

## SYMPOSIUM ON UNILATERAL TARGETED SANCTIONS

### STATE RESPONSIBILITY FOR “TARGETED SANCTIONS”

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The United States and other actors such as the European Union impose “targeted sanctions” against foreign officials for acts carried out in their official capacity, or against legal entities of targeted states. This mirrors the practice and experience of the United Nations. The Security Council’s practice of imposing comprehensive sanctions in the early 1990s quickly evolved into a practice of “targeted” or “smart” sanctions, to both improve effectiveness and to alleviate the significant effects of sanctions on the population of targeted states.<sup>1</sup> However, the legal regime for resorting to sanctions is different when it comes to states acting unilaterally than it is for collective action within the framework of the UN Charter. This essay first clarifies some terminological issues. It then delves into the legality of the practice of unilateral “targeted sanctions,” and concludes that the most legally difficult aspect of these measures is their purported extraterritoriality.

#### *Terminology*

First, it is useful to clarify the terms of the debate. We often hear that the United States has adopted “sanctions” against this or that state—e.g., that it reintroduced sanctions against Iran<sup>2</sup>—just as we hear that the United Nations has adopted “sanctions” against North Korea, for example. “Sanctions,” however, is not a term of art in international law. In particular, the UN Security Council has the power, acting under Chapter VII of the UN Charter, to adopt “measures not involving the use of armed force” in response to a threat to the peace, breach of the peace, or act of aggression.<sup>3</sup> These measures are binding on all UN member states by virtue of Article 25 of the Charter, and supersede any obligations that the member states have under international treaties in accordance with Article 103. Even though these are not formally called “sanctions” in the UN Charter, it is best to reserve the unqualified term “sanctions” for such collective action undertaken by an international organization.<sup>4</sup>

States may, however, impose “unilateral sanctions,” i.e., adopt certain measures targeting another state, its officials, or individuals or legal entities with the nationality of that state. In some cases, these measures may be unfriendly but not unlawful, meaning that the state adopting them is not actually violating any international

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<sup>1</sup> See UN Secretary-General, *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, UN Doc. A/50/60-S/1995/1, at para. 70 (Jan. 3, 1995).

<sup>2</sup> *Trump Administration to Reinstate All Iran Sanctions*, BBC NEWS (Nov. 3, 2018).

<sup>3</sup> *UN Charter* arts. 39 & 41.

<sup>4</sup> *International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries*, II (2) Y. B. INT’L L. COMM’N 31, 75 (2001).

obligation that it owes to the targeted state. Such measures are called “retorsion.”<sup>5</sup> Being lawful measures, they do not require any justification under international law. An example of an act of retorsion is the withdrawal of voluntary aid that was being given to the targeted state.<sup>6</sup> There is no obligation to provide such aid under international law, so its withdrawal is not unlawful. Similarly, there can be “targeted” acts of retorsion, such as excluding certain persons from the United States. Since the United States is under no international law obligation to admit any foreign national into its territory, such a “sanction” is an act of retorsion that requires no legal justification.

By contrast, a state may adopt measures against another state that are on their face unlawful, i.e., measures that breach the obligations of the reacting state towards the targeted state. Such measures engage the responsibility of the reacting state, unless they can be justified as being taken in response to a previous breach by the targeted state of its obligations towards the reacting state. In that case, the *prima facie* unlawful measures are considered to be “countermeasures” and thus their wrongfulness is precluded,<sup>7</sup> as long as they comply with the relevant international rules for resort to countermeasures.

Essentially, then, “targeted sanctions” taken by states unilaterally against other states, their officials, and so forth, may be acts of retorsion, in which case no legal justification is required—anybody is allowed to be unfriendly as long as they do not violate the law—or they may be countermeasures. If the unilateral “targeted sanctions” breach the reacting state’s obligation towards the targeted state and cannot be justified (excused) as countermeasures, then they violate international law and engage the international responsibility of the state taking them.

### *Legality*

What are the conditions for lawful resort to countermeasures? They are many, and complicated, and this is merely a rough sketch. Countermeasures are measures that are in breach of an obligation of the reacting (injured) state taken against a target (responsible) state, in response to a previous breach of an obligation of the target state that is owed to the reacting state, or to a group of states including that state, and aiming to induce the compliance of the target state with its obligations under the law of state responsibility to cease the wrongful act if it is continuing, to offer assurances and guarantees of nonrepetition, and to offer reparation.

From the elements of this definition emerge the legal conditions for lawful resort to countermeasures. Since the function of countermeasures is to induce compliance,<sup>8</sup> they cannot be punitive in character. Instead, they must be (i) limited to the nonperformance of obligations “for the time being” (i.e., until compliance is achieved)<sup>9</sup> and (ii) reversible, so as to allow the reacting state to resume compliance with its own obligations.<sup>10</sup> Since they must be targeted on the responsible state, the target must be a state that is internationally responsible for the breach of an obligation (iii).<sup>11</sup> Since they can only be taken by an injured state, the obligation that the target state breached must be owed to the reacting state (iv).<sup>12</sup> The measures must be proportionate to the injury suffered by the reacting state (v).<sup>13</sup> In addition, they cannot be in breach of certain obligations, such as the obligation not to use force, obligations of a humanitarian character, and obligations to respect human rights, other obligations under peremptory

<sup>5</sup> *Id.* at 128.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, art. 22.

<sup>8</sup> *Id.*, art. 49(1) & 130.

<sup>9</sup> *Id.*, art. 49(2).

<sup>10</sup> *Id.*, art. 49(3).

<sup>11</sup> *Id.* at 130.

<sup>12</sup> See *id.*, arts. 42 & 48 (providing definitions of injured states); cf. *id.*, art. 54 (discussing third-state countermeasures).

<sup>13</sup> *Id.*, art. 51.

norms of international law, or certain obligations under diplomatic law (vi).<sup>14</sup> There are certain other procedural requirements for resort to countermeasures, such as notification,<sup>15</sup> which can on occasion be circumvented by recourse to “urgent” countermeasures.<sup>16</sup>

What emerges is that we can only assess the legality of unilateral “targeted sanctions” on a case-by-case basis. Every measure must be reviewed to determine whether it falls foul of any obligations of the state taking it owed to the target state. If not, the measure is an act of retorsion, and the legal assessment stops there. If the measure appears to breach some obligation owed to the target state, then it must be assessed against the conditions for lawful resort to countermeasures. If it complies with those conditions, the wrongfulness of the measure is precluded, and the reacting state bears no international responsibility for it. If, however, the measure falls foul of any of those conditions, it constitutes an internationally wrongful act, which engages the responsibility of the reacting state.

If it is impossible to assess the legality of all potential targeted sanctions in the abstract, it is worth examining the “sanctions” that the United States reintroduced against Iran after its “withdrawal” from the Joint Comprehensive Plan of Action,<sup>17</sup> especially against the background of claims brought by Iran in the ICJ against the United States for violations of the Treaty of Amity of 1955 between them.<sup>18</sup>

Iran claims that the U.S. decision to reimpose and aggravate a comprehensive set of so-called “sanctions” and restrictive measures targeting, directly or indirectly, Iran, Iranian companies, and Iranian nationals, violates U.S. obligations under the 1955 Treaty of Amity.<sup>19</sup> The sanctions imposed by the United States relate to the blocking of property of certain Iranian natural and legal persons, the revocation of licences to Iranian companies, and the exclusion of certain Iranian nationals from the United States.<sup>20</sup> There are a couple of things to note with respect to the Iranian claim.

The first is that Iran brought no claim against the United States with respect to the previous iteration of the sanctions. This may be explained by the fact that the previous regime of U.S. sanctions was “covered,” at least to a large extent, by the parallel regime of UN Security Council sanctions against Iran. Indeed, the United States could have retorted, in such a case, that it was under an obligation to adopt these measures in accordance with Article 25 of the Charter, and that this obligation superseded its obligations to Iran under the Treaty of Amity in accordance with Article 103. To the extent that a state takes measures in compliance with a Security Council resolution, they require no independent justification under international law (though they do require such justification when they go beyond what the Security Council requires).

The second thing to note is that Iran brought no claims under customary international law. This is because of jurisdictional restrictions in the instance: since Iran is relying on the compromissory clause in the Treaty of Amity, it can only bring before the court a dispute as to the interpretation and application of that treaty.<sup>21</sup> However, the treaty imposes a number of obligations that states do not have under customary international law, and it is these obligations that Iran argues the U.S. sanctions are breaching: the obligation not to adopt discriminatory and

<sup>14</sup> *Id.*, art. 50.

<sup>15</sup> *Id.*, art. 52(1).

<sup>16</sup> *Id.*, art. 52(2).

<sup>17</sup> See [S.C. Res. 2231](#) (July 20, 2015) (endorsing the Joint Comprehensive Plan of Action).

<sup>18</sup> [Alleged Violations of the Treaty of Amity, Economic Relations, and Consular Rights \(Iran v. U.S.\)](#), Application Instituting Proceedings (July 16, 2018) [hereinafter Application Instituting Proceedings].

<sup>19</sup> *Id.* at para. 1.

<sup>20</sup> See, e.g., *id.* at para. 21.

<sup>21</sup> [Treaty of Amity, Economic Relations, and Consular Rights](#) art. XXI(2), Aug. 15, 1955, 8 U.S.T. 899, 284 UNTS 93 [hereinafter Treaty of Amity].

unreasonable measures, the obligation not to restrict fund transfers, the obligation to extend to Iran most-favored-nation status and national treatment, and the obligation to maintain freedom of commerce and navigation between the two states.<sup>22</sup>

Irrespective of whether the United States is actually in breach of these obligations or can invoke relevant exceptions in the Treaty of Amity,<sup>23</sup> the point here is that, were it not for the U.S. treaty obligations, the measures would probably not breach obligations owed to Iran under general international law. As the ICJ stated in *Nicaragua*, “[certain] action on the economic plane [such as the reduction of sugar quotas or the cessation of aid]” cannot be regarded “as a breach of the customary law principle of non-intervention,”<sup>24</sup> not to mention that “[a] state is not bound to continue particular trade relations longer than it sees fit to do so, *in the absence of a treaty commitment or other specific legal obligation.*”<sup>25</sup>

Even if the measures are in breach of customary or treaty obligations of the United States, it is still possible that the United States will seek to justify them as countermeasures against Iran. If so, it will fall to be determined whether these comply with the requirements described above. Yet this may not be the end of the story. Because even if the measures against Iran are justified as against Iran itself, it may be that they breach U.S. obligations towards other states. This is in particular because many such “targeted sanctions” purport to have extraterritorial effects, and thus to affect third states or their companies and nationals.

### *Extraterritoriality*

The problem of extraterritoriality of “targeted sanctions” is related to the problem of what is probably more appropriately called “jurisdiction by territorial extension of domestic law.”<sup>26</sup> This means that a state may condition access to its market on an economic operator satisfying certain demands of the state, even when that operator is acting outside the domestic sphere.<sup>27</sup> A state may demand that economic operators of third states comply with “targeted sanctions” it is imposing against another state and its companies and nationals, thus establishing a regime of “secondary sanctions” or a “secondary boycott.”<sup>28</sup> Essentially, by making these measures applicable to economic operators of third states in their dealings with the targeted state, the state taking the “sanctions” is universalizing its sanctions regime and thereby reducing the foreign policy space of third states towards the target state.<sup>29</sup>

The legality of such actions is highly questionable with respect to the third states that have their economic operators targeted, as it were, by association, and their foreign policy space reduced.<sup>30</sup> China, Russia, and India have rejected such sanctions, Iran has done the same in its recent application against the United States,<sup>31</sup> and the UN General Assembly,<sup>32</sup> the Human Rights Council,<sup>33</sup> and the Non-Aligned

<sup>22</sup> *Id.*, arts. IV, VII, VIII, IX & X; [Application Instituting Proceedings](#), *supra* note 18, at para. 41.

<sup>23</sup> See [Treaty of Amity](#), *supra* note 21, art. XX.

<sup>24</sup> [Military and Paramilitary Activities in and against Nicaragua](#) (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 126, para. 245 (June 27).

<sup>25</sup> *Id.* at 138, para. 276 (emphasis added).

<sup>26</sup> See CEDRIC RYNGAERT, [JURISDICTION IN INTERNATIONAL LAW](#) 94 (2d ed. 2015); Joanne Scott, [Extraterritoriality and Territorial Extension in EU Law](#), 62 AM. J. COMP. L. 87, 90 (2014).

<sup>27</sup> RYNGAERT, *supra* note 26, at 94.

<sup>28</sup> *Id.* at 117.

<sup>29</sup> *Id.*

<sup>30</sup> See generally Cedric Ryngaert, [Extraterritorial Export Controls \(Secondary Boycotts\)](#), 7 CHIN. J. INT'L L. 625 (2008).

<sup>31</sup> See [Application Instituting Proceedings](#), *supra* note 18, at paras. 12, 28.

<sup>32</sup> [G.A. Res. 51/22](#) (Dec. 6, 1996); [G.A. Res. 53/10](#) (Nov. 3, 1998); [G.A. Res. 57/5](#) (Nov. 1, 2002); [G.A. Res. 61/170](#) (Feb. 7, 2007).

<sup>33</sup> [Human Rights Council Res. 36/10](#), UN Doc. A/HRC/RES/36/10 (Oct. 9, 2017).

Movement<sup>34</sup> have also stated that they consider them impermissible under international law. Many states react to them by adopting so-called “blocking statutes” or other measures that aim to frustrate the exercise of what they deem illegal extraterritorial jurisdiction by the reacting state.

It appears, then, that the most problematic aspect of “targeted sanctions” unilaterally adopted by a state is precisely this extraterritorial aspect given to them. It is clear why a reacting state would want its sanctions regime to have such an aspect: it reduces the “flouting” of sanctions by operators and states not otherwise bound by the reacting state’s law. But it also makes good sense why third states react to the exorbitant jurisdictional reach thus claimed by the reacting state: the rules of jurisdiction are meant to curb such an excessive reach of measures adopted by means of domestic law. There is a way to achieve such a global, universal reach of sanctions: through action by the Security Council.

### *Piercing the Veil*

“Targeted sanctions” target individuals and legal entities, whether of the nationality of the target state, or even of third states. This type of piercing the state veil, which developed in part by tracking UN “smart” sanctions, brings up another problem: that of potential remedies for the individuals and legal entities targeted. They can always bring a claim before the courts of the reacting state for violations of the law of that state in the process of their being designated as targets, or because of the effects of such designation. But this route might leave something to be desired, especially where domestic law grants the targeting authority significant discretion. The other route would be for the state of nationality of those targeted to take up their claims via diplomatic protection. Iran can be seen as doing this, for example, through the claims it brought against the United States in the ICJ. After all, it is complaining of violations by the United States of obligations owed to it and violated in part in the person of its nationals. Third states could do the same.

But if the measures taken by the reacting state also constitute potential violations of human rights of the targeted entities, then these entities might be able to bring claims in their own name against the state targeting them, either in that state’s own courts or in international courts established under human rights treaties, such as the European Court of Human Rights, or even in EU courts if the sanctions are taken by the European Union. In fact, there is quite detailed jurisprudence in EU courts on the legality and conformity with human rights (as guaranteed under EU law) of targeted autonomous EU sanctions.<sup>35</sup>

### *Conclusion*

The umbrella term “targeted sanctions” hides underneath it a whole host of measures that may be assessed differently under international law. Measures that are not in violation of international law—acts of retorsion—require no justification even if they are unfriendly and put pressure on the target state. Measures that are on their face in breach of the reacting state’s international obligations towards the target state may be justified as countermeasures. But even if the measures are justifiable as towards the target state, they may have extraterritorial aspects that render them unlawful with respect to third states, and thus engage the reacting state’s international responsibility.

<sup>34</sup> See, e.g., [Ministerial Declaration on the Occasion of the 40th Anniversary of the Group of 77](#) para. 35 (June 12, 2004); [Ministerial Declaration of the Group of 77 and China, Annexed to the Letter Dated 30 September 2014 from the Permanent Representative of the Plurinational State of Bolivia to the United Nations Addressed to the Secretary-General](#) para. 47, UN Doc. A/69/423 (Oct. 7, 2014).

<sup>35</sup> See Antonios Tzanakopoulos, [Domestic Court Reactions to Security Council Sanctions](#), in CHALLENGING ACTS OF INTERNATIONAL ORGANISATIONS BEFORE NATIONAL COURTS 54 (August Reinisch ed., 2010); Antonios Tzanakopoulos, [Collective Security and Human Rights](#), in HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS 42 (Erika de Wet & Jure Vidmar eds., 2012); Antonios Tzanakopoulos, [Sanctions Imposed Unilaterally by the European Union: Implications for the European Union’s Responsibility](#), in ECONOMIC SANCTIONS UNDER INTERNATIONAL LAW 145 (Ali Z. Marossi & Melissa R. Bassett eds., 2015).