was that Iran's currency should 'become like [that of] North Korea' (Rogin 2012). His comments provoked outrage in the press (e.g. Hussain 2012), particularly as North Korea's faminerelated deaths – provoked by severe economic problems, infrastructural collapse and food shortages – are estimated to have entered into the millions (Noland 2003). In a similar vein, US Democrat Bill Sherman wrote in a political blog in 2010, 'The goal ... is to drive Iran's economy into a crisis and force its leaders to the negotiating table', adding, 'Critics ... argued that these measures will hurt the



US Democrat Bill Sherman wrote in a political blog in 2010, ‘The goal ... is to drive Iran’s economy into a crisis and force its leaders to the negotiating table’, adding, ‘Critics ... argued that these measures will hurt the Iranian people

Iranian people. Quite frankly, we need [them] to do just that’ (Sherman 2010). A recent article in the Guardian cites interviews with unnamed European officials stating that ‘discussions are underway in Brussels on how to strengthen safeguards for atrisk Iranians’; and talks were also taking place between London, Washington and Brussels ‘with the aim of unblocking the supply of medicines ... [though had so far failed to have reached] a decisive outcome ’ (Borger and Dehghan 2013). The same article claims that ‘European officials are aware of the potential for disaster reminiscent of the debacle of the

UN oil-for-food programme imposed on Iraq’ but notes that ‘the scale of the looming Iranian health crisis threatens to overwhelm recent efforts to mitigate the sanctions regime’. In contrast, interviews for this paper with EU officials working on Iran sanctions (throughout November 2012) suggest that little in the way of policy initiatives is currently under way in the EU to monitor, research or help address growing public concern regarding possible negative humanitarian impacts of international sanctions in Iran.

Syria sanctions

Faced with escalating violence and repression by Syrian government forces against opposition groups, the USA was the first to impose sanctions on the country in April 2011 (US Executive Order 13,572). The UNSC has discussed various resolutions to tackle the crisis, only to repeatedly face vetoes by Russia and China. With few policy alternatives available and military intervention remaining a contentious and complicated option at the time of writing, various other countries and regional groupings have imposed sanctions on the Syrian government. These have included the EU, the Arab League, Turkey, Switzerland, Canada, Australia, Norway and Japan (BBC 2012b).

The EU’s ‘comprehensive restrictive measures’, in place since May 2011, are among the most stringent levied against the Syrian government given the former weight of shared trade (EU 2012). Sanctions sit at the heart of the EU’s response to the Syria conflict (Portela 2012) and have been gradually broadened since their inception (EU 2012). Like those placed on Iran, these measures are unusual in that they were agreed with unparalleled speed by EU member states and are unprecedented on account of their broadness and reach (Portela 2012). Instigated at the unusual behest of the League of Arab States, the now-elaborate sanctions package targets a number of key areas: the energy/oil sector (including bans on the import, transport and insurance of Syrian oil products); the banking, financial and trade sectors; a group of individuals and entities linked to regime-led repression (in the form of travel bans and asset freezes); and materials and

equipment employed in repression and monitoring (Friberg Lyme 2012). In addition to exemptions on the sale of humanitarian-related goods in international sanctions legislation, the EU has intensified its efforts to provide medical aid to those parts of Syria deemed to be in most need of assistance (EU 2012).

Unravelling cause and effect

Like other countries facing violent civil unrest, identifying specific effects of sanctions is a particular challenge in the case of Syria (telephone interview with UN official, 27 November 2012), particularly as the conflict continues to evolve at great pace at the time of writing. International NGOs, including Physicians for Human Rights, Amnesty International and Médecins Sans Frontières, have reported ‘gross breaches of medical neutrality’ and the deliberate targeting by government forces of medical facilities, health workers and patients (Bamania 2012, p. 1936). Medical professionals have united to criticise the Syrian government’s ‘disregard for the Geneva Conventions ... alongside the failure of the UN system to prevent these violations’ (The Lancet 2012, p. 537). Fighting is reported to have destroyed pharmaceutical factories (Peel 2012) with pharmacies closing throughout much of the country (The Lancet 2012).

Many doctors who have remained in Syria – or those who have been smuggled, along with medicines, across borders into areas such as Homs – reportedly risk their lives operating secret field hospitals that must relocate regularly to avoid detection (The Lancet 2012, Bamania 2012). According to Amnesty International, being found with medical supplies in Syria can be ‘worse than being caught with weapons’ (The Lancet 2012, p. 537). Large humanitarian and health charities have become increasingly reluctant to work in the country (Bamania 2012).

Syria’s mounting public health and humanitarian catastrophe has seen a drop in government provisions of all basic services in parts of the country, including for health care and education (Warrick and Fordham 2012). A UN mission to Syria in March 2012 reported that almost all governorates visited around the country reported shortages of essential medicines (Friberg Lyme 2012). The UN Office for the Coordination of Humanitarian Affairs found that 10 per cent of health centres, 35 per cent of hospitals and 40 per cent of Syria’s ambulances have been severely damaged (Coutts et al. 2013). Direct effects of the fighting have reportedly led to difficulties in dealing with routine illnesses alongside countless injuries from blasts, shelling, sniper wounds, collapsed buildings and torture (Bamania 2012). Chemical weapon attacks by the Assad regime were also documented in 2013, leading to a US–Russian brokered agreement with the Syrian government authorising the Organisation for the Prohibition of Chemical Weapons (OPCW) teams to destroy all Syrian chemical weapons and production facilities by mid- 2014 (OPCW 2013).

Vaccination and disease registration programmes have ceased in much of the country since the onset of fighting (Coutts et al. 2013). Other cited concerns include serious psychological distress, particularly among children, and dire health problems faced by refugees, including severely inadequate sanitation and shelter, and poor access to medicine and food (Al Faisal et al. 2012). The World

Food Programme has warned of epidemic outbreaks and widespread hunger in Syria (United Nations 2012). The Tropical Medical Bureau (2012) presents credible reports of a rise in tuberculosis in urban areas and refugee camps and an increase in leishmaniasis among Syrian children.

Given the mounting humanitarian emergency in Syria and worsening conflict, how might sanctions be adding additional pressure to the already dire situation? Restrictions on the energy and financial sectors are thought to be having a particularly devastating impact on the Syrian economy (EU 2012). They have caused a sharp drop in cash reserves (Mahony 2012) and disrupt the Syrian government's access to funds, including through restricting access to foreign currency and difficulties obtaining credit (Landis 2012). A recent study conducted on behalf of the Danish Institute for International Studies (Friberg Lyme 2012) suggests that sanctions, especially those implemented by the EU, have played an important role in the general decline of socio-economic well-being in Syria, including in the area of health. The study concludes that sanctions have contributed to the following:

- Severe economic deterioration.
- At least a doubling in unemployment.
- Fall in salaries in both the public and private sectors, particularly among non-
- Syrian refugee groups.
- Rise in the price of basic commodities, impacting most severely those on fixed incomes, such as the elderly (see also Sen et al. 2012, p. 198).
- Cuts to state revenues, impacting on the welfare state, among other areas.
- European Security 129
- Restrictions on the receipt of remittances.
- Cuts to micro-credit schemes, formerly supporting thousands of women.
- Difficulties importing both medicines and food (including through companies' overcompliance with financial sanctions, reluctance among international financial institutions to trade with Syrian companies and difficulties for Syrian companies to obtain credit to pay for goods).
- Increased production costs, a rise in consumer prices and shortages of medicines caused by a surge in the price of raw materials and lack of fuel.
- Reduction in domestic medicine production, whereby almost 93 per cent of drugs consumed in Syria are produced domestically but depend on imported medical equipment, machinery and active agents.
- Recorded increase in rates of depression, suicide and domestic violence linked to decline of socio-economic well-being.

Studies published in *The Lancet* and the *Journal of Public Health* paint a similar picture. Whilst acknowledging the far-reaching effects of the civil war, shortages of paediatric medicine in the few hospitals that continue to operate in the country are attributed in part to international sanctions (*The Lancet* 2012). They have also

been blamed for exacerbating the ability of ordinary Syrians to meet payments for basic essential goods and medicines (Al Faisal et al. 2012). Sanctions on the Syrian energy sector have also been linked to daily interruptions in electrical supplies (Sen et al. 2012) presenting problems that include the safe storage of medicines and vaccines, and the ability to conduct operations. Water sanitation has also deteriorated, blamed in part on sanctions, which has reportedly led to a rise in waterborne infections and diarrhoeal diseases, particularly among the young (Al Faisal et al. 2012).

Press reporting in Syria on the impacts of sanctions on health is more limited

than in the case of Iran, most likely due to heightened interest in more pressing concerns surrounding the ongoing civil war and refugee crisis. One 2012 Financial Times article attributes partial blame on international sanctions for the collapse of the Syrian pound, widespread job losses, a more than doubling of the price of basic essentials such as milk, eggs and rice, and a threefold increase in the cost of heating oil (Peel 2012). This paper claims that sanctions have led to difficulties importing all types of goods, including medicines, which has hampered the treatment of chronic illnesses, such as diabetes and respiratory diseases, alongside common contagious ailments.

Confirming views outlined earlier, a group of UN humanitarian officials working to supply aid to Syria from Damascus and Brussels interviewed for this paper concurred that sanctions appeared to be impacting on civilian health through a general decline of the economy, job losses and ‘the fact that (mainly US) banking sanctions have made it complicated, often more expensive, [though] not impossible, to procure hardware and supplies for essential services such as medical equipment and drugs’ (email interviews, 27–29 November 2012).

Like other sanctioning powers, and similar to the situation in Iran, the EU has sought to demonstrate that sanctions are not targeted against the Syrian people and has attempted to avoid blame for any adverse impacts. A European External Action Service (EEAS) report, for example, attributes much of the responsibility for Syria’s current economic and health care problems to the Syrian government: The economic hardship felt in Syria is primarily a consequence of the policies of the Syrian regime. The violent repression of popular protest and disregard for national law – and international law – has discouraged tourism, trade, investment and economic activities. The regime’s channelling of national resources for its own purposes at the expense of the economic and social interests of the general public has contributed to the hardship faced by citizens. Furthermore, the Syrian regime is abusing its control over basic services such as cutting off electricity and water to deter further protest and cause increased suffering to civilians



Sanctions on the Syrian energy sector have also been linked to daily interruptions in electrical supplies presenting problems that include the safe storage of medicines and vaccines, and the ability to conduct operations



EU sanctions scholars have increasingly begun to raise concerns over EU measures against Syria

(EEAS 2012, p. 1).

While no doubt a legitimate argument,⁹ failing to acknowledge at least some responsibility for humanitarian impacts that broadened sanctions may be having on the country's civilian population could open the EU to criticism. EU sanctions scholars have increasingly begun to raise concerns over EU measures against Syria. Eriksson and Giumelli (2011, p. 2), for example, have warned:

The EU was [initially] careful to avoid negative humanitarian effects by going after only powerful players in the Assad regime ... European officials [now] have ditched those concerns and moved

towards heavy, or comprehensive, sanctions ... imposed with little regard for their impact on Syria's civilian population – the population that the EU ostensibly wants to help – in the hope that, to avoid their own people's suffering, leaders will change their behaviour.

Portela (2012, p. 2) has cautioned: 'The fact that the EU incorporates selective trade bans in its sanctions has distressing implications ... selective embargoes affects entire sectors and are ... more likely to disadvantage individuals bearing no responsibility for the condemned policies'.

EU sanctions policy: matching rhetoric with action

The EU is clearly not the only sanctioning power whose measures may be impacting negatively on the Iranian and Syrian populations. Similarly, sanctions are clearly not the only or main driving force sparking economic decline, civilian suffering and mounting health care problems. In Iran, prevailing concerns centre on the complex interplay between long-term economic mismanagement, government corruption and investor unease. In Syria, the pervasive and devastating effects of civil war and deliberate government targeting of medical facilities and workers by pro-regime forces represent overriding concerns (Bamania 2012, Maziak et al. 2012). Access to reliable statistics is also limited in both cases intensifying difficulties in establishing cause and effect.

Compounding the problem is the fact that governments of targeted regimes frequently exaggerate the impact of sanctions on health care for political purposes (as argued by a UN official, interviewed 27 November 2012), serving to bolster waning popularity among domestic audiences or garner support from the international community.¹⁰ Nonstate actors, such as rebel groups in Syria, may also purposely hinder the provision of medicines and aid for political purposes (interview with humanitarian aid worker dealing with the refugee crisis in Syria, 12 January 2013).

In addition, targeted governments can be the key culprits in causing humanitarian distress among their people. In the cases of Iraq and the former

Yugoslavia, Saddam Hussein and Slobodan Milošević and their forces were the main perpetrators responsible for the repression of vulnerable groups and the breakdown of public health provisions (Brumage 2000). In the case of comprehensive sanctions, regime leaders can also be in a position to control the flow of hard-to-access commodities, such as medicines and food, and sell them at elevated prices or retain them for use among pro-government factions (Hufbauer et al. 2007, Sitt et al. 2010).

Despite these considerations, earlier studies demonstrate clear and often unexpected impacts of broad-based sanctions, which suggests that any move away from carefully targeted measures should be accompanied by equally careful mitigation of risks associated with unplanned humanitarian outcomes (e.g. as advocated by De Vries and Hazelzet 2005 in the EU context or Weiss et al. 1997 in relation to comprehensive measures more generally). Contrary to this view, officials at the UN, European Commission (EC) and EEAS in Geneva, Brussels and Damascus working on the provision of humanitarian assistance to Syria confirmed that there was no UN or EU research or monitoring currently under way on the link between Syria sanctions and health to the best of their knowledge (phone and email interviews, 27–29 November 2012).

One EC official from the Department for Humanitarian Aid (ECHO) said ‘the EU does not have a mandate to assess the humanitarian impact of sanctions’ (telephone interview, 29 November 2012), adding that the provision of EU aid was ‘not designed to match any damage caused by broadened restrictive measures on either country’. This echoes findings of Staibano (2005) in relation to the UN and Eriksson (2010) regarding the EU, who suggest that sanctions teams in both instances tended to be more reactive than systematic in their work.

Where now for EU sanctions policy?

There are sound reasons why the international community, including stakeholders and policy-makers in the EU, should be concerned about the potential health impacts of recently tightened sanctions on Iran and Syria – either proven or perceived. First, policies that contribute to a devastating decline in health standards among innocent civilians raise serious ethical and moral questions, irrelevant of whether or not sanctioning powers reach their stated policy aims over the course of time.

Second, the EU and its member states are signatories to international agreements. The UN Charter and the Universal Declaration of Human Rights guarantee the right to life, medicine, shelter and other basic needs to all individuals. The Fourth Geneva Convention calls for the unhindered access of medical supplies and food in situations of military conflict. The UN Covenant for Economic, Social and Cultural Rights calls for uninterrupted access to food, sanitation supplies and pharmaceuticals (Sen et al. 2012). Although coercive measures that include sanctions are justified under Chapter VII, Articles 39, 40 and 41 of the UN Charter in contexts where fundamental interests of a state can be considered at risk (Sitt et al. 2010), the way in which they are used remains poorly regulated under international law (Cameron 2005).

In the case of selective embargoes, exemptions on humanitarian grounds or the

simple provision of supplementary aid are often not enough to ensure basic access to health care (Ganson-Myshkin 2000). Described as ‘an “affirmative obligation” [on the part of sanctioning powers] to ensure that humanitarian assistance is actually delivered’ to target countries (Cortright 1995, p. 2), Cameron (2005, p. 197) adds: ‘humanitarian exceptions... may remove some human rights problems, and ... ameliorate the position of individuals affected by sanctions, but will definitely not solve all the problems involved’. The EU, like the UN, faces numerous internal constraints preventing more effective implementation of sanctions policy and the monitoring of unforeseen outcomes, however. The reasons for this are numerous and widely documented (e.g. Hufbauer et al. 2007, Eriksson 2010, Vines 2012).

First, sanctions implementation tends to suffer from understaffing and a lack of resources, both within EU institutions and member state governments (phone interview with EU member state official, 13 November 2012). Targeted sanctions, in contrast to comprehensive measures, tend to be more administratively complicated and timeconsuming to implement: demanding more complex capacities in order for them to remain effective (Wallenstein and Staibano 2005). Taking some of these concerns into account, Basic Principles acknowledges that the EU is ‘engaged in a constant learning process aimed at improving its implementation capacity’ (Sitt et al. 2010, p. 16).

Second, a weak institutional memory, absence of established procedures and poor coordination between the EU institutions contribute to an environment in which important matters are sometimes overlooked in relation to sanctions policy-making (De Vries and Hazelzet 2005, Giumelli 2010, Burke 2012). This is compounded by the fact that various teams hold some responsibility for sanctions in the EU, including that which was transferred from the European Council to the EEAS following its creation and another housed in the European Commission (Portela 2013). Other sanctions-related responsibilities are held by member state governments, further complicating the matter.

Third, sanctions policies are often overly narrow in scope, whereby the use of static, rather than adaptable, wording can prevent flexibility in the EU’s ability to respond efficiently to rapidly changing circumstances on the ground (Eriksson 2010). Similar to the situation observed at the UN (Eriksson 2010), different sanctions policies may enjoy different levels of political support in the EU and among member states, which can affect how they are implemented and monitored. The possibility also exists that the EU might become increasingly reluctant to use targeted sanctions given recent cases brought to the European Court of Justice by targeted individuals, including that of Saudi businessman, Yassin Abdullah Kadi (the Kadi case).

What remains unclear at this stage is whether EU-tightened measures against Iran and Syria represent a new page in the EU’s sanctions practices, following a trajectory of increased confidence and willingness to use such tools over recent years. If a concerted decision has been made by EU policy-makers to abandon carefully targeted sanctions in favour of tougher measures, as appears to be the case regarding EU restrictive measures on Iran and Syria, the humanitarian ramifications should be acknowledged and the moral and practical

responsibilities for such decisions should be taken on board.

This paper advocates a return to more strictly targeted measures by the EU in order to minimise negative humanitarian impacts of ongoing sanctions regimes in Iran and Syria. The author also recommends the instigation of systematic assessments of the humanitarian impacts of sanctions regimes more widely – multilateral and unilateral alike – as part of their implementation and monitoring. Such a move could reap strategic benefits to sanctioning powers in appeasing critics while also convincing economically and politically important third parties to strengthen their support to ongoing and future sanctions regimes.

In the short term, steps should be taken to address both likely and proven humanitarian outcomes of measures already under way. They should seek to remedy the ongoing problem associated with sanctions policy-making whereby ‘legitimate concerns about mitigating humanitarian consequences ... [sometimes receives] inadequate attention’ (Cortright and Lopez 2005, p. 67). EU policy-makers should make clear who within the EU, UN, member states and among other partner organisations holds ownership for the monitoring and mitigating of humanitarian impacts of sanctions in Iran and Syria. This should include improved mechanisms to implement preventative monitoring for water purity, infectious disease transmission and food availability.

Assistance to groups most frequently affected by sharp economic decline should be prioritised, particularly women, children, the elderly and those with chronic health complaints. The academic and NGO communities should also play a key role in conducting multidisciplinary studies that integrate the fields of medical, social, legal and political sciences. Further study investigating the current levels of humanitarian assistance offered to both countries in relation to any mismatch between existing needs is also urgently required.

Conclusion

The unparalleled tightening of international economic sanctions on Iran and Syria’s financial and energy sectors since 2012 appears to be contributing to a marked economic decline in both countries. The cumulative effect of sanctions employed by a range of actors on Iran and Syria can be considered de facto comprehensive measures linked elsewhere to widespread negative impacts on civilian health and well-being. In the case of the EU, its ‘comprehensive restrictive measures’ in place against both countries – significant given the former weight of shared trade – mark a departure from the EU’s history of carefully targeted sanctions. The use of such measures also appears to sit in contrast to the EU’s self-proclaimed commitment to foreign policy values



The unparalleled tightening of international economic sanctions on Iran and Syria’s financial and energy sectors since 2012 appears to be contributing to a marked economic decline in both countries



Interviews with EU officials and analysis of official discourse conducted for this paper suggest a failure on the part of the EU, at the time of writing, to recognise any responsibility for detrimental effects caused to date

marked by keen humanitarian concerns. In seeking to address the problematic task of unravelling the effects of sanctions from other factors such as economic mismanagement, investor unease, armed conflict and deliberate withholding of medicines and food by hegemonic groups, the author acknowledges the validity of arguments put forward by EU policy-makers regarding difficulties establishing cause and effect. Nevertheless, findings from earlier studies reviewed for this paper demonstrate how broad-based sanctions can contribute to a decline in citizen well-being in a multitude of unexpected

and detrimental ways, both directly and indirectly.

Interviews with EU officials and analysis of official discourse conducted for this paper suggest a failure on the part of the EU, at the time of writing, to recognise any responsibility for detrimental effects caused to date. This is despite mounting concern in press reporting, academic circles and at the UN. Such a stance could open the EU to criticism, as policies that contribute to a serious decline in health standards among innocent civilians raise serious ethical, moral and legal questions. Evidence suggests that exemptions on humanitarian grounds or the simple provision of supplementary aid are often not sufficient to ensure access to basic health care in the case of sector-wide embargoes. Such policies also fail to take heed of, at least in public rhetoric, findings which suggest that measures that impose more suffering on an entire country do not necessarily lead to better chances of meeting stated foreign policy aims.

The author acknowledges that the EU is not the only sanctioning power whose measures may be impacting negatively on the Iranian and Syrian populations and also recognises the considerable institutional and bureaucratic constraints that currently hinder more efficient monitoring of existing sanctions regimes, both in the EU and UN contexts. Serious challenges are also posed by the scale of urgency regarding mounting political, diplomatic and security tensions in the wider region, and the growing humanitarian catastrophe unfolding in Syria in light of the civil war. Despite these concerns, the author argues that there should be no excuse for knowingly contributing to the devastating and long-term impacts of factors including malnutrition, contaminated water or substandard health care, which in many cases may leave a permanent mark on a population. This paper recommends further study to explore whether broadened measures against Iran and Syria represent a new phase for EU sanctions practice. The author suggests that if a concerted decision has been made to abandon carefully targeted sanctions in favour of tougher measures, it would appear to be in the EU's long-term strategic interest to acknowledge the humanitarian implications and take on board appropriate moral and practical responsibilities. This paper

concludes by advocating a return to more strictly targeted sanctions, the instigation of more widespread systematic assessments of humanitarian impacts and the strengthening of mechanisms to counter the negative effects of measures already in place. This will be vital if sanctions are to remain a viable instrument of foreign and security policy to the EU and its allies in coming years and if a worsening humanitarian situation is to be avoided.

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Economic Sanctions and Protection of Fundamental Human Rights:

A Review of the ICJ's Ruling on Alleged Violations of the Iran-U.S. Treaty of Amity

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Abstract:

This article studies the unilateral regime of sanctions and their impact on two fundamental human rights: the right to food and the right to health. This article argues that international tribunals will set the level of obligation required to protect these human rights by observing the empirical correlation between economic sanctions and the deterioration of these rights in target states. By reviewing the elements that contribute to the strength of punitive economic measures, this article shows how sanctions have a greater impact on a population. This article concludes that the more powerful the economic sanctions, the higher the level of obligation of the imposing state will be to ensure that the sanctioned state's population's fundamental rights are protected.

1. INTRODUCTION

Economic sanctions² have become the most relevant instrument of foreign policy

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2 See generally Thomas W. Walde, Managing the Risk of Sanctions in the Global Oil & Gas Industry: Corporate Response under Political, Legal and Commercial Pressures, 36 TEXAS INT'L L.J. 184

(2001) ("economic sanctions" generally refer to specific punitive economic actions which goes further than the traditional trade-based models of sanctions and includes any effective restrictive measures).

designed to respond to a wrongful act or policy of a state,³ such as aggression,⁴ support of terrorism,⁵ involvement in internal wars,⁶ and the violation of human rights.⁷ Sanctions are primarily imposed to change the behavior of the wrongdoer state. However, they have been widely used as an instrument to induce regime change⁸ or even as a complement to war.⁹ The increasing global interdependence associated with the flow of goods and services has significantly increased the power of economic sanctions, making them a potentially devastating policy for the target country's people. Economic sanctions, which are often designed to address violations of civil and political rights of the wrongdoer states, instead undermine the economic and social rights of the people living in the target country.¹⁰

The negative humanitarian impact of economic sanctions has raised questions on the limits to which embargoes should extend in order to punish the wrongful deeds of a target country. This inquiry extends to whether sanctioning states have any responsibility and the duty of care for the effects of their prohibitive regulations and, if so, where the responsibility of sanctioning states lies regarding the humanitarian impact of such restrictive measures.

To address these issues, the Draft Articles on Responsibility of States for Internationally Wrongful Acts,¹¹ adopted by the International Law Commission ("ILC") in August 2001, developed a legal framework for when a state is held responsible for breaching an international obligation and the adoption of countermeasures between states. Article 50(1)(b) of the Draft Articles on Responsibility of States requires that the adoption of countermeasures by



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3 Jana Ilieva, Aleksandar Dashtevski, & Filip Kokotovic, *Economic Sanctions in International Law*, 9 *UTMS J. ECON.* 201, 201 (2018).

4 For example, economic sanction against Germany in 1930s. GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* 5 (2d ed. 1990).

5 For example, economic sanction against Libya in late 1980s and early 1990s. *Id.* at 16.

6 For example, economic sanctions against internal wars in Somalia, Liberia, Angola, Rwanda, Sierra Leone and FR Yugoslavia (Kosovo). *Id.* at 28–32.

7 See PETER WALLENSTEEN, *A CENTURY OF ECONOMIC SANCTIONS: A FIELD REVISITED* 2 (2000).

8 Lenina Pomeranz, *Economic Sanctions as a Political Instrument in International Relations*, 3 *REVISTA TEMPO DO MUNDO* 181, 193 (2017).

9 David J. Lektzian & Christopher M. Sprecher, *Sanctions, Signals, and Militarized Conflict*, 51 *AM. J. POL. SCI.* 415, 415 (2007).

10 Amy Howlett, *Getting "Smart": Crafting Economic Sanctions That Respect All Human Rights*, 73 *FORDHAM L. REV.* 1199, 1200 (2004).

11 See generally Int'l Law Comm'n, *Rep. on Responsibility of States for Internationally Wrongful Acts, With Commentaries, Work if Its Fifty-Third Session*, U.N. Doc. A/56/10 (2001).



The ICJ found that rights asserted by Iran under the 1955 Treaty of Amity, “so far as they relate to the importation and purchase of goods required for humanitarian needs[,]” are plausible and not even the treaty’s national security exception can prohibit Iran’s right to humanitarian goods

states shall not affect “obligations for the protection of fundamental human rights.”¹² The strong language of the Article 50(1)(b) raises a question as to the level of obligation a sanctioning state is subject to when ensuring that its economic countermeasures do not affect the protection of fundamental human rights.

Similarly, the ruling of the International Court of Justice (“ICJ”) regarding Iran’s request for the application of provisional measures in *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. United States)*, issued October 3, 2018,

was a step forward in establishing a higher level of obligation on the United States for the extraterritorial effects of its unilateral sanctions. The ICJ found that rights asserted by Iran under the 1955 Treaty of Amity, “so far as they relate to the importation and purchase of goods required for humanitarian needs[,]” are plausible and not even the treaty’s national security exception can prohibit Iran’s right to humanitarian goods.¹³ The ICJ went a step further, ruling that the mere existence of specific carve-outs for humanitarian trade in the sanctions does not release the United States from its obligations and asked the United States to “ensure payments and other transfers of funds . . . relat[ing] to [humanitarian] goods and services” are not restricted.¹⁴

This article consists of three main parts. First, it explains the evolution of international law and different approaches in addressing the humanitarian impact of economic sanctions. Second, it analyzes the elements that contribute to the power of a sanction program. In doing so, the article sets out a conceptual framework for a higher level of obligation to protect fundamental human rights in the face of such powerful economic sanctions. Finally, the third part consists of a review and analysis of the ICJ ruling regarding Iran’s request for the indication of provisional measures following the United States’ withdrawal from the Iran nuclear deal, also known as the Joint Comprehensive Plan of Action (“JCPOA”). Through examination of the ICJ’s ruling, this article concludes that there is a higher level of obligation on imposing states to ensure the protection of the fundamental human rights of sanctioned states’ populations.

2. ECONOMIC SANCTIONS AND RIGHT TO FOOD AND MEDICINE

¹² *Id.* at 131.

¹³ *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. U.S.)*, Request for the Indication of Provisional Measures, ¶ 70 (July 16, 2018), <https://www.icj-cij.org/files/case-related/175/175-20180716-REQ-01-00-EN.pdf> [hereinafter *Iranian Provisional Measures*].

¹⁴ *Id.* ¶ 98.

Post-Cold War developments in international law and the integration of national economies have contributed to the increased strength and effectiveness of economic sanctions.¹⁵ As such, economic sanctions became a desirable and popular policy tool in the post-Cold War period.¹⁶ The United Nations Security Council (“UNSC”), the body tasked with the adoption of multilateral sanctions under the UN Charter, resorted to these measures thirteen times throughout the 1990s.¹⁷ The United States was the most frequent user of economic sanctions, sanctioning more than thirty-five countries between 1993 and 1996.¹⁸ This evolution transformed economic sanctions from isolated “emergency incidents” in foreign affairs to a common feature in foreign and national security policy.¹⁹

International trade plays a key role in the realization of both the right to food²⁰ and health. Cross-border trade provides opportunities “to reduce hunger and poverty in many of the developing countries.”²¹ In order to provide access to adequate food and life-saving medicine, it is necessary that these goods transfer from production sites to places of consumption. Exportation of these essential goods from countries producing to countries consuming them is a major element in increasing food and medicine security.²² The dependence of developing and underdeveloped countries on the importation of foodstuffs and medicines has made restrictions on access to international markets and the free movement of goods and services an effective strategy for the sanctioning state to achieve its foreign policy goals with significant negative consequences.²³

The sanctioning countries have treated the trade of humanitarian goods (food and medicine) differently in their various sanction programs since World War

15 William H. Kaempfer & Anton D. Lowenberg, *The Political Economy of Economic Sanctions*, in 2 HANDBOOK OF DEFENSE ECONOMICS 868, 869 (Todd Sandler & Keith Hartley eds., 2007) (“Historically, economic sanctions . . . were used by Napoleon in the Continental System commencing in 1806, by Thomas Jefferson in the Embargo Act of 1807, and by the League of Nations against Italy in 1935 . . .”).

16 See generally Joy Gordon, *Economic Sanctions, Just War Doctrine, and the “Fearful Spectacle of the Civilian Dead,”* 49 CROSSCURRENTS 387 (1999).

17 See SELECT COMMITTEE ON ECONOMIC AFFAIRS, *THE IMPACT OF ECONOMIC SANCTIONS*, 2006-7, HL 96-I, ¶ 17 (UK) (UNSC has “imposed sanctions against Afghanistan, Angola, Cote d’Ivoire, the Democratic Republic of the Congo (DRC), Ethiopia and Eritrea, Haiti, Iraq, Liberia, Libya, Rwanda, Sierra Leone, Somalia, Sudan, the former Yugoslavia, North Korea and Iran”).

18 William H. Kaempfer & Anton D. Lowenberg, *Unilateral Versus Multilateral International Sanctions: A Public Choice Perspective*, 43 INT’L STUD. Q., 37, 37 (1999).

19 Robert A. Pape, *Why Economic Sanctions Do Not Work*, 22 INT’L SEC. 90, 90 (1997).

20 See, e.g., *Comm. on Econ., Soc., and Cultural Rights, General Comment No. 12: The Right to Adequate Food (Art. 11), E/C.12/1999/5* (1999) [hereinafter *General Comment No. 12*] (the realization of right to food refers to the availability of food, physically and financially, either through feeding oneself from production or international trade—i.e., movement from the production site to the place of consumption).

21 *Food & Agric. Org. of the U.N., Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, adopted Its One Hundred Twenty-Seventh Session, ¶ 7 (2004) [hereinafter *Information and Case Studies*].

22 See *World Food Summit, Rome Declaration on World Food Security* ¶ 37 (1996) [hereinafter *Rome Declaration*].

23 See generally KAMAL MALHOTRA ET AL., *MAKING GLOBAL TRADE WORK FOR PEOPLE* (2003).

II. This differential treatment is mainly due to differing views of sanctions—some countries regarded them as a full and efficient alternative to military intervention, while others viewed them as a mere instrument of foreign policy, just one part of a forced escalation curve.²⁴ The most extreme position taken included using punitive measures with regards to the trade of food and medicine and the silence of sanction regulation on permissibility of trade of humanitarian goods.

Punitive measures on humanitarian goods were manifested in forms, such as the sanctioning nation removing food aid²⁵ and refusing to grant credit for purchasing food and medicine.²⁶ These forms of sanctions have a devastating impact on countries which depend largely on the flow of humanitarian aid to their territories, or on the grant of credit for their food and medicine industries.²⁷ The structure of restrictive measures gradually moved from silence on humanitarian goods toward the inclusion of a specific carve-out for humanitarian goods in the sanction regulations. An explicit exemption was made by the UNSC to exclude medical supplies and foodstuffs when sanctioning the Federal Republic of Yugoslavia (Serbia and Montenegro).²⁸ Regarding unilateral state-to-state sanctions, the U.S. embargoes against Nicaragua and Haiti also provided for similar exemptions.²⁹

A humanitarian crisis occurred when the UNSC imposed comprehensive sanctions against Iraq. The UNSC resolution provided an explicit exemption for “supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs,”³⁰ and a subsequent exclusion for foodstuffs from the application of trade prohibitions in another resolution.³¹

However, the comprehensive nature of the economic sanctions against Iraq following the 1991 Persian Gulf War destroyed almost the entirety of Iraq’s infrastructure. It dramatically reduced the importation of food and caused an exhaustion of food stockpiles, which led to the implementation of food rationing in Iraq. The twenty-five-fold increase in prices of nonrationed food and the shortfall in production led to massive malnutrition amongst the population. The destruction of Iraq’s infrastructure had an impact on health care; diseases spread due to contaminated water, severe malnutrition increased, and there was a lack

24 Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. 1159, 1169 n.20 (1987) (U.S. President Woodrow Wilson stated: “a nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted, but it brings a pressure upon the nation which, in my judgment, no modern nation could resist.”).

25 See, e.g., *HUFBAUER ET AL.*, supra note 3, at 458 (U.S. sanctions against the Nicaraguan Sandinista government included the withdrawal of food assistance).

26 Howlett, supra note 9, at 1218 (for example, the United States’ refusal to grant Poland \$740 million of credit to buy U.S. corn caused domestic food shortages due to the Polish poultry industry’s dependence on U.S. feed corn).

27 Howlett, supra note 9, at 1217.

28 S.C. Res. 757, ¶ 4(c) (May 30, 1992).

29 Richard Garfield, Julia Devin, & Joy Fausey, *The Health Impact of Economic Sanctions*, 72 BULLETIN OF THE NEW YORK ACADEMY OF MEDICINE 454, 458–62 (1995).

30 S.C. Res. 661, ¶ 3(c) (Aug. 6, 1990).

31 S.C. Res. 687, ¶ 20 (Apr. 3, 1991).

of access to primary health care and life-saving medicines.³² The imposition of comprehensive economic sanctions has been seen as a form of collective punishment on civilian populations. Some scholars have compared this to blowing up an airplane containing innocent passengers to kill a terrorist,³³ or killing cells indiscriminately to kill a cancer.³⁴

3. RESPONSIBILITY FOR THE HUMANITARIAN IMPACT OF ECONOMIC SANCTIONS

The mere imposition of unilateral economic sanctions, irrespective of the existence of a bilateral or multilateral commitment, would not be in breach of an obligation under general international law.³⁵ According to the ICJ, “[a] state is not bound to continue particular trade relations longer than it sees fit to do so.”³⁶ In this context, the traditional Westphalian approach to international public law considers the wrongdoer state responsible for a violation of international law. As such, the consequences of such a violation impact its own population.

However, with the development of human rights and international treaties, the humanitarian impact of economic sanctions has come under scrutiny. From a human rights perspective, the ideal situation is that states avoid imposing any unilateral measure which “impedes the full achievement of economic and social development by the populations of the affected countries.”³⁷ The humanitarian analysis of economic sanctions has raised the question as to whether a sanctioning state has any responsibility and duty of care for the indirect effects of its prohibitive regulations.³⁸

The early efforts of international legal scholars and writers have focused on drawing analogies with laws applicable to war conditions.³⁹ They believed that



The imposition of comprehensive economic sanctions has been seen as a form of collective punishment on civilian populations

32 Garfield, Devin, & Fausey, *supra* note 28, at 464–65.

33 Howlett, *supra* note 9, at 1217.

34 *Id.*

35 See Antonios Tzanakopoulos, *State Responsibility For “Targeted Sanctions,”* 113 *AM. J. INT’L L. UNBOUND*, 135, 138 (2019).

36 *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 *I.C.J.* 14, ¶ 276 (June 27).

37 *Information and Case Studies*, *supra* note 20, ¶ 3 (emphasis added). See also Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, ETO CONSORTIUM (Jan. 2013), https://www.etoconsortium.org/nc/en/main-navigation/library/maastrichtprinciples/?tx_drblob_pi1%5BdownloadUid%5D=23 [hereinafter *Maastricht Principles*].

38 Idriss Jazairy, *Unilateral Economic Sanctions, International Law, and Human Rights*, 33 *CARNEGIE COUNCIL FOR ETHICS IN INT’L AFFS.* 291, 291 (2019).

39 See, e.g., Garfield, Devin, & Fausey, *supra* note 28.

the effects of economic blockades imposed on a population was comparable to wartime blockades under the law of armed conflicts. This led some writers to look for similarities between some principles of international humanitarian law applicable to armed conflict situations—such as the prohibition on starvation of civilians or the free passage of essential food and medicine—to the economic sanctions situation.⁴⁰ While the commentators generally reject the argument that sought to include nonmilitary interventions (e.g., unilateral economic sanctions) within the scope of the UN Charter Article 2(4) prohibiting the use of force,⁴¹ international human rights laws and literature are, to some extent, sensitive to discussions regarding the similarities between the effects of economic sanctions and war on civilian populations. When discussing the obligations unaffected by countermeasures, the UN International Law Commission refers to the Additional Protocol to the Geneva Conventions relating to the protection of victims of international armed conflicts to draw an analogy with the prohibition, contained therein, of using the “starvation of civilians as a method of warfare.”⁴² The Human Rights Council’s Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights concludes in its report in 2018 that “the combination of comprehensive unilateral coercive measures and the imposition of secondary sanctions on third parties unrelated to the dispute are tantamount to a peacetime blockade.”⁴³

A major step toward human rights limitations on economic sanctions was at the urging of the UN Commission on Economic, Social and Cultural Rights (“CESCR”) to states to refrain from enacting food embargoes and measures that directly restrict or endanger the production and supply of food⁴⁴ and adequate medicine and medical equipment.⁴⁵ The CESCR’s provision made states imposing sanctions responsible for the direct consequences of their food and medicine embargoes, a weapon which some claim is still used in modern warfare.⁴⁶ While the CESCR believes that the imposition of economic sanctions does not nullify and diminish the obligation of the sanctioned state to protect the human rights of its citizens,⁴⁷ it calls on the sanctioning state to distinguish

40 Hans-Peter Gasser, *Collective Economic Sanctions and International Humanitarian Law—An Enforcement Measure Under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals?*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAORV] 871, 901 (1996).

41 J. Curtis Henderson, *Legality of Economic Sanctions Under International Law: The Case of Nicaragua*, 43 WASH. & LEE L. REV. 167, 180 (1986).

42 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, art. 54, ¶ 1, June 8, 1977, 1125 U.N.T.S. 3; Int’l L. Comm’n Rep., supra note 10.

43 U.N. Human Rights Council, Rep. of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, ¶ 34, A/HRC/39/54 (2018).

44 General Comment No. 12, supra note 19, ¶ 37.

45 U.N. Comm. on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), ¶ 41, E/C.12/2000/4 (2000) [hereinafter General Comment No. 14].

46 JOANNA MACRAE & ANTHONY B. ZWIWI, *Food as an Instrument of War in Contemporary African Famines: A Review of the Evidence*, in 16 DISASTERS 299, 299 (1992). See e.g., Garfield, Devin, & Fausey, supra note 28, at 454

47 U.N. Comm. on Economic, Social and Cultural Rights, General Comment No. 8 on the

between the basic objectives of its sanctions and “the collateral infliction of suffering upon the most vulnerable groups within the targeted country.”⁴⁸ A major step in developing the role of human rights in the adoption and implementation of economic countermeasures and sanctions was the creation of the Draft Articles on Responsibility of States,⁴⁹ which aimed at codifying and developing customary international law on state responsibility, means of reparation⁵⁰ and the adoption of countermeasures as an instrument of response by the injured state. Article 50(1)(b) provides that regardless of how grave a state’s wrongful act may be and no matter how critical its failure to respect international obligations any countermeasure introduced shall not affect the “obligations for protection of fundamental human rights.”⁵¹ This obligation is addressed to either the sanctioning state⁵² or the sanctioned state⁵³ and imposes certain limits on economic sanctions.⁵⁴ Article 50(1)(b)’s strong language⁵⁵ develops a legal framework for the sanctioning state, where the adoption of countermeasures cannot impinge on the “protection of fundamental human rights.” The question, then, will be whether the sanctioning state’s obligation with regards to its sanction measures is only a negative obligation to refrain from imposing *de jure* prohibitions on the trade of humanitarian goods or whether this obligation goes further, such that a state could be held liable for the extraterritorial effects of its unilateral measures.

4. PROTECTION OF THE FUNDAMENTAL RIGHT TO FOOD AND HEALTH

The International Covenant on Economic, Social and Cultural Rights (“ICESCR”) defines the right to adequate food as a “right of everyone to an adequate standard of living.”⁵⁶ This definition refers to physical⁵⁷ and economic⁵⁸

Work of Its Seventeenth Session, E/C.12/1997/8, at ¶ 10 (1997) [hereinafter General Comment No. 8] (“While sanctions will inevitably diminish the capacity of the affected State to fund or support some of the necessary measures, the State remains under an obligation to ensure the absence of discrimination in relation to the enjoyment of these rights, and to take all possible measures, including negotiations with other States and the international community, to reduce to a minimum the negative impact upon the rights of vulnerable groups within the society.”).

48 *Id.* ¶ 4.

49 See Int’l Law Comm’n Rep., *supra* note 10, at 132 cmt. 6–7.

50 *Id.* at 129–37 (means of reparation include restitution, compensation, and satisfaction).

51 *Id.* at 131.

52 See Silvia Borelli & Simon Olleson, Obligations Relating to Human Rights and Humanitarian Law, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 1187–88 (James Crawford et al. eds., 2010).

53 HANS MORTEN HAUGEN, *THE RIGHT TO FOOD AND THE TRIPS AGREEMENT: WITH A PARTICULAR EMPHASIS ON DEVELOPING COUNTRIES’ MEASURES FOR FOOD PRODUCTION AND DISTRIBUTION* 365 (2007).

54 See Int’l Law Comm’n Rep., *supra* note 10, at 131.

55 *Id.*

56 G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, at art. 11 ¶ 1 (Jan. 3, 1976).

57 General Comment No. 12, *supra* note 19, ¶ 8 (“availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals”).

58 *Id.* ¶ 13 (“Financial costs associated with the acquisition of food for an adequate diet”



The ICESCR recognizes the fundamental aspect and core obligation of the right to food by “recognizing the fundamental right of everyone to be free from hunger.” Equally, access to life-saving medicines is viewed as a core content, with a minimum level of right to health

access to adequate food.⁵⁹ Similarly, the ICESCR calls on state parties to recognize the universal right to physical and mental health,⁶⁰ which closely relates to the right to life.⁶¹ This requires that facilities and goods be available, accessible, acceptable and be of good quality.⁶²

Despite the general definition of these two rights, the ICESCR put forward a minimalistic understanding of the core content of these rights. The states' obligation to comply with the core content of these rights is an immediate rather than progressive obligation.⁶³ Accordingly, the ICESCR recognizes the fundamental aspect and core obligation

of the right to food by “recognizing the fundamental right of everyone to be free from hunger.”⁶⁴ Equally, access to life-saving medicines is viewed as a core content, with a minimum level of right to health.⁶⁵ The CESCR calls on states to “refrain at all times from imposing embargoes or similar measures restricting the supply of another state with adequate medicines and medical equipment.”⁶⁶ In addition, the Maastricht Principles on Extraterritorial Obligation on Social and Economic Rights insist on humanitarian goods and require states to fully respect human rights obligations in the “the design, implementation and termination of any sanctions regime,” and to refrain from embargoes on “goods and services essential to meet core obligations.”⁶⁷

Recent sanctions programs generally include food and medicinerelated carve-outs to comply with states' obligations contained in the human rights treaties and the Draft Articles on Responsibility of States. Although these humanitarian

which do not threaten “the attainment and satisfaction of other basic needs . . .”).

59 Rome Declaration, *supra* note 21, ¶ 13.

60 G.A. Res. 2200A (XXI), *supra* note 55, art. 12; see G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25(1) (Dec. 10, 1948); see also G.A. Res. 44/25, Convention on the Rights of the Child, at art. 24 (Nov. 20, 1989).

61 G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 6 (Dec. 16, 1966) (relating to right to life through increase and/or decrease in infant mortality and life expectancy); see also U.N. Human Rights Comm., General Comment No. 6: Article 6 (Right to Life), ¶ 5 (Apr. 30, 1982) [hereinafter General Comment No. 6].

62 General Comment No. 14, *supra* note 44, ¶ 12(d) (“As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.”).

63 General Comment No. 12, *supra* note 19, ¶ 1 (For right to food: CESAR links the identification of the medicines to the WHO Model List of Essential Drugs (G.C. 14, ¶ 12(a)).

64 General Comment No. 6, *supra* note 60, art. 11(2).

65 General Comment No. 14, *supra* note 44, ¶ 43(d).

66 General Comment No. 14, *supra* note 44, ¶ 41.

67 Maastricht Principles, *supra* note 36, ¶ 22.

exemptions have become a universal clause, controversy nevertheless exists regarding the effectiveness of these textual exemptions and carve-outs in protecting the fundamental rights of the target population.⁶⁸

The CESCR sets a clear distinction between three levels of human rights obligations with which states must comply. These are known as “the obligations to respect, to protect and to fulfill.”⁶⁹ The obligation to respect is a negative obligation on states to ensure that they do not adopt measures or take actions which violate human rights. The obligation to protect lies between the obligation to respect and obligation to fulfill. It goes beyond a mere negative obligation of the state by calling upon the states to ensure that the human rights in question are not significantly affected by measures taken.⁷⁰ Finally, the obligation to fulfill requires the state to proactively take actions that improve living conditions, like individuals’ access to food and medicine (obligation to facilitate). If the state is unsuccessful in this, they must provide assistance and aid directly to the individuals (obligation to provide).⁷¹

There is a serious doubt concerning whether providing a textual carveout for humanitarian goods in a sanction programs releases the sanctioning state from its obligation to protect fundamental human rights. The obligation to protect requires that a state refrains from taking actions that directly affects fundamental human rights. However, the obligation goes further than this simple textual carve-out by obligating a state to ensure that impediments and obstacles to trade of humanitarian goods are effectively removed. The question is therefore how to interpret the scope of a sanctioning state’s obligation to remove impediments to the provision of human rights-related goods from its sanction regulation, in light of the state’s liability for the extraterritorial effects of its domestic measures.

A. Impact on the Target Population

Generally, a state can be held liable for actions occurring outside its territory and jurisdiction only under exceptional circumstances such as situations when a state exercises control over a territory or when a state exercises authority and

68 Some sanction programs also view humanitarian exemptions from a business perspective. For example in Canada’s Special Economic Measures Act (“SEMA”) 2010 against Iran, Canada expressed its business expectation such that despite “areas of trade that are expressly permitted under the Regulations— such as trade in wheat, pulses and vaccines, of which Canada is historically a large supplier—which fall under the exemption for the provision of food and medicines” these areas will be affected by sanctions “if Iran decides to retaliate for the additional measures imposed by choosing alternative suppliers for these goods.” Special Economic Measures (Iran) Regulations, SOR/2010-165 (Can.).

69 General Comment No. 12, *supra* note 19, ¶ 15.

70 General Comment No. 14, *supra* note 44, ¶ 35 (“Obligations to protect include, inter alia, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.”).

71 *Id.* ¶ 23.

control over an individual.⁷²

The impact of a domestic action outside of the jurisdiction of a state can also trigger liability issues for the acting state. If a state's domestic action leads to a violation of human rights outside of its jurisdiction, a state can be held liable.⁷³ Sanction programs are not static, and their impact is not necessarily limited to the territory of the sanctioning state. Sanctioning states often resort to a variety of components to maximize the effectiveness of sanctions. This increases the pressure on the target state. As such, each sanction program might have a different humanitarian impact on the target population. These components consist in the nature of the sanction measures, the reach of these measures, the number of states adopting the sanction measures and the dominant and exclusive control of the sanctioning state on the target's transactional supply chain and economy.

Comprehensiveness

A major motivating factor for a sanctioning state increasing the power and impact of sanction programs relates to the scope of sanctions. The decision to increase the scope of sanctions and to extend the areas of prohibition to different sectors of the sanctioned state's economy not directly related to the state's wrongful act increases pressure on the civilian population in the sanctioned state.

The catastrophic humanitarian consequences of the broad and comprehensive embargoes imposed by the UNSC in the 1990s on Iraq⁷⁴ led to a major shift in the UNSC policy toward using economic sanctions. This shift forced the United Nations to step back from the traditional policy of designing comprehensive sanctions and adopt a smarter approach. Instead of sanctioning the target state's whole economy, the UNSC has moved to sanctioning certain sectors and individuals directly related to the target state's wrongful act.⁷⁵ However, while comprehensive sanctions are no longer considered a multilateral solution to threats to peace and security, they are still used in the state-to-state unilateral context.⁷⁶ The underlying reason for using comprehensive sanctions is that it pushes the ruling elites of the affected population to seek a change in the policies of their state to end the suffering of the sanctioned population.⁷⁷

Comprehensive sanctions have regressive effects on the right to health and food since the burden falls on the most vulnerable parts of the population.⁷⁸ The

72 *Al Skeini v. United Kingdom*, 53 Eur. Ct. H.R. 18, 58–59, ¶¶ 133–38. (2011); For further information, see generally Jane M. Rooney, *The Relationship Between Jurisdiction and Attribution After Jaloud v. Netherlands*, 62 NETH. INT'L L. REV. 407–28 (2015).

73 Mehmet Şükrü Güzel, *Venezuela Sanctions and the Concept of Extraterritorial Humanitarian Responsibility*, 11 ZFWT 169, 184 (2019).

74 Jazairy, *Unilateral Economic Sanctions*, supra note 37, at 294.

75 Peter Van Elsuwege, *The Adoption of "Targeted Sanctions" and the Potential for Inter-Institutional Litigation After Lisbon*, 7 J. CONTEMP. EUR. RES. 488, 488 (2011).

76 WALLENSTEEN, supra note 6, at 22–23.

77 Howlett, supra note 9, at 1212.

78 Idriss Jazairy (Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights), *Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights*, UN Doc. A/HRC/30/45, ¶ 16 (Aug. 10, 20153010, 20185).

decision-makers in the sanctioned state, who should really be the targets of these sanctions, may find the latter desirable and advantageous on a personal level.⁷⁹ Comprehensive sanctions harm the sanctioned state's economy in a significant manner by crippling sensitive income-generating sectors of the economy, especially in mono-product countries.⁸⁰ Far-reaching comprehensive sanctions, in addition to negative macroeconomic consequences, usually lead to a chilling effect discouraging foreign business entities from engaging in authorized transactions, to avoid any unintentional violation of sanction measures.⁸¹ In addition, sanctions increase transaction costs by making public goods unavailable in the sanctioned state, causing a catastrophic situation in both economic and social terms.



Comprehensive sanctions have regressive effects on the right to health and food since the burden falls on the most vulnerable parts of the population

Extraterritoriality

The other element strengthening the impact of sanction programs is the extraterritorial application of domestic sanction measures. The element of extraterritoriality in sanction programs, often known as secondary sanctions, aims at universalizing the restrictive measures by closing other trade alternatives for the target state, thereby increasing the reach of the sanctions.

An extraterritorial sanction program sets certain restrictions on individuals and entities outside of the jurisdiction of the sanctioning state, who generally conduct business with the target state.⁸² Such programs assert that accessing the sanctioning state's market should be penalized and punished as a breach of the domestic sanction provisions. This "jurisdiction by territorial extension of domestic law"⁸³ has been

79 General Comment No. 8, supra note 46, ¶ 3 ("In addition, their unintended consequences can include reinforcement of the power of oppressive élites, the emergence, almost invariably, of a black market and the generation of huge windfall profits for the privileged élites which manage it, enhancement of the control of the governing elites over the population at large, and restriction of opportunities to seek asylum or to manifest political opposition.")

80 See David Cortright & George A. Lopez, Introduction: Assessing Smart Sanctions, in SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT 12 (David Cortright & George A. Lopez eds., 2002) (Oil Embargo in comprehensive way in Iraq oil embargo in targeted way against Cambodia, Sierra Leone and Angola for the territories controlled by rebelled and armed groups).

81 INTERNATIONAL CRISIS GROUP Middle East Report No. 138, Spider Web: The Making and Unmaking of Iran Sanctions, INT'L CRISIS GRP. (Feb. 25, 2013), <https://d2071andvip0wj.cloudfront.net/138-spider-web-the-making-and-unmaking-of-iran-sanctions.pdf> [<https://perma.cc/QV6R-98VB>] [hereinafter INT'L CRISIS GROUP REPORT].

82 Jeffrey A. Meyer, Second Thoughts on Secondary Sanctions, 30 U. PA. J. INT'L L. 905, 906 (2009).

83 CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 94 (2nd ed. 2015); Joanne Scott, Extraterritoriality and Territorial Extension in EU Law, 62 AM. J. COMP. L. 87,



By generalizing the restriction to all commercial partners around the globe, extraterritorial sanctions remove any alternative ways for the sanctioned state to continue its foreign trade and reduces the bargaining power of the sanctioned state in doing trade, even trade of humanitarian goods

highly controversial in international relations.⁸⁴ It ignores the conventional understanding of jurisdiction toward other states causing the opposing states to react to these measures by enacting blocking statutes.⁸⁵

On the other side, the extraterritorial sanctions have been questioned as being unlawful with regards to its human rights impact toward target state.⁸⁶ By generalizing the restriction to all commercial partners around the globe, extraterritorial sanctions remove any alternative ways for the sanctioned state to continue its foreign trade and reduces the bargaining power

of the sanctioned state in doing trade, even trade of humanitarian goods.⁸⁷

Multilateralization

One element that increases the power of sanction measures is the number of states adopting the same restrictive measure against the target country. Creating an effective coalition for the implementation of restrictive measures makes sanctions more likely to succeed and affects the financial and trading capacity of the target country. Sanctioning states have sought to design measures and actions ensuring “that sanctions measures are applied multilaterally whenever possible.”⁸⁸ However, this requires a continuous effort from sanctioning states to expand the reach of the restrictive measures by maintaining an alliance with all participants despite different objectives. Therefore, working with like-minded countries to grow the list of sanctioning states, with the aim of maximizing the impact of the sanction provisions, has been at the cornerstone of sanctioning states’ foreign policy.

The comparison between the economic sanctions imposed against Iran in the 2010–2013 period, and the U.S. withdrawal from the JCPOA and reimposition of secondary sanctions against Iran in May 2018, illustrates the importance of the multilateralization element to increase the power and impact of sanction programs. Multilateralism in sanction programs is generally ensured through the initiation or backing of the program by the UNSC. In July 2010, the

87–90 (2014).

84 Jazairy, *Unilateral Economic Sanctions*, supra note 37, at 296.

85 Council Regulation 2271/96, 19196 O.J. (L 309) 1 (EC) (for example, the EU Blocking Statute is to protect EU operators from the extra-territorial application of third country laws).

86 Jazairy, *Unilateral Economic Sanctions*, supra note 37, at 296.

87 Cedric Ryngaert, *Extraterritorial Export Controls (Secondary Boycotts)*, 7 *CHINESE J. INT’L L.* 625, 626 (2008).

88 *Canadian Sanctions Frequently Asked Questions*, GOV’T OF CANADA,

https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/faq.aspx?lang=eng (last visited Feb. 4, 2020).

European Union and the United States enacted two sanction regulations that set considerable prohibitions on Iran's energy and financial sectors.⁸⁹ These restrictions, introduced after the imposition of UNSC Resolution 1929 against Iran, had a significant impact on Iran's economy and its foreign trade sector due to the adoption of similar prohibitive measures by Iran's major trading partners, such as Switzerland, Canada, Australia, South Korea and Japan.⁹⁰ The restrictions significantly impacted Iran's economy.

The multilateralization effort, even in the absence of a UNSC specific ruling on the prohibitive measure, can have a serious impact on the sanctioned state. The EU Council Decision dated January 23, 2012,⁹¹ which banned the purchase of Iranian crude oil, was adopted following discussions among high-level political decision-makers in Europe. It was the outcome of a multilateral effort initiated by the United States, which had enacted the National Defense Authorization Act for Fiscal Year 2012 ("NDAA 2012").⁹² This set of sanction provisions, though going significantly further than the legal prohibitions provided under the UNSC resolutions against Iran,⁹³ was orchestrated by a coalition of like-minded countries with a multilaterally agreed target.⁹⁴

Monopoly Situation

A business transaction requires availability of certain logistical elements—such as banking relations, insurance, and means of transportation—without which a transaction could not be completed. Unlike extraterritorial sanctions, which directly address elements outside of the jurisdiction of the sanctioning state, holding a monopoly over one of the constituent elements of a business transaction enables the sanctioning state to give extraterritorial effect to its domestic measure, vis-à-vis individuals and entities outside of its territory. The U.S. banking system is a perfect example of such a monopoly. Its monopoly over banking payments, insurance, and transportation means U.S. domestic sanctions indirectly prevent individuals and entities, who are subject to a different jurisdiction, from providing domestically-prohibited services to the sanctioned state.⁹⁵ In such a context, the United States enjoys a monopoly over one of the key components of the trading chain, thus impeding the formation of the business transactions, which should have been outside the scope of the U.S. jurisdiction, and making economic sanctions one of the utmost effective tools

89 Council Decision 2010/413/CFSP of 26 July 2010 O.J. (L 195) 39 (EC).

90 Farshad Shamgholi, *Sanctions Against Iran and Their Effects on the Global Shipping Industry* (Spring 2012) (unpublished Master's Thesis, Lund University), (<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=2520391&fileId=3046709>).

91 Council Decision 2012/35/CFSP of 23 Jan. 2012 O.J. (L 19) 22 (EC).

92 Nat'l. Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81 (2012).

93 S.C. Res. 1737, ¶ 3-19 (Dec. 27, 2006); S.C. Res. 1747, ¶ 5-8 (Mar. 24, 2007); S.C. Res. 1803, ¶ 3-13 (Mar. 3, 2008); S.C. Res. 1929, ¶ 7-31 (June 9, 2010) (the UNSC Resolutions imposing economic restrictive measure against Iran were UNSC Resolutions 1737, 1747, 1803, and 1929).

94 Scott, *supra* note 84, at 120.

95 Robert J. Graves & Indranil Ganguli, *Extraterritorial Application of the USA PATRIOT Act and Related Regimes: Issues for European Banks Operating in the United States*, 3 *PRIVACY & DATA SECURITY L.J.* 967, 983 (2007).

for dictating a desired foreign policy.

a. The International Financial System: the U.S. Example

The most important chain in a transaction, the monopoly for which is currently held by the United States, is the banking system. The banking system facilitates the transfer of the value of a transaction from one party to another. In the absence of such a crucial component, the transaction will not be completed. U.S. leverage over the international banking system comes from the dominance of the U.S. currency, which started as the reserve currency for most countries following the internationalization process of the U.S. Dollar.⁹⁶ It also acts as the trade settlement currency due to the fact that it acts as a benchmark for commodity prices, such as oil, in global markets.⁹⁷ This makes the U.S. Dollar the usual currency for international transactions, foreign exchange reserves of central banks around the world and forex trading.⁹⁸ The United States has used its banking leverage and the international financial mechanism as a powerful tool for limiting access to financial institutions breaching U.S. secondary sanctions through their conduct of “significant financial transactions”⁹⁹ on behalf of sanctioned nationals and individuals, to the international banking system.¹⁰⁰ The intertwining of the United States and global financial systems¹⁰¹ allows for the possibility of prohibiting certain entities and their banks from opening correspondent or payable-through accounts in the United States. Further actions, like restricting access to financial messaging services such as SWIFT,¹⁰² act as powerful instruments in the hands of the United States to punish foreign financial institutions that fail to comply with U.S. sanctions. Such actions, which take place either through judicial indictment, U.S. Treasury designation, or fines addressed to the major banks for their past actions facilitating transactions for a sanctioned state,¹⁰³ can cause the depletion of a bank’s deposits and even the

96 Ramaa Vasudevan, Finance, Imperialism, and the Hegemony of the Dollar, MONTHLY REV., APR. 1, 2008, at 3.

97 Carla Norrlof, Dollar Hegemony: A Power Analysis, 21 REV. INT’L POL. ECON. 1042, 1058 (2014).

98 Kimberly Amadeo, Why the US Dollar Is the Global Currency, The Balance, <https://www.thebalance.com/world-currency-3305931> (last updated Dec. 13, 2019).

99 Exec. Order No. 13,622, 70 C.F.R. 45897, Section 1 (July 30, 2012) (according to U.S. President Executive Order 13,622, foreign financial institutions that knowingly facilitate significant transactions or provide significant financial services for sanctioned entities or individuals are exposed to potential loss of access to the U.S. financial system).

100 See <https://www.treasury.gov/press-center/press-releases/Pages/tg1661.aspx> (announcing the imposition of sanctions under the CISADA, against Bank of Kurlun in China and Elaf Islamic Bank in Iraq for knowingly facilitating significant transactions or providing significant financial services for designated Iranian banks).

101 Thomas Costigan, The US Dollar as the Global Reserve Currency: Implications for US Hegemony, 8 WORLD REV. OF POL. ECON. 104, 104–22 (2017).

102 The Society for Worldwide Interbank Financial Telecommunication (SWIFT), WIKIPEDIA, https://en.wikipedia.org/wiki/Society_for_Worldwide_Interbank_Financial_Telecommunication (last visited Feb. 23, 2020).

103 For example, Barclays was fined \$298 Million in August 2010, Credit Suisse was fined \$536 Million in December 2010, Lloyds Banking \$350 Million in January 2009, UBS was fined \$100 Million, ABN Amro Bank NV \$80 Million in December 2005, JP Morgan Chase \$88.3 Million in August 2011, HSBC \$1 Billion in May 2011, Standard Chartered \$327 Million in December 2012, and Bank of Tokyo Mitsubishi UFJ was fined \$250 Million in June 2013. See Oriana

permanent closure of the bank.¹⁰⁴ This forces the sanctioned state to make a considerable shift in its trade policy, at least on the short term.¹⁰⁵

Besides financial institutions, such restrictive measures can also target a banking jurisdiction in its entirety by sanctioning the use of the sanctioned state's currency by other financial institutions.¹⁰⁶ Designating the sanctioned state's banking sector as an area at risk for money laundering is a further action that can be taken by sanctioning states. For example, the U.S. President's decision in November 2011 designated Iran as an area of "primary money laundering concern"¹⁰⁷ and authorized the United

States to take special measures against foreign banks establishing corresponding relations with Iranian financial institutions. Such a domestic measure has had a significant impact on Iran's banking sector, to the extent that even when U.S. secondary sanctions against Iran were lifted following the implementation of the Iran nuclear deal, Iran's banking relations nevertheless failed to normalize with non-Iranian financial institutions.

By using its dominant position in global financial markets, the United States' actions went further than sanctioning international financial institutions and have been used as a powerful instrument to persuade international companies to walk away from doing business with the sanctioned state.¹⁰⁸ In one of the most



By using its dominant position in global financial markets, the United States' actions went further than sanctioning international financial institutions and have been used as a powerful instrument to persuade international companies to walk away from doing business with the sanctioned state

Roncarolo, Arms and Dual-Use Goods Export Controls, DELOITTE (Nov. 23, 2017), https://www2.deloitte.com/content/dam/Deloitte/it/Documents/finance/dualusegoods/Opening%20Address_O.%20Roncarolo.pdf.

104 Nate Raymond & Lynnley Browning, Swiss Bank Wegelin to Close After Guilty Plea, REUTERS (Apr. 3, 2013, 7:11 PM), <https://www.reuters.com/article/us-swissbank-wegelin-idUSBRE90200020130104> (explaining that U.S. indictment against the Switzerland's oldest bank, Bank Wegelin & Co., caused the bank to close permanently).

105 See Carrie Lyn Donigan Guymon, The Best Tool for the Job: The US Campaign to Freeze Assets of Proliferators and Their Supporters, 49 VA. J. INT'L 849, 877 (2009) (providing the example that the U.S.

Treasury's designation of Banco Delta Asia SARL as a "primary money laundering concern" on September 2005, led to depletion of 34% of deposits from this bank and acted as a major element in causing North Korea to seriously re-engage in the Six Party Talks).

106 Exec. Order 13,645, 78 C.F.R. 33945 (June 3, 2013) (for example, US sanctions against the Iranian currency (the Rial) under U.S. President Executive Order 13,645, June 3, 2013).

107 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (under section 311 of the U.S. Patriot Act authorizing the United States to adopt special measures against a jurisdiction as a whole, an institution, a class of transactions or a type of account).

108 Exec. Order No. 13,622, *supra* note 100, § 4 (imposing sanctions on the ISA sanctions menu including barring banks from the U.S. financial system, for certain activities including purchase of oil, other petroleum, or petrochemical products from Iran).



To some extent, the European Union and, in particular, the United Kingdom, enjoy the same leverage over the insurance industry as the United States has over the international banking system

prominent cases, the French multinational oil company, Total, announced that following the U.S. withdrawal from the Iran nuclear deal and the reinstatement of U.S. secondary sanctions, it was not in a position to continue operating the megaproject, South Pars 11, in Iran due to several U.S.-created risks,¹⁰⁹ including the risk of “loss of financing in dollars by U.S. banks for [its] worldwide operations.” Indeed, U.S. banks were involved in more than ninety percent of Total’s financing operations.¹¹⁰

The pressure and reputational risk for commercial partners working with a sanctioned state, including non-sanctioned areas, and the possibility of unknowingly breaching sanction provisions—exposing commercial partners to administrative and judicial enforcement actions in the United States—dissuades commercial partners from engaging in business transactions, whether or not they are permitted, due to the potential triggering of default events and acceleration clauses with their commercial counterparties.¹¹¹

b. The Insurance Industry: the EU Example

Another major chain in transactions, necessary for completing any trading operation and modes of transportation of goods, is insurance. Insurance coverage, either for the cargo, the vessel or the ports, is required for a seller to ship goods to the buyer. Without insurance, a commercial transaction will not be completed. The European insurance industry provides most of the insurance coverage for the world’s maritime transportation. To some extent, the European Union and, in particular, the United Kingdom, enjoy the same leverage over the insurance industry as the United States has over the international banking system.

This level of influence exerted by the European Union allowed their domestic measures to enjoy a significant extraterritorial effect, going so far as to affect the trade of foodstuffs and medicine.¹¹² The EU ban on the (re)insurance of tankers

¹⁰⁹ See US Withdrawal From the JCPOA: Total’s Position Related to the South Pars 11 Project in Iran, TOTAL (May 16, 2018), <https://www.total.com/en/media/news/press-releases/us-withdrawal-jcpoatotal-position-related-south-pars-11-project-iran> (in addition to U.S. financing, Total mentioned the loss of its U.S. shareholders, which represent more than 30% of its shareholding, and its inability to continue its U.S. operations as other reason for halting its business relations in Iran).

¹¹⁰ Id.

¹¹¹ Dick Ziggers, Iran Having Trouble Financing Grain Imports, ALL ABOUT FEED (Jan. 30, 2012), <https://allaboutfeed.net/Process-Management/Management/2012/1/iran-having-trouble-financing-grainimports-AAF012736W/> (explaining major European banks, including Rabobank, have ceased financing grade and other agricultural trades bound for Iran).

¹¹² Special Economic Measures (Iran) Regulations, SOR/2010-165 (Can.) (holding Canada’s

carrying Iranian crude oil was an effective measure on the Iranian economy.¹¹³ European protection and indemnity insurers (“P&Is”)¹¹⁴ were unable to provide related services, thus leaving Iranian vessels without insurance coverage.¹¹⁴ Restrictive measures on insurance and transportation not only significantly increase the cost of transactions,¹¹⁵ they also cause considerable delays (up to four times more than usual) in the importation of goods into the sanctioned state, assuming the commercial operators are able to complete their transactions at all.¹¹⁶

5. The Economy of the Sanctioned State: Macroeconomic Consequences

Another element affecting the efficacy of sanction programs concerns the sanctioned state’s macroeconomic structure and its degree of economic interdependence. The fact that the sanctioned state depends on outside sources for financial aid or food is key in assessing the humanitarian impact of economic sanctions. For example, the U.S. decision to deny credit facilities to Poland that would have allowed it to buy U.S. corn had a considerable short-term impact on the Polish civilian population, due to Poland’s dependence on this external source for food.¹¹⁷

The most devastating effects of sanctions stem from the macroeconomic consequences of economic sanctions on the target country. The impacts depend on the structure and the level of resilience of each economy. Macroeconomic repercussions of sanctions generally include high inflation, lowered purchasing power, and a reduction in access to essential goods.¹¹⁸ High inflation and the unavailability of external finance following the imposition of sanctions caused Sudan’s annual gross domestic product to decline.¹¹⁹ Malnourishment among

expectation on the possibility of keeping Iran as a customer of its agricultural products in 2010 was that “while agricultural exports are specifically excluded from the sanctions, indirect measures placing restrictions on Iranian vessels and on financing can adversely affect the volume of the trade”).

113 See Clare Baldwin & Osamu Tsukimori, *Marine Insurance: The Stranglehold on Iran?*, REUTERS (Apr. 17, 2012, 2:11 AM), <http://uk.reuters.com/article/2012/04/17/uk-iran-oil-insuranceidUKLNE83G00G20120417>.

114 See Protection and Indemnity Insurance, WIKIPEDIA, http://en.wikipedia.org/wiki/Protection_and_indemnity_insurance (last visited on Feb. 25, 2020) (P&I insurance is a form of marine insurance provided by a P&I club, a mutual (i.e., co-operative) insurance association that provides cover for its members, who will typically be ship-owners, ship-operators, or demise charterers).

115 By reportedly more than forty percent. See PAAIA, REPORT ON IRAN SANCTIONS 18 (August 2012), <http://www.paaia.org/CMS/Data/Sites/1/PDFs/Iran%20Sanctions%20Report%202012.pdf>.

116 “Iran Shipbuilding Boycott Lifted” Does Not Solve Shipping Problem, BBC NEWS (Sept. 19, 2013), http://www.bbc.co.uk/persian/business/2013/09/130919_101_shipping_lines_eu_sanctions.shtml.

117 HUFBAUER ET AL., *supra* note 3, at 201.

118 Ioana Petrescu, *The Humanitarian Impact of Economic Sanctions*, 10 EUROPOLITY 205, 205–06(2016).

119 SUZAN ADAM MOHAMMED HAMID, *THE RAMIFICATIONS OF ECONOMIC SANCTIONS ON HEALTH SERVICE SYSTEM: A COMPARATIVE STUDY OF SUDAN HEALTH SERVICE SYSTEM BEFORE AND AFTER ECONOMIC SANCTIONS* 35 (2012).

children increased from five percent to twenty-three percent in Haiti following sanctions.¹²⁰ The decline in economic activities,¹²¹ the inefficient allocation and utilization of resources, the unequal distribution of facilities and budget cuts in the health sector,¹²² result in the spread of diseases, some of which become untreatable due to lack of access to clean water, sufficient food, and life-saving medicine.¹²³ As an example, economic sanctions against Burma caused thousands of layoffs, including 100,000 women working in the textile industry and forced many unemployed women to engage in prostitution.¹²⁴

The role of foreign trade in the economy of a sanctioned state and the diversity of its income-generating exports of goods and services also play a major role in the level of impact sanctions will have. Targeting income-generating sectors of an economy limits the financial capacity of a sanctioned state to continue its routine trade. This limitation, if it hits mono product economies, becomes particularly potent. Countries whose economies are almost exclusively based on the exportation of a limited number of commodities are the most vulnerable to sanctions. The economic sanctions against Iran were crippling once they began targeting the purchase of Iranian crude oil and oil products.

The National Defense Authorization Act (“NDAA”), enacted in 2012 and entered into force on January 23, 2012 by EU Council Decision,¹²⁵ prohibited the “import, purchase or transport of Iranian crude oil and petroleum products”¹²⁶ and the “financing or financial assistance, including financial derivatives, as well as insurance and reinsurance” related to these activities.¹²⁷ This led to a sharp drop in Iranian crude oil exports, as much as a third of usual exports.¹²⁸ This amounted to a loss of \$133 million per day and an annual loss of \$48 billion, or approximately ten percent of the Iranian economy.¹²⁹ The European Union’s decision to designate the Central Bank of Iran (“CBI”) as a sanctioned entity alongside identical U.S. measures,¹³⁰ led to an international freeze at several financial institutions on the funds and assets of the CBI, which act as the main recipient of the proceeds of the sale of Iranian crude oil.¹³¹ The sanction

120 Richard Garfield, *The Silently, Deadly Remedy*, 14 F. APPLIED RES. & PUB. POL’Y 52, 55 (1999).

121 U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFF. & UNICEF, *Economic Sanctions, Health, and Welfare in the Federal Republic of Yugoslavia 1990–2000*, 28 (May 25, 2001) (“In 1991, prior to sanctions, trade averaged US \$800 million per month. In 1994 it had declined to a low of US \$200 million per month.”).

122 Garfield, Devin, & Fausey, *supra* note 28, at 465.

123 HAMID, *supra* note 121, at 2.

124 Donald M. Seekins, *Burma and U.S. Sanctions: Punishing an Authoritarian Regime*, 45 ASIAN SURV. 437, 442 (2005).

125 Council Decision 2012/35/CFSP of 23 Jan. 2012 O.J. (L 19) 22 (EC).

126 *Id.* at 23, art. 1(2)1.

127 *Id.* at 23, art. 1(2)2.

128 Rick Gladstone, *Iranian Oil Minister Concedes Sanctions Have Hurt Exports*, N.Y. TIMES (Jan. 7, 2013), <https://www.nytimes.com/2013/01/08/world/middleeast/irans-oil-exports-and-sales-down-40-percent-official-admits.html>.

129 See Anthony DiPaola & Isaac Arnsdorf, *Iran Loses \$133 Million a Day on Embargo, Buoying Obama*, BLOOMBERG (Aug. 2, 2012, 9:04 AM), <http://www.bloomberg.com/news/2012-08-01/iran-loses-133-million-a-day-from-sanctions-as-oil-buoys-obama.html>.

130 Exec. Order No. 13,622, *supra* note 100, § 5.

131 Matt Pearce, *Where Are Iran’s Billions in Frozen Assets, and How Soon Will It Get Them*

measure against CBI, which also acts as financial facilitator for the trade of food and medicine in Iran,¹³² had a significant impact on the CBI's operations and Iranians' access to essential medicines.¹³³

6. Other Elements

The gravity of the wrongful act being sanctioned confers greater legitimacy on such economic countermeasures. The impact of the sanctions on the affected population are also determined by further, "softer" elements. Such elements include the influence of specific pressure groups altering the effectiveness of economic sanctions in their early phases;¹³⁴ the legal enforcement actions available within a sanction program, like the possibility of punishing any engagement, whether pursued knowingly or unknowingly by an entity, with sanctioned entities or activities;¹³⁵ the level of judicial review available for sanction-related decisions and regulations;¹³⁶ the use of more or less ambiguous legal terminology without any clear definitions or guidelines; and the provision of broad definitions increasing the scope of sanctions.¹³⁷

Finally, the manner in which the sanction is enforced and the seriousness of

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L.A. TIMES (Jan 20, 2016, 3:00 AM), <https://www.latimes.com/world/middleeast/la-fg-iran-frozen-assets-20160120-story.html>.

132 Council Regulation 267/2012, 2012 O.J. (L 88) 1, 2 (EC) (due to the possible impact of these punitive measures, this Council Regulation provided that these restrictive measures "should not prevent trade operations, including contracts relating to foodstuffs, healthcare, medical equipment or for humanitarian purposes in accordance with the provisions of this Regulation").

133 Mehrnaz Kheirandish et al., Impact of Economic Sanctions on Access to Noncommunicable Diseases Medicines in the Islamic Republic of Iran, 24 E. MEDITERRANEAN HEALTH J. 42, 42 (2018).

134 For example, in the United States, the "Cuban lobby" with regards to sanctions against Cuba; the "Jewish lobby" with respect to sanctions on Libya, Iraq, and Iran; the "Armenian lobby" with respect to Azerbaijan; etc. See Thomas Ambrosio, Legitimate Influence or Parochial Capture? Conclusions on Ethnic Identity Groups and the Formulation of U.S. Foreign Policy, in ETHNIC IDENTITY GROUPS AND U.S. FOREIGN POLICY 206 (Thomas Ambrosio ed., 2002).

135 Guymon, *supra* note 106, at 856 (noting that a person is subject to designation for engaging in activities that "pose a risk" of materially contributing to proliferation as opposed to making any actual contribution).

136 See 5 U.S.C. § 706(2)(A) (2018) (designating the statutory standard of review limits the courts' determination to whether a decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152, 158 (D.C. Cir.

2004) (holding the court is not permitted "to make any judgment whatsoever regarding whether the material before the Secretary is or is not true," but is allowed to inquire "whether the Secretary had enough information before [him] to come to the conclusion") (internal quotations omitted); *Paradissiotis v. Rubin*, 171 F.3d 983, 987 (5th Cir. 1999).

137 See, e.g., 22 U.S.C. § 8701 (2018) (incorporating the definition of "United States person" from 22 U.S.C. § 8511 (2018) and lowering the EAR de minimis threshold for sanctioned countries, such as Cuba and Iran, from 25% to 10% U.S.-origin content, thus changing the definition of U.S. goods, for which U.S.

control laws apply extraterritorially); see also *Restricting Additional Exports and Reexports to Cuba*, 84 Fed. Reg. 56,117 (Oct. 21, 2019) (to be codified at 15 C.F.R. pts. 734, 740, and 746), <https://www.federalregister.gov/documents/2019/10/21/2019-22876/restricting-additional-exports-andreexports-to-cuba>.



Finally, the manner in which the sanction is enforced and the seriousness of the application of legal measures play an important role in the severity of the sanctions

the application of legal measures play an important role in the severity of the sanctions.¹³⁸ The sudden or gradual enforcement actions leading to a sanction,¹³⁹ the aggressive approach of the sanctioning state,¹⁴⁰ the employment of non-legal measures, such as political and media pressure, and the way sanctions are portrayed in domestic politics of the target country¹⁴¹ also affect the efficacy of economic sanctions.

B. The Human Rights Obligations of the Sanctioning State

Sanctions are aimed at reducing trade flows, denying investment, and limiting foreign exchange and credit facilities to the country. Therefore, sanctions affect access to humanitarian goods because they have a negative impact on the macroeconomic indexes of the target economy, dropping the value of the sanctioned state's currency, depleting the state's foreign exchange reserves, causing liquidity shortages due to the inconvertibility or non-transferability of its income, and limiting access to funds needed for purchasing humanitarian goods.¹⁴² The negative macroeconomic impact along with the traders' unwillingness to engage in trade with the sanctioned state due to reputational damage and difficulties in securing a method of payment and obtaining letters of credit, even for humanitarian goods,¹⁴³ makes ring-fencing the trade of humanitarian goods from the general impact of sanction programs impossible. The sanctioning state's efforts to convince other states to adopt similar restrictive measures against the sanctioned state and a state's monopoly in at least one of the components necessary for the formation of business transactions push foreign companies to refrain from permissible business of the target country. In addition, existence of factors such as the ambivalence of the sanction regulations, and

138 SMART SANCTIONS, *supra* note 79, at 10.

139 Walde, *supra* note 1, at 187.

140 For example, the U.S. announced in 2018 that it had adopted a maximum pressure policy and that harming Iran was the "actual[] intended consequence[]" of the sanctions regime. Background Briefing on President Trump's Decision to Withdraw From the JCPOA, U.S. DEP'T OF ST. (May 8, 2018), <https://www.state.gov/background-briefing-on-president-trumps-decision-to-withdraw-from-the-jcpoa/>.

141 SELECT COMMITTEE ON ECONOMIC AFFAIRS, *supra* note 16, ¶ 7.

142 For example, following U.S. sanctions against Iran on oil sales, billions of dollars of payments for the purchase of Iranian oil were held up in South Korea and India due to the countries' inability to complete funds transfers to Iran. See Cho Mee-young & Yoo Choonsik, Exclusive: Sanctions Trap Billions of Iran Petrodollars in Korea, REUTERS (Aug. 31, 2011, 3:58 AM), <https://www.reuters.com/article/us-irankorea/exclusive-sanctions-trap-billions-of-iran-petrodollars-in-korea-idUSTRE77228Q20110803>.

143 See Nigel Hunt & Michael Hogan, Exclusive: EU Banks Halt Iran Grain Trade Finance, REUTERS (Jan. 26, 2012, 10:05 PM), <https://www.dailystar.com.lb/Business/Middle-East/2012/Jan-26/161189-eubanks-halt-iran-grain-trade-finance-traders.ashx>.

political and media pressure can exacerbate the level of caution the international companies adopt in dealing with a sanctioned country. Restricted access to banking services and difficulties in securing insurance policies increase the associated risks and the cost of transactions. This consequently decreases overall trade volumes. As such, the general impact of sanctions on the whole economy makes it impossible to isolate the effects of comprehensive economic countermeasures on the access to food and medicine,¹⁴⁴ leading to a generalized shortage of essential medicine and medical equipment.¹⁴⁵

1. Human Rights Impact Assessment

The increase in the impact of sanction programs causes a higher level of care and duty for the sanctioning state to limit negative effects and to ensure that fundamental human rights, such as access to food and medicine, are protected. In this respect, the CESCR sets out obligations for states and organizations “responsible for the imposition, maintenance or implementation of the sanctions,” to fully take into account the social and economic rights provided for in the ICESCR when designing sanction programs. The Committee is of the view that the key provisions of the UN Charter dealing with human rights (Articles 1, 55, and 56) fully apply when imposing sanctions:¹⁴⁶ “whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights.”¹⁴⁷

The Human Rights Council presents a more structured approach to this obligation by stating that an effective “human rights impact assessment,”¹⁴⁸ with the purpose of identifying, examining, and measuring the effects of sanctions on human rights “should become a non-derogable standard in cases of sanctions imposed by groups of States or regional organizations.”¹⁴⁹ This impact assessment, which can be conducted not only by the sanctioning states, but also by NGOs and international organizations,¹⁵⁰ should be conducted *ex ante* before sanction regimes are applied, with the “aim to measure the potential future effects of such measures on human rights” and possibly “adjust or change the sanctions regime with a view to preventing human rights violations.”¹⁵¹

2. Monitoring and Responding to Suffering

The humanitarian impact assessment of sanction measures should not be limited to the phase when sanctions are designed and introduced. The Council proposes that the impact assessment continue *ex post* by measuring “the actual impact of implemented sanctions through comparisons between the current situation and the situation before the measures were adopted.”¹⁵⁴ The *ex post* assessment shall include the materialized human rights risks, unforeseen effects, affected

144 Garfield, Devin, & Fausey, *supra* note 28, at 465.

145 See, e.g., *id.* at 458.

146 General Comment No. 8, *supra* note 46, ¶ 1.

147 *Id.* ¶ 1.

148 Jazairy, *Unilateral Economic Sanctions*, *supra* note 37, at 296.

149 *Id.*

150 *Id.*

151 *Id.* at 296–97.

stakeholders, and the mitigating measures that could be adopted to reduce negative effects.¹⁵²

The CESCR also highlights proposals such as establishing “a United Nations mechanism for anticipating and tracking sanctions impacts” and “[creating] a better resourced set of sanctions committees”¹⁵³ to better monitor the humanitarian impact of economic sanctions on the civilian population of the sanctioned state. After monitoring for negative effects, the sanctioning state would be required “to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.”¹⁵⁴

V. IRAN SANCTIONS: NEW DEVELOPMENTS IN THE ICJ’S RULING

On May 8, 2018, U.S. President Donald Trump withdrew from the Iran 5+1 nuclear deal (the “JCPOA”) by issuing a National Security Presidential Memorandum (“NSPM”). Following the implementation of the JCPOA, endorsed by UN Security Council Resolution 2231 on July 20, 2015, the UN, U.S., and EU sanctions against Iran, which were targeting almost the entire economy of Iran, were lifted. The significance of Iran’s nuclear activities to Western countries and Iran’s resistance to their sanctions mobilized the entire economic and political clout of the sanctioning states, who ended up enacting what some view¹⁵⁵ as some of the most punitive economic sanctions ever, with some of the most complex and severe sets of restrictive measures adopted by U.S. Department of Treasury.¹⁵⁶

The U.S. withdrawal from the JCPOA led to the reinstatement of U.S. sanctions against Iran, including the U.S. Presidential Executive Orders and the main congressional acts, such as the Iran Sanctions Act, the Iran Threat Reduction and Syria Human Rights Act, the National Defense Authorization Act, and the Iran Freedom and Counter-Proliferation Act.¹⁵⁷ Accordingly, the United States’ comprehensive and secondary sanctions were unilaterally imposed. Two ninety-and one-hundred-eighty-day wind-down periods were considered for non-U.S. companies to terminate their activities and exit Iran.¹⁵⁸ The sudden decrease, by

152 See Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development, NORDIC TR. FUND & THE WORLD BANK 30 (Feb. 2013), <http://documents.worldbank.org/curated/en/834611524474505865/pdf/125557-WP-PUBLIC-HRIAWeb.pdf>.

153 General Comment No. 8, supra note 46, ¶ 12.

154 Id. ¶ 14.

155 Patrick Goodenough, Obama Touts Toughest Iran Sanctions in History, But Report Questions Their Effectiveness, CNSNEWS (Oct. 23, 2012, 4:35 AM), <http://cnsnews.com/news/article/obama-toutstoughest-iran-sanctions-history-report-questions-their-effectiveness>; Biden Touts Iran Sanctions as Ryan Voices Doubts, YAHOO! NEWS (Oct. 11, 2012), <http://news.yahoo.com/biden-touts-iran-sanctions-ryanvoices-doubts-013524142--election.html>.

156 JUAN C. ZARATE, TREASURY’S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE 315 (2013).

157 Memorandum on Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran’s Malign Influence and Deny Iran All Paths to a Nuclear Weapon, WHITEHOUSE (May 8, 2018), <https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additionalaction-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/>.

158 Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the

seventy percent, of the value of the Iranian currency¹⁵⁹ following the imposition of U.S. sanctions against Iran in May 2018, and the end of banking relations between Iranian and non-Iranian banks¹⁶⁰ affected the importation and prices of imported medicines and goods used for the production of medicines in Iran.

The re-imposition of U.S. comprehensive secondary sanctions on Iran and the humanitarian impact of these measures led Iran to initiate judicial proceedings before the International Court of Justice against the United States on July 18, 2018, based on the violation of the 1955 Treaty of Amity, Economic Relations, and Consular Rights.¹⁶¹ Iran further submitted

a Request for the Indication of Provisional Measures.¹⁶² In its Request, Iran asked the court to order that the United States “immediately take all measures at its disposal to ensure the suspension of the implementation and enforcement of all of the sanctions from May 8, including the extraterritorial sanctions.”¹⁶³

The United States argued that the U.S. sanctions targeting the Iranian economy provided for broad authorizations and exceptions¹⁶⁷ “for conducting or facilitating a transaction for the provision (including any sale) of agricultural commodities, food, medicine or medical devices to Iran.”¹⁶⁸ However, Iran claimed that despite these carve-outs and exemptions, the applicable measures made the importation of urgently needed supplies impossible and “deeply



The re-imposition of U.S. comprehensive secondary sanctions on Iran and the humanitarian impact of these measures led Iran to initiate judicial proceedings before the International Court of Justice against the United States

May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA), U.S. DEPT OF TREASURY 1 (May 8, 2018), https://www.treasury.gov/resourcecenter/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf.

159 Mohammad Nasiri, *Iranians Say US Sanctions Blocking Access to Needed Medicine*, A.P. NEWS (July 30, 2019), <https://www.apnews.com/23327f44786845dbbecee530664ee5a6>.

160 See Esfandiyar Batmanghelidj, *Ambiguity in Trump Sanctions Could Put Humanitarian Trade with Iran at Risk*, BOURSE & BAZAAR (May 14, 2018),

<https://www.bourseandbazaar.com/articles/2018/5/10/deadly-ambiguity-in-trump-sanctions-move-risks-allhumanitarian-trade-with-iran> (“Interruptions in banking channels saw payments turn from the use of industry-standard letters of credit and deferred payment terms to cash-in-advance payments using exchange houses. Transaction and operational costs skyrocketed, with costs being passed on to the consumer, whose buying power was eroded by currency devaluation.”).

161 *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. U.S.)*, Application Instituting Proceedings, 2018 I.C.J. 175 (July 16).

162 *Iranian Provisional Measures*, supra note 12, ¶ 77 (explaining the request for provisional measures was submitted pursuant to Article 41 of the Statute and to Articles 73, 74, and 75 of the Rules of International Court of Justice. The Court’s power to indicate provisional measures exist when there is a risk that irreparable prejudice could be caused to rights which are the subject of judicial proceedings, or when the alleged disregard of such rights may entail irreparable consequences and if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused before the Court gives its final decision).

163 *Id.* ¶ 14.



Iran, in its claim arguing for the detrimental impact of U.S. sanctions on Iranian civilians, referred to certain elements in the U.S. sanctions that could amplify their impact

affected the delivery and availability” of life-saving medicines and medical equipment to the Iranian people.¹⁶⁴

Iran, in its claim arguing for the detrimental impact of U.S. sanctions on Iranian civilians, referred to certain elements in the U.S. sanctions that could amplify their impact. Iran referred to statements made by U.S. authorities expressing their “[determination] to cause even greater prejudice”¹⁶⁵ against Iran, tighten the screws on Iran,¹⁶⁶ and about the U.S. administration’s maximum pressure policy and the announcement of further sanctions and their chilling effects.¹⁶⁷ These were important facts in

establishing a real and imminent risk that would cause irreparable prejudice. This matter highlights the importance of the sanctioning state’s approach when increasing the impact of its sanctions.¹⁶⁸ Additionally, Iran referred to the extraterritorial element to show how the impact of U.S. sanctions exacerbated their chilling effect on many foreign companies and nationals, who announced “their withdrawal from activities in Iran, including the termination of their contractual relations with Iranian companies and nationals.”¹⁶⁹

On October 3, 2018, the ICJ issued an interim order establishing an important step in the role of human rights obligations when designing and imposing economic sanctions.¹⁷⁰ Although the court order was instituted mainly in accordance with the 1955 Treaty of Amity, it marks a new development with regard to the duty of the sanctioning state vis-à-vis the fundamental human rights of the sanctioned state’s civilian population.

A. Importance of the Impact

The ICJ first reminded the parties of the importance of human rights obligations. The “importation and purchase of goods required for humanitarian needs” was discussed as a necessary element that cannot be superseded, even by measures “necessary to protect . . . essential security interests” of the sanctioning states.¹⁷¹ Further, the court, instead of reviewing the domestic sanction measure of the sanctioning state, focused on the impact of the sanction measures and deemed that a sanctioning state’s mere textual exemption and expression of best endeavor is insufficient for claiming fulfillment of its duty of care. These elements “are

164 Iranian Provisional Measures, supra note 12, ¶ 81.

165 Id. ¶ 80.

166 Id. ¶ 82.

167 Id. ¶ 72.

168 Jazairy, *Unilateral Economic Sanctions*, supra note 37, at 296.

169 Iranian Provisional Measures, supra note 12, ¶ 83.

170 Id.

171 Iranian Provisional Measures, supra note 12, ¶ 68.

not adequate to address fully the humanitarian and safety concerns raised by the Applicant.¹⁷²

The court's findings regarding the existence of an "Imminent Risk," "Irreparable Impact,"¹⁷³ and "Irreparable Prejudice," to assess whether the requirements for an interim order were satisfied, went a step further from focusing only on the domestic sanctions measure. The court considered the "irreparable consequences" the sanctions may have on the population of the sanctioned state, without being merely satisfied with "rights relating to the importation and purchase of goods required for humanitarian needs."¹⁷⁴ In addition, the court noted the restrictions on companies providing maintenance for Iranian aviation companies.¹⁷⁵ This provided an insight that the court may also take into account how the sanction measure spells out in practice.

The United States' claim that "there could be multiple causes to which the economic stagnation and difficulties in Iran can be attributed, including mismanagement by the Iranian Government" was ruled out by the court on the basis that it is difficult "to assess the specific impact of its measures on the Iranian economy."¹⁷⁶ In return, the court emphasized the objective outcome of the sanctions and observed that despite the fact that the importation of food, medical supplies, and equipment is exempted from the U.S. sanctions, "it appears to have become more difficult in practice, since the announcement of the measures by the United States, for Iran, Iranian companies and nationals to obtain such imported foodstuffs, supplies and equipment."¹⁷⁷

B. The Procedure for Granting Licenses

The humanitarian exemptions have been mostly structured in a manner which require prior U.S. government approval for transactions and payments related to exempted supplies. The ambiguity, arbitrary nature, and inconsistent interpretations of these exemptions have caused delays, confusion, and, in some cases, denial of requests to export humanitarian goods.¹⁷⁸ The procedural difficulties in obtaining approvals for exempted supplies and the fear of prosecution under sanctions enforcement actions impede the task of aid agencies¹⁷⁹ and have resulted in many international firms and entities refusing to sell humanitarian goods, thus significantly affecting the level of access to life-saving medicine and food.¹⁸⁰

172 *Id.* ¶ 92.

173 *Id.* ¶ 91 ("The Court is of the view that a prejudice can be considered as irreparable when the persons concerned are exposed to danger to health and life . . .").

174 *Id.* ¶ 90.

175 *Id.* ¶ 88.

176 *Id.* ¶ 85.

177 *Id.* ¶ 89.

178 General Comment No. 8, *supra* note 46, ¶ 5.

179 LARRY MINEAR ET AL., *INST. FOR INT'L STUDIES, TOWARD MORE HUMAN AND EFFECTIVE SANCTIONS MANAGEMENT: ENHANCING THE CAPACITY OF THE UNITED NATIONS SYSTEM* 58 (1998).

180 See, e.g., Garfield, Devin, & Fausey, *supra* note 28, at 460 (serious delays occurred while foreign firms sought U.S. authorization for the sale of medicines to Cuba, and on several

A major factor in making the humanitarian carve-outs more compatible with the effective protection of fundamental human rights has been monitoring the procedure for granting licenses. Establishing uniform criteria and definitions for these exemptions, as well as operational criteria for sanctions committees, is of the utmost importance.¹⁸¹ CESCR, without endorsing any proposal, notes that proposals should have a “more transparent set of agreed principles and procedures based on respect for human rights,” “authorization of agreed technical agencies to determine necessary exemptions,” and the “introduction of greater overall flexibility.”¹⁸²

The European Union’s restrictive measures against Iran provide a clear example of an increased observation for the trade of humanitarian goods. The measures set a more relaxed licensing procedure when increasing embargo measures. Initially, the EU Regulation of October 15, 2010,¹⁸⁸ included only limited, weak humanitarian exemptions.¹⁸³ However, the EU Council later moved towards toughening the embargo against Iran and adopted Council Regulation 267/2012, which was accompanied by the introduction of a new mechanism for granting authorizations to ease investment in “food, agricultural, medical, or other humanitarian purposes.”¹⁸⁴ The authorization regime for trade transactions was also eased, by lifting the “appropriate end-user guarantees” and removing Iran’s undertaking “not to use the goods or technology concerned . . . in proliferation-sensitive nuclear activities or for development of nuclear weapon delivery systems.”¹⁸⁵

The court’s order following Iran’s request provides guidance on how humanitarian carve-outs should be drafted and enforced to meet human rights requirements. In this context, the court found that merely providing an explicit textual humanitarian carve-out or “licensing policy providing for a case-by-case issuance of licenses”¹⁸⁶ does not meet the humanitarian obligation of the sanctioning state. Rather, “[t]he United States of America shall ensure that licenses and necessary authorizations are granted.”¹⁸⁷ The court’s ruling was a further step in defining sanctioning obligations as results-oriented rather than means-oriented.

One of the major elements when designing the humanitarian carve-out is identifying a wide range of exempted goods and services. Prohibitions on importing necessary medical equipment, such as incubators or catheters for babies,¹⁸⁸ or excluding certain pharmaceutical inputs from the humanitarian exemptions adversely affect the production of medicine in the sanctioned state.¹⁸⁹ The adverse impact of these deficiencies significantly increased the

occasions the product was useless by the time it arrived).

181 *Id.* at 467–68.

182 General Comment No. 8, *supra* note 46, ¶ 12.

183 See *id.* art. 7 (providing humanitarian exceptions, including “appropriate end-user guarantees”).

184 Council Regulation 267/2012, art. 19, 2012 O.J. (L 88) 1, 9.

185 *Id.* art. 7.

186 Iranian Provisional Measures, *supra* note 12, ¶ 86.

187 *Id.* ¶ 102.

188 HUFBAUER ET AL., *supra* note 3, at 603.

189 Petrescu, *supra* note 120, at 210.

humanitarian impact of sanctions in countries such as Iraq,¹⁹⁰ Yugoslavia,¹⁹¹ and Burundi.¹⁹² To address this deficiency, the CESR's General Comment 8 highlights the proposal of having a "wider range of exempt goods and services"¹⁹³ in order to make sanction programs more compatible with human rights obligations.

This element was not invoked by Iran in its Request, but it was referred to by the court indirectly in its enumeration of humanitarian goods and elaboration of further goods necessary for the safety of civil aviation. In its interim ruling, the ICJ provided that the United States "shall remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of the Islamic Republic of Iran of (i) medicines and medical devices; (ii) foodstuffs and agricultural commodities; and (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and inspections) necessary for the safety of civil aviation."¹⁹⁴

C. The Removal of Any Impediment and Banking Payment

One of the main elements increasing the impact of sanction measures is the control of the sanctioning state over a necessary chain in a transaction. The United States' leading role in financial markets and multinational companies' dependence on access to banking payment services necessary for conducting humanitarian trade operations with Iran¹⁹⁵ have had a major extraterritorial impact on the importation of humanitarian goods to Iran.¹⁹⁶ The impact of banking sanctions, especially those blocking transactions, have not only impacted the flow of humanitarian goods but also prevented donations from foreign charities, including those approved by the U.S. Treasury.¹⁹⁷

Due to these impediments and banking difficulties experienced under the



Prohibitions on importing necessary medical equipment, such as incubators or catheters for babies, or excluding certain pharmaceutical inputs from the humanitarian exemptions adversely affect the production of medicine in the sanctioned state

190 Comm. on Econ., Soc. and Cultural Rights, Third Periodic Rep. on the Work of Its Seventeenth Session, E/C.12/1/Add.17, ¶ 7 (Dec. 12, 1997).

191 See Michael P. Scharf & Joshua L. Dorosin, *Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee*, 19 BROOK. J. INT'L L. 771, 784–86 (1993).

192 Julia Grauvogel, *Regional Sanctions Against Burundi: A Powerful Campaign and its Unintended Consequences* 10 (German Inst. of Global & Area Studies Working Paper No. 225, 2014).

193 General Comment No. 8, *supra* note 46, ¶ 12.

194 Iranian Provisional Measures, *supra* note 12, ¶ 98.

195 Kenneth Katzman, *Iran Sanctions 68–69* (Library of Congress Congressional Research Service, Paper RS20871, Jan. 24, 2020).

196 Esfandiyar Batmanghelidj, *Ambiguity in Trump Sanctions Could Put Humanitarian Trade with Iran at Risk*, BOURSE & BAZAAR (May 14, 2018), <https://www.bourseandbazaar.com/articles/2018/5/10/deadly-ambiguity-in-trump-sanctions-move-risks-all-humanitarian-trade-with-iran>.

197 Nasiri, *supra* note 162.



Iran’s request also stated that “sanctions” on the purchase or acquisition of U.S. dollar banknotes and on significant transactions related to the purchase or sale of Iranian rial plainly impose restrictions on the making of payments, remittances, and other transfers to or from Iran

previous Iran sanctions regime between 2010–2015, the Swiss government, following the introduction of U.S. sanctions on May 8, 2018, entered into discussions with the U.S. administration to establish a humanitarian channel with Iran.¹⁹⁸ The goal of the Swiss government was to seek “some sort of ‘certainty’ for banks involved [in humanitarian trade with Iran] so that they will not be excluded from the U.S. market” and clarity on the permissibility of “the transfer of Iranian-origin funds into the Swiss accounts” when Iranian importers pay Swiss importers for humanitarian goods. Though these requests were

consistent with existing U.S. sanctions laws, they were blocked by the U.S. administration in 2018.¹⁹⁹ In addition, the U.S. administration took a step further in designating Parsian Bank,²⁰⁰ a major Iranian bank handling banking payment for humanitarian trade, as a Specially Designated Global Terrorist (“SDGT”).²⁰¹ This decision came as a big surprise to Iran’s humanitarian trade.

Iran’s request also stated that “sanctions” on the purchase or acquisition of U.S. dollar banknotes and on significant transactions related to the purchase or sale of Iranian rial plainly impose restrictions on the making of payments, remittances, and other transfers to or from Iran.”²⁰² The ICJ observed that “as a result of the measures, certain foreign banks have withdrawn from financing agreements or suspended co-operation with Iranian banks.”²⁰³ These foreign banks refused to

198 Esfandiyar Batmanghelidj, Trump’s NSC “Blocks” Swiss Effort to Ease Iran Humanitarian Trade, BOURSE & BAZAAR (July 31, 2019), <https://www.bourseandbazaar.com/articles/2019/7/31/trumps-nsblocks-swiss-effort-to-ease-humanitarian-trade-with-iran>.

199 The Swiss Humanitarian Trade Arrangement (“SHTA”) finally opened in late January 2020 with the purpose of assuring export guarantees through Swiss financial institutions on shipments of food, pharmaceuticals, and medical products to Iran. Michael Shields & Humeyra Pamuk, U.S. Says First Shipments of Medicine to Iran Delivered Via Swiss Humanitarian Channel, REUTERS (Jan. 30, 2020), <https://www.reuters.com/article/us-swiss-iran/u-s-says-first-shipments-of-medicine-to-iran-delivered-viaswiss-humanitarian-channel-idUSKBN1ZT205>.

200 Treasury Sanctions Vast Financial Network Supporting Iranian Paramilitary Force That Recruits and Trains Child Soldiers, U.S. DEPT OF THE TREASURY (Oct. 16, 2018), <https://home.treasury.gov/news/press-releases/sm524>.

201 Parsian Bank—along with three other Iranian banks: Pasargad Bank, Middle East Bank, and Saman Bank—is unusual among Iranian financial institutions because it complies with FATF-reflective standards on anti-money laundering procedures. For this reason, it was a major bank in handling sanction-compliant trade with Iran. Esfandiyar Batmanghelidj, New Sanctions on Iran’s Parsian Bank Threaten Humanitarian Trade, BOURSE & BAZAAR (Oct. 16, 2018),

<https://www.bourseandbazaar.com/articles/2018/10/16/new-sanctions-on-irans-parsian-bank-threaten-humanitarian-trade>.

202 Iranian Provisional Measures, supra note 12, ¶ 57.

203 Id. ¶ 89.

accept banking transfers and ceased all corresponding relations.

The court found that “it has become difficult if not impossible for Iran, Iranian companies and nationals to engage in international financial transactions that would allow them to purchase items not covered, in principle, by the measures, such as foodstuffs, medical supplies and medical equipment.”²⁰⁴ The court ruled that having “broad authorizations and exceptions to allow for humanitarian-related activity”²⁰⁵ does not meet the minimum requirement for the protection of human rights. It ruled that the United States “shall remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of the Islamic Republic of Iran” of humanitarian goods.²⁰⁶

VI. CONCLUSION

Economic sanctions are the most prevalent policy tools for decisionmakers in international relations. They have been widely used by the powerful and economically advanced states to enhance their foreign policy. The global economic structure and complicated nature of international trade relations have created a complex picture of countermeasures in the human rights context. The general regression of social and economic rights, the impact of economic sanctions on the trade of humanitarian goods due to negative macroeconomic effects, and the significant increase in transaction costs have made the merely textual legal carve-outs in sanctions an insufficient policy for addressing these humanitarian consequences.

In this context, a sanctioning state, while not required to provide direct humanitarian assistance to the sanctioned country, cannot be released from its liability if it only limits its actions to the mere inclusion of textual waivers for humanitarian goods in its sanction programs. The lack of clear procedures for such carve-outs and their related payments, the fining of major international financial institutions for facilitating payments related to sanctioned economies, the approach of the sanctioning state in exerting maximum pressure on the sanctioned state, the structure of the sanctioned economy, and the comprehensive nature and extraterritorial implementation of domestic laws all play a role in enhancing the power of a sanction program, and consequently affect the importation of humanitarian goods to the sanctioned country.

The Order of the ICJ pursuant to the Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America) case established a legal precedent in designing and structuring economic sanctions and humanitarian carve-outs. Although the court bound its jurisdiction on the Treaty of Amity, its decision concerning the irreparable damages of the reinstatement of U.S. secondary sanctions on May 8, 2018 provides an insight into how a sanction regime must be designed to be more compatible with human rights obligations.

The Court ruling provided that a licensing policy, based on a “case-by-case”

204 Id.

205 Id. ¶ 86.

206 Id. ¶ 98.

issuance of licenses, does not meet the humanitarian obligation of the sanctioning state. The sanctioning state must, therefore, ensure that licenses and necessary authorizations are “effectively granted.” In addition, the court ruled for the insufficiency of the broad authorizations and waivers regime and required that any impediment arising from sanction measures to the free exportation of humanitarian goods to the sanctioned state must be removed by the sanctioning state. To this end, the court, due to the United States’ domination of the international financial system, highlights the issues encountered by legitimate financial institutions with banking transfers. The sanctioning state must ensure that the banking transfers related to humanitarian goods and services are not subject to any restriction.

The more sanction regimes increase in strength and scope, the higher the level of obligation of the sanctioning state in seeking the “protection of fundamental human rights,” especially in relation to the civilian population of the sanctioned state. This obligation goes beyond providing mere textual exceptions and authorizations in sanction laws and regulations and shall take into consideration the power of the sanctioning state and the effect of the restrictive measures on the population of the sanctioned state. Therefore, when it comes to U.S. economic sanctions, the United States, due to its greater authority in global financial system, shall ensure that the banking transfers related to humanitarian goods shall be made without any restriction.

Iran, Sanctions, and the COVID-19 Pandemic

Roxane Farmanfarmaian

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This week, Iran announced its highest single-day death toll from COVID-19 since the start of the outbreak in February. The uptick in cases and deaths is the result of a new wave of infections that began May 3rd, two weeks after the gradual easing of the country's partial lockdown in mid-April.

Coincident with the upsurge has been a drop of 13% this past month in the value of Iran's currency, reflecting not only the economic impact of the virus, but a disinclination by exporters to repatriate their foreign currency. How effectively Iran is handling this health crisis, in the face of the mounting damage to its already enfeebled economy, is a debate that has generally judged Iran harshly, both outside Iran and among groups within. Yet, criticising Iran's conduct fits into a picture that is not unique to the issue of Covid-19, but which afflicts many discussions to do with the Islamic Republic, in which context and fact are understood within a politicized frame of curated data and received wisdom, clouding the true picture, to the detriment of those attempting to formulate policy towards it.

In the case of Iran's approach to Covid-19, the numbers and the context are worth considering. Iran's first four deaths were reported on February 6th. This made it the first country outside East Asia to experience the impact of the virus, when it was still being called an epidemic. A full month would pass before the World Health Organisation labelled it a pandemic and offered specific guidelines for its containment.

Iran was also the first country to be exposed to Covid-19 without previous experience with the virulence of a SARS corona virus, unlike China, South Korea, Hong Kong, Singapore, Taiwan and Vietnam, all of which responded with immediate border closures and lockdown once it appeared.

Instead, Iran at first hesitated, like many other countries in the world. In the first two weeks after the virus crossed the Iranian border, the government made multiple errors that significantly contributed to its spread. President Rouhani's



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administration did not lock down Qom, where the virus initially emerged; it did not stop flights transporting personal protective equipment (PPE) to Wuhan to help out with the crisis; it held a parliamentary election; and it kept most mosques, government offices, transport lines and businesses open, opting instead to initiate widespread public infrastructure sanitation and social distancing. Further, the government was unable to agree a common platform, the division between Conservatives and Reformists, and a lack of cooperation by the establishment clergy in Qom, leading to ambiguous messaging, insufficient transparency,

and delayed policies. Those two weeks proved critical, and the virus spread logarithmically.

This was not a pattern unique to Iran. Other states, most notably the UK and the US, delayed lock-down procedures, as large sports events gathered their citizens together well after the virus had been detected. India conducted an election after Iran's and put no restrictions in place in February, to accommodate a state visit by US President Trump that same month. As the weeks unfolded, it became increasingly clear to populations and leaders the world over that timing and containment measures were not only difficult, but nationally specific.

Iran's unique context

As a frontline country, Iran's calculations starkly contrasted the trade-off between saving its people's health and saving the economy. On the one hand, it enjoyed a significant advantage – its health care system – which includes quality medical training and a domestic pharmaceuticals industry that produces not only PPE, ventilators and testing kits, but self-sufficiency in 70% of the drugs needed by the population (although this changed drastically with the virus outbreak, particularly as it must still import key ingredients, and specialised packaging).

On the other hand, US sanctions were isolating and suffocating its economy. On the plus side, four decades of sanctions had instilled a resilience among Iran's people; there was little panic buying as a gradual lockdown was put in place, and economic turnarounds had become an expectation after each new sanctions regime translated into domestic solutions to closed foreign markets – as in the case of the pharmaceuticals industry. Yet, the government was cash poor, leaving it few options to offer business bailouts, loan support or employment supplements.

On May 4th, nine weeks into the pandemic, the curve flattened and the number of daily deaths in Iran reached a low after a sustained month-long decline, the total standing at 6,091. Economists, such as Harvard's Djavad Salehi-Isfahani, who

monitors long term health statistics produced by several government ministries, considers the numbers generally credible, reflecting data collected routinely through the country's network of health and insurance facilities. By July 7th, according to the BBC, one in every 45 people was being tested. The numbers presented by regime opposition group the Mujaheddin-e Khalq (MEK), showing five times the government's statistics, are by contrast neither verifiable nor collected systematically. In comparison to Iran's official total of 12,635 deaths (World meter), the UK, with a population of 20 million less people and having battled the virus for less time, had, by June 12th, a similar number of confirmed cases, and 44,819 deaths, almost four times Iran's.

Unlike the UK, however, Iran's demographics have been a boon, with the average age just 31. Yet also unlike the UK, Iran's battle has been fought under the carapace of sanctions, significantly narrowing its options. The pandemic did little to change that picture, and indeed, rather than easing the pressure during the crisis, the US has applied four more rounds of sanctions since February and contributed to the derailing of Iran's application for an IMF loan. The three special financial instruments designed to facilitate the transfer of humanitarian aid to Iran in the face of secondary sanctions on international banking transactions – Europe's INSTEX, the US-backed Swiss Humanitarian Trade Arrangement (SHTA), and the South Korean Humanitarian Trade Arrangement (KHTA) – have proven so far to have been one-shot channels, stymied by US regulatory red tape.

Unexpectedly, perhaps, it has been its Gulf neighbors, particularly the UAE, that have come to the rescue with PPE and medicines as heightened need led to shortages. Likewise, they have facilitated large financial trades for Iran, springing leaks in the US regime.

Although most of the financial buffers made available by the government will not keep up with inflation, the Rohani administration has nevertheless offered \$4 billion in loans to small and medium-sized businesses, loans in the form of transfer payments to households, and nominal pension payments. Yet, it is clear to most Iranians that they are becoming poorer, a trend that began in earnest with Obama's sanctions in 2012, after two decades of high oil prices and a sustained rise in living standards.

As the new surge in infections grips five out of Iran's 31 provinces, the government is battling social distancing fatigue and widespread fear that the currency drop will cut deeply into people's ability to withstand the economic slowdown. Although the roads are choked with traffic, and the bazaar, quiet for the first time in centuries, is now bustling, the concern is that hyperinflation may be in the offing, and hard decisions balancing health against economic welfare, according to the Health Minister, Said Namaki, could prompt protests.

Whispers behind closed doors suggest Iran's storied capacity to face down sanctions may finally have met its match in Covid-19. What is clear is that although the government does not consider the virus is out of control and spokesman Ali Rabiei sees 'the gradient of the death toll is still not sharp' enough to warrant the economic risk of a second lockdown, Iran is balancing choices as its death toll remains stubbornly high that few other countries are having to contend with.

For Tourism in Iran, It Wasn't Supposed to Be Like This

Kyle Olson¹

**This article is the second in a five-part series originally published in Bourse & Bazaar.*

Iran has many enticements for the intrepid foreign traveler. With its culture and history, its cuisine and its arts, Iran is a highly desirable destination. But for many throughout the world, Iran's negative portrayal in the media has a major impact on how it is viewed². For the past forty years, Iran has been depicted as a rogue state, an international pariah, and a land of religious fanatics chanting "Death to America" and "Death to Israel." From George W. Bush branding Iran as a member of the "axis of evil" to Donald Trump's designation of Iran as the world's "leading sponsor of terrorism," a particular narrative has taken root in Anglophone media that positions Iran as a dangerous, hostile, and unwelcoming country.

Dissenting voices, however, do exist. Most important among them are journalists, such as Dutch New York Times correspondent Thomas Erdbrink, whose 2018 Frontline special feature *Our Man in Tehran*³, provides a much needed corrective on Iranian society, focusing on human-interest stories which show Western audiences slices of life in Iran. In vivid sequences⁴, among many other topics, Erdbrink documents "ordinary Iranians' love of country, love of travel, of music, of fun, the craving for respect and national stature, fascination with America, hatred of injustice, and reverence for parents."

But perhaps even more important than journalists are travel-show hosts, who show through their own personal experiences just how transformative actually visiting Iran can be. Take for example, Anthony Bourdain, who captured the effect that being in Iran can have on perception of the place and its people in his CNN show *Parts Unknown*. He narrates his confusion in a street-scene montage at the beginning of his famous Iran episode⁵: "It wasn't supposed to be like this. Of all the places, of all the countries, of all the years of traveling, it's here—in Iran—that I'm greeted most warmly by total strangers." Seated at a kabob restaurant, as he rips apart a piece of noon-sangak, a popular flatbread, he says directly to the camera: "Good to be here, finally—it's taken some time. Like, a lot of time—like, four years, I've been trying. Finally!" Over a shot of meat and vegetable kabobs being prepared and served, Bourdain invites the viewer to "forget about the politics for a moment, if you can," before extolling the virtues of Iran's rich, complex cuisine, highlighting

Iranian hospitality, and noting that Iranians tend to kill guests with kindness.

While food and hospitality are featured by Bourdain, Rick Steves, another famous travel-show host, highlights the allure of Iran's other major attraction for travelers and tourists. In the first minute of Steves' "Iran: Yesterday and Today⁶," images of Persepolis appear three times, Iran's 2500-year legacy of civilization is praised, and the viewer is primed for footage of the "splendid monuments of Iran's rich and glorious past."

The significance of Iran's cultural heritage in capturing the imagination of foreign travelers is further reflected in the plot of the 2006 Iranian adaptation of *My Big Fat*

Greek Wedding, titled in Farsi *Ezdevaj be Sabk-e Irani* (Marriage, Iranian Style⁷).

One day while working at her father's tour agency, the female lead Shirin meets an American, David Howard (Davood), when he comes into the office to schedule a tour to Shiraz. The scene is painfully awkward for both characters—and the viewer, I should add—but through this brief encounter, a budding courtship begins. Shirin's father is particularly displeased and seeks to distance the two, but her Uncle Mehdi and mother Akram-Khanoum conspire to arrange for Shirin to join the tour as a guide. The first steps of a flirtatious dance between the David and Shirin occur on the tour—upon the Apadana of Persepolis⁸ itself no less—and culminate in David's declaration of his love for Shirin at the Tomb of Hafez. The choice of these settings is far from accidental, connecting the intercultural romance—and by extension, the relationship between the protagonists' two countries—directly to Iranian heritage. The significance of Iran's cultural heritage sites, beyond their clear symbolic importance to Iran's national identity, is reflected not just in media representations of the country, but in the fact that tourism and cultural heritage have been coupled administratively in Iran since their merger into a single government agency in 1982. In its various organizational forms, this agency has overseen the development of a network of museums and foundations, academic departments and research centers, contractors, and traditional craft producers, as well as charitable trusts and religious endowments. In 2019, the former Organization for Cultural Heritage, Handicrafts and Tourism (ICHHTO) was upgraded to the status of an official government ministry⁹ (the Ministry of Cultural Heritage, Tourism and Handicrafts or MCTH). While my sources tell me that this has not resulted in significant changes to the structure of the organization or its personnel, it has increased its prestige, and crucially, its budget. Whatever the motives for and ultimate effects of this administrative reorganization might be, the change reflects the important role that tourism has come to play in Iran's government, public policy, and economy. According to Mohammad-Hossein Asgharpour, MCTH's Director General of the Office of Facilities and Resources, in its first year, the ministry oversaw the



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execution of approximately 750 projects, representing investments of USD 153.6 million, providing direct employment for 7266 people¹⁰. These projects include everything from the development of hotels, eco-tourism resorts, guesthouses, and health villages, to supporting museums and restoration/conservation efforts. As indicated by a recent statement¹¹ from the MCTH's Director General of the Office for Tourism Studies and Training, considerable investments are being made in capacity-building and human capital. In the first six months of the Iranian year 1399 (2020-21), at least 10,000 stakeholders and professionals attended trainings

sponsored by the Ministry in a range of domains. These include workshops on topics such as: facilities management, ecotourism and sustainability, applications of new technologies, quality management, financial management, etiquette and hospitality, and training and retraining tour guides. While it is difficult to ascertain the exact proportion of the ministry's budget spent on human capital and tourism, as opposed to heritage protection, preservation, restoration, and research, there can be no doubt that archaeological sites and museums are a major draw for tourists and represent focal points of infrastructural investment in the tourism industry.¹² With a favorable exchange rate, a famous culture of hospitality, and numerous UNESCO World Heritage Sites, not to mention all the investment outlined above, Iran should by all accounts be a highly sought-after destination for international travelers. Major tour operators targeting foreign tourists are certainly keen to highlight Iran's cultural heritage on their websites and in their advertising. These firms emphasize above all else the depth of history and culture in Iran, spotlighting ancient monuments as well as Iran's rich artistic and architectural traditions. One operator currently provides seven main tour packages, three of which are specifically focused on heritage, but all of which involve visiting heritage sites¹³. Another tour¹⁴ leads its pitch with an invitation to experience "the wondrous remains of the ancient capital of Persepolis – the scale and grandeur will leave you in no doubt that this was once the center of the known world." Welcome to Iran's¹⁵ Iran Historical Tours describes Iran as a land with an "ancient civilization, rich history, [and] historical monuments," highlighting Iran's archaeological heritage as a particular draw for tourists interested in art and history. English-speaking tourists who might have come into contact with this advertising copy, however, constitute only a fraction of all the tourists traveling to and within Iran. After the United States pulled out of the JCPOA, despite specific targeted attempts to attract foreign tourists to Iran from Europe and China, arrivals from these countries decreased by 25-40%, whereas arrivals from neighboring countries such as Iraq, Azerbaijan, Afghanistan, Turkey, Pakistan, and Turkmenistan increased substantially. According to MCTH, many of these "tourists" are actually

pilgrims¹⁶, who have come to Iran to experience the country's Islamic—rather than ancient—heritage. In terms of visas issued, the number of pilgrims exceeded tourists in 1396 (2017-18) by approximately 100,000, and in 1397 (2018-2019) by over 1 million.

Regardless of the origins and motivations of tourists coming to Iran, heritage is clearly a draw and is recognized as potentially big business. Prior to and immediately following the signing of the JCPOA, experts and policymakers had hoped that the tourism industry would not only benefit from the normalization of Iran's international relations, but in fact become a central part of the Iranian economy, providing a sustainable base for employment and revenue for years¹⁷ to come. By MCTH's own accounting, nearly 1.3 million people¹⁸ are employed in the tourism industry in Iran. In 2016, the economic activity of the sector represented approximately 2 percent of the country's GDP¹⁹ and all indicators suggest that it continued to grow until early 2020. Before COVID-19 struck, despite American sanctions, the Iranian heritage and tourism sector was flourishing, attracting 8 million foreign²⁰ tourists in the Iranian calendar year 1397 (2018-19). This represents significant growth from ten years prior, when Iran recorded only 3 million foreign arrivals²¹.

Ultimately, it appears that American sanctions did not significantly slow the arrival²² of foreign tourists to Iran, though it may have had an impact on who visited Iran and from where. In the first three months of 1399 (2020-21), however, only 74 foreign tourists visited Iran, and with inter-provincial travel subject to stiff restrictions, the tourism industry has been one of the hardest²³ hit by the pandemic, with estimates of losses across the industry exceeding two billion dollars in the first six months of 1399. Regardless of the pandemic, however, because of the pressure of sanctions, the MCTH's long-term strategic outlook was already focused on fostering the growth of domestic tourism as a pillar of sustainable development.²⁴ Between 1397 (2018-19) and 1398 (2019-20), domestic tourism reportedly increased by 20 percent²⁵. Two European colleagues related that between 2016-2018, while there were increased numbers of Italian, French, German, and Chinese tourists visiting the sites where they were working, the overwhelming majority of tourists were Iranian. It is important to note, however, that while there is substantial domestic²⁶ demand, spending by Iranian nationals is seen²⁷ to be lower than that of foreign visitors, even though foreign tourists must travel with cash as it is presently impossible to make payments using international credit cards. Despite obstacles to capitalizing on the available opportunities²⁸ and the Coronavirus pandemic, this sector is still seen by policymakers as one with great potential for growth.

At the present juncture, however, it is difficult to gauge the direct and specific effect of American sanctions on the economics of the Iranian cultural heritage management sector. But by recognizing the importance of Iranian cultural heritage to the tourism industry and examining the impact of American policy on that sector, we can obliquely approximate the consequences of maximum pressure on heritage management. Currently, it appears that American sanctions have had two outcomes: first, there has been a decrease in foreign tourists from Europe and China coupled with an increase in foreign tourists from neighboring countries, presumably for pilgrimage; and second, policymakers have shifted their attention

to stimulating demand for domestic tourism. By all measures, however, the industry has been severely handicapped by the COVID-19 pandemic, suffering job losses estimated²⁹ at around 13,000 by August 2020 among tour guides alone, not to mention in hotels and travel agencies. Prognoses for the future remain bleak, as demand is not likely to rebound soon, and promised government³⁰ support for the industry has been slow to materialize. Yet, the importance of tourism for improving Iran's image on the world stage is clear. According to the results of MCHT-internal surveys, tourists reported a "very positive view" of Iran after visiting, noting how much their opinion of the country had changed after seeing it with their own eyes, rather than through the lens of the media. Ali Asghar Mounesan, the Minister in charge of MCTH, recently observed that tourists are cultural ambassadors all over the world, but nowhere more so than in Iran. Indeed, according to Mounesan, tourism has the ability to bring nations closer together. Iran's heritage plays a role in cultural diplomacy that³¹ goes far beyond tourism, however. In the next article in this series, we will explore in greater depth the impact of American sanctions on museum exchanges and inter-institutional cooperation in the heritage sector.

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