21

Economic Sanctions

Accountability, Legality, and Legitimacy

Joy Gordon

The questions of accountability, legality, and legitimacy in regard to economic sanctions are remarkably convoluted. And while they are distinct concepts, in the context of economic sanctions they are also closely intertwined.

When economic measures were introduced as tools to be used in the League of Nations and the UNSC, it seemed there was little need for monitoring or accountability regarding their possible misuse. Their legitimacy seemed irrefutable, given the broad international support for those institutions, as well as the intended uses for economic measures to stop aggression and address threats to international peace and security. In a sense, it would have been odd to speak about accountability in the context of economic sanctions – they *were* the tools of accountability for those who violated global norms. In the context of foreign policy, the notion of accountability likewise seemed inapposite; economic measures could be framed simply in terms of the right of sovereign nations to choose with whom they did or did not wish to do business. This was a choice that seemed to lay clearly within their sovereign rights, and could not be either illegal or illegitimate.

Accountability can be found in many forms, including judicial venues, institutional oversight, political mechanisms, and public protest. In the international legal order, states, in the first place, self-interpret international law and respond on their own initiative to what they assert are violations, in part through countermeasures – acts that are usually unlawful, but are permitted when a state has been injured by a violation of international law. All such interpretations of the law would be far from impartial. Countermeasures that are disproportionate or improper may be challenged in a judicial venue, notably the International Court of Justice;[1] and in some circumstance, third states

[1] Antonios Tzanakopoulos, "Legal Mechanisms to Assess and Mitigate Adverse Human Rights Impact of Unilateral Sanctions through Accountability," Workshop on the Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, UNHRC, May 23, 2014, 4.

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may claim that disproportionate countermeasures, such as those impacting human rights, violate obligations *erga omnes*, and third states may impose their own countermeasures against the sanctioning state.[2] But this rarely occurs. Resolving the matter diplomatically is also problematic, particularly when there is a power imbalance; if a weaker state disputes the countermeasures imposed by the more powerful one, any negotiations would in turn reflect the power imbalance.[3]

The notion that a sanctioner ought to be held accountable for the illegal or illegitimate use of sanctions emerged most forcefully as part of a larger paradigm shift within sanctions practice in the 1990s. There may have been questions about the legality or legitimacy of the use of sanctions during the Cold War, but those concerns rarely received much attention, in part because sanctions during the Cold War were never so damaging as to raise serious humanitarian concerns. If the West sanctioned a country, it could trade with the Eastern Bloc and vice versa. And the mutual veto threats of the UNSC's permanent members meant that economic measures binding on all of the UN's member states would be exceedingly rare. So no country that was the target of sanctions was ever fully isolated from the international community, even though South Africa experienced increasing economic isolation in the 1980s. At the same time, sanctions imposed by governments, acting alone or in concert with others, were never so intrusive in the affairs of third countries as to raise broad objections of overreaching on the part of the international community.

It was not surprising that the academic literature in the 1970s and 1980s showed little interest in the question of whether sanctioners should be held accountable for measures that were illegal, illegitimate, or inhumane. On the contrary, commentators in the field – at least those in the West – predominantly addressed issues that were of concern to sanctioners. Nossal and others addressed the question of how to maintain the cohesion of a coalition of sanctioners, in the face of economic and political pressures.[4] Even greater attention was paid to the question of whether and to what degree sanctions succeeded in compelling the target state to comply with the demands made of it. In the 1980s, a study by Gary Clyde Hufbauer and Jeffrey J. Schott, *Economic Sanctions Reconsidered*, found that target states complied with the sanctioner's demands only about one-third of the time.[5] Scholars in the field then turned their attention to articulating other kinds of objectives. Margaret P. Doxey identified several objectives other than compliance, including punishment, signaling, and

[2] Tzanakopoulos, "Legal Mechanisms," 5.

[3] Tzanakopoulos, "Legal Mechanisms," 4.

[4] See, for example, Kim Richard Nossal, *Rain Dancing: Sanctions in Canadian and Australian Foreign Policy* (Toronto: University of Toronto Press, 1994).

[5] Gary Clyde Hufbauer and Jeffrey J. Schott, *Economic Sanctions Reconsidered* (Washington, DC: Institute for International Economics, 1985); Gary Clyde Hufbauer, et al., *Economic Sanctions Reconsidered: History and Current Policy*, 2d ed. (Washington, DC: Institute for International Economics, 1990).

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expressing disapproval.[6] If these are the objectives of sanctions, it can then be argued that sanctions are "effective" simply by virtue of being imposed. Similarly, David Baldwin argued that merely changing the target state's costs and thereby influencing its calculus could be considered an effective use of sanctions.[7]

Thus, at least in the Cold War era, criticisms of sanctions were largely focused on concerns about their effectiveness in achieving the sanctioner's objectives; and in light of the role played by sanctions and the divestment movement in achieving democracy in South Africa, there seemed to be powerful evidence that sanctions could be impressively effective. What received little attention, at least in the West among governments or commentators, or within institutions of global governance, was the fact that the discourse was quite one-dimensional: While the questions of compliance, cohesion, and success rates seemed to be issues of universal concern, in fact they were all questions that arose specifically from the viewpoint of the sanctioners. There were other issues that might have emerged from those with other viewpoints, such as private actors and third-party countries that were impacted. Countries that were targeted by sanctions may also have legitimate concerns under international law. But these questions received little attention, at least in the West. This was unsurprising, at least in regard to the views of governments, since the majority of sanctions regimes were imposed by Western powers, in particular, the US.

The legitimacy of sanctions was further solidified in the 1980s, when sanctions and related measures were brought to bear against South Africa's apartheid regime. The rightness of using these to achieve democracy and human rights seemed to be beyond question, particularly since many Black South African leaders called upon the international community to express its support for their struggle by this means.[8] Even though many Black South Africans were negatively impacted by sanctions and divestment, the support from Black South African religious leaders, trade unions, and others did much to obviate concerns about their moral legitimacy.

Thus, at least during the Cold War, even if there might have been grounds to challenge the legality or legitimacy of a sanctions regime, the question seemed to be largely theoretical, since sanctions were not responsible for any large-scale damage that was highly visible to the international community. If there were issues of legality or legitimacy, there were few occasions when these were manifested in ways that forced a public reckoning.

[6] Margaret P. Doxey, *International Sanctions in Contemporary Perspective*, 2nd ed. (New York: St. Martin's Press, 1996), 55.

[7] David A. Baldwin, *Economic Statecraft* (Princeton: Princeton University Press, 1985).

[8] Neta C. Crawford, "Trump Card or Theater? An Introduction to Two Sanctions Debates," in *How Sanctions Work: Lessons from South Africa*, ed. Neta C. Crawford and Audie Klotz (New York: St. Martin's Press, 1999), 3.

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THE CASE OF IRAQ

All of this changed when the UNSC imposed comprehensive sanctions on Iraq, which then required the participation and enforcement by every member state of the UN. In response to Iraq's invasion of Kuwait in August 1990, the UNSC voted overwhelmingly to prohibit all imports into the country, all exports from Iraq, and all financial transactions.[9] Iraq's economy and state were highly dependent on revenue from oil exports, and the country was highly dependent on imports for food and other goods essential to the economy and to the population. The provisions for humanitarian exemptions were minimal. On the face of it, there was no question as to the legality of these measures, since Chapter VII of the Charter authorizes the Council to respond to aggression, breaches of the peace, and threats to peace, and Article 41 specifically authorizes the Council to impose economic measures. In addition, while the severe sanctions disrupted Iraq's economy, they were not immediately devastating. However, the bombing campaign of the Persian Gulf War of 1991 was so extensive that UN officials reported that Iraq had been relegated to a "pre-industrial age."[10] For the next twelve years, the sanctions then prevented Iraq from rebuilding, and essential infrastructure, including electricity, transportation, telecommunication, and water and sewage treatment, were never fully restored. The health and education systems largely collapsed. There were ongoing epidemics of cholera and typhoid, and malnutrition was widespread. UN agencies such as UNICEF and the WHO documented the humanitarian crisis, alongside of international organizations such as the ICRC. International criticism grew, as did tensions within the UN. In an influential study by legal scholar Marc Bossuyt, commissioned by the UNCHR, Bossuyt concluded that sanctions were bound by the major treaties of international law, including the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, the Covenant on Economic, Social, and Cultural Rights, the Hague Convention, and the Geneva Conventions on the laws of war. He proposed a six-prong test for evaluating the legitimacy and the legality of sanctions under international law and well-established principles of human rights.[11] Using this framework, he concluded that "[t]he sanctions regime against Iraq is unequivocally illegal under existing international humanitarian law and human rights law."[12] Thus,

[9] UNSC, Resolution 661, Adopted by the Security Council at Its 2933rd Meeting, on August 6, 1990, S/RES/661(1990).

[10] UN, "Report to the Secretary-General on Humanitarian Needs in Kuwait and Iraq in the Immediate Post-Crisis Environment by a Mission to the Area Led by Mr. Martti Ahtisaari, Under-Secretary-General for Administration and Management, Dated 20 March 1991," S/22366, 5.

[11] UNCHR, Sub-commission on the Promotion and Protection of Human Rights, "The Adverse Consequences of Human Rights," Working paper prepared by Mr. Marc Bossuyt, E/CN.4/Sub.2/2000/33, June 21, 2000.

[12] UNCHR, "Adverse Consequences," 18.

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while Chapter VII measures adopted by the UNSC have presumptive legality, there were credible arguments that, in the case of Iraq, the Security Council measures ran counter to international law. However, there was no judicial venue in which the matter could be raised. The ICJ has no jurisdiction over the UNSC in contentious matters. The ICJ may provide an advisory opinion if the UNSC itself (or certain other UN bodies) requests it.[13] But no such request was ever made.

The suffering brought about by widespread malnutrition, lack of medical care, ongoing epidemics of cholera and typhoid, and severe impoverishment called into question the moral legitimacy of the sanctions. For over a decade, the sanctions continued to have a central role in the indiscriminate harm suffered by civilians, in particular vulnerable populations such as women, young children, the elderly, and the poor. While the ostensible justification for these measures was establishing peace and security in the region, such claims strained credulity once international organizations consistently framed the sanctions as a humanitarian catastrophe; the ICRC, for example, included Iraq in its *World Disasters Report*.[14] Ethicists, religious leaders, and grass roots organizations increasingly argued that the sanctions were morally indefensible. Thus, apart from the question of their legality, the sanctions so clearly ran counter to norms of basic decency it seemed that any claim to moral legitimacy was no longer plausible.

In the absence of a judicial venue or institutional oversight, it might be said that the main form of accountability that came into play was public pressure, and political pressure within the UN and outside of it. These were both considerable. Two high-ranking officials, Denis Halliday and Hans von Sponeck, resigned their positions at the UN, where they had served as the humanitarian coordinators in Iraq, on the grounds that they would not be complicit in the UN's perpetration of a humanitarian catastrophe. In the US, there were grassroots organizations, such as Voices in the Wilderness and Education for Peace in Iraq, which organized demonstrations and lobbying. British academics established Campaign Against Sanctions on Iraq (CASI) to post documents related to the sanctions. CASI as well as publications such as the Middle East Research and Information Project contributed analyses of the situation as it developed. In the face of these and other forms of public and political pressure, as well as the growing media coverage, the UNSC made a number of concessions, most notably the OFFP, which allowed Iraq to sell oil, the proceeds from which were then to be used to purchase humanitarian goods.[15] However, the

[13] UN Charter, Art. 96.

[14] IFRC, *World Disasters Report 1998* (Oxford/New York: Oxford University Press, 1998).

[15] UNSC, Resolution 986, Authorization to Permit the Import of Petroleum and Petroleum Products Originating in Iraq, As a Temporary Measure to Provide for Humanitarian Needs of the Iraqi People, Adopted by the Security Council at Its 3519th Meeting, on 14 April 1995, S/RES/986.

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humanitarian impact of this program was limited. First, the amount of funds available was compromised: There was initially a ceiling on how much oil could be sold; a significant portion of the proceeds were directed to be used for compensating Kuwait and others with claims against Iraq; and maneuvers such as the "retroactive oil pricing mechanism" undermined oil sales. At the same time, while the UNSC did not interfere in the purchase of some humanitarian goods, specifically food and certain medicines, the US and the UK blocked nearly everything necessary for the functioning of Iraq's infrastructure, including electricity production, transportation, and telecommunications, undermining, among other things, the distribution of food and the cold chain for medicines.[16] Thus, while public pressure compelled the UNSC to make apparent concessions in response to the humanitarian crisis in Iraq, the UNSC – in particular, the US and the UK – at the same time found ways to vitiate those concessions. In the end, even after the OFFP had been in operation for several years, it never came close to restoring the conditions necessary to ensure the basic well-being of the Iraqi population. While the US, UK, and others blamed the Iraqi government, as well as some corruption that took place in the OFFP, the lion's share of the damage done could be traced directly to the bombing campaign of 1991 and the sanctions that then severely compromised Iraq's economy and infrastructure for over a decade.

THE INTRODUCTION, AND FAILURE, OF TARGETED SANCTIONS

In response to criticisms of comprehensive sanctions, there was a high-profile reform movement, known as targeted or "smart" sanctions, that purported to address humanitarian concerns, while increasing the effectiveness of sanctions.[17] But despite the broad claims after 2000 by scholars and practitioners that sanctions were now "smart," many sanctions regimes in fact continued to impact civilian populations. This occurred not because sanctions regimes were explicitly comprehensive, but because they aggressively targeted key sectors of the economy. Of the sanctions regimes imposed by the UNSC, this was most notable in the case of the measures imposed on North Korea. A series of UNSC resolutions adopted in 2016 and 2017 targeted many of North Korea's major exports, including coal, textiles, seafood, and iron; while blocking critical imports, such as those related to shipbuilding, construction, industrial production, and transportation; as well as access to key services from international entities, such as shipping.[18] Vulnerable populations, such as women, were not

[16] Joy Gordon, "The Magnitude of the Catastrophe," in *Invisible War: The United States and the Iraq Sanctions* (Cambridge: Harvard University Press, 2010), 86–102.

[17] See, for example, David Cortright and George A. Lopez, *Smart Sanctions: Targeting Economic Statecraft* (New York: Rowman and Littlefield, 2002).

[18] UNSC Resolutions 2270, 2321, 2371, 2375, and 2397.

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at all exempt from the impact of sanctions. On the contrary, the UN sanctions imposed on North Korea "burden women through their adverse humanitarian and developmental consequences, especially when they impact their livelihood by targeting industries that have high ratios of female workers,"[19] such as the textile industry.

There were also severe restrictions on North Korea's fuel imports. After 2016, the UNSC permitted North Korea to import only 0.5 million barrels per year of refined petroleum products, and blocked the import of crude oil – a precipitous decline from the 4.5 million barrels of refined oil that North Korea had previously imported annually.[20] Thus, while the sanctions regime was not explicitly framed as "comprehensive," it nonetheless broadly compromised North Korea's imports, exports, and infrastructure, indiscriminately affecting the civilian population in a manner that is not much different from a sanctions regime that is explicitly comprehensive. In her chapter in this volume, Hazel Smith shows how the lack of fuel compromises agricultural production and the distribution of food, worsening food insecurity. In their chapter, Suzy Kim and Kevin Gray demonstrate how sanctions impact the health and security of women by targeting the textile industry, triggering extensive unemployment of women. As C. Yoonhee Ryder, Edward I. Ham, and Kee B. Park argue in this volume, even when there are humanitarian exemptions, such as those for medical goods, the UNSC imposes such onerous requirements that the flow of urgently needed medical goods is substantially impeded. Consequently, it may well be argued that the UNSC sanctions against North Korea are indiscriminate, and run afoul of IHL as well as fundamental principles of human rights. However, as with the Iraq sanctions, there is no judicial venue in which litigation may be brought against the UNSC. Nor is there any effective form of political accountability. Within the Security Council, while Russia or China may be able to block further sanctions, the "reverse veto" power of the Western permanent members can ensure that the current measures remain in place indefinitely. And while there was a public outcry against the UN sanctions on Iraq, there has been little response of that sort regarding North Korea.

There are specific accountability issues in regard to measures imposed by states. As Beaucillon notes,

> the fact that unilateral and extraterritorial sanctions are adopted by states and [regional economic integration organizations, REIOs, such as the EU] at their own instigation and in accordance with their own foreign policy objectives, that is, in a purely subjective manner, sets them apart from the objective sanctions of law that may be imposed by impartial third parties in an institutional or jurisdictional capacity. This calls for close questioning of their legitimacy. Can states and REIOs legitimately, even without

[19] Korea Peace Now, "The Human Costs and Gendered Impact of Sanctions on North Korea," Report, October 2019, iv.

[20] US Mission to the UN, "Fact Sheet: UN Security Council Resolution 2397 on North Korea," December 22, 2017, accessed August 23, 2024, http://bit.ly/44NmWdl.

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the use of armed force, compel the behaviour of third states and entities in the name of their own interpretation of international law, their own values, their own interests and their own objectives?[21]

Unilateral "autonomous" sanctions imposed by states have, in some cases, had a broad and indiscriminate impact on the target country's economy and development by targeting key components of the economy. This was true, for example, of the US sanctions against Cuba. While US sanctions had been in place for decades, in the 1990s, the US tightened them severely, primarily through two statutes: the Torricelli Act, also known as the Cuban Democracy Act, adopted in 1992,[22] and the Helms–Burton Law, adopted in 1996.[23] As Raúl Rodríguez Rodríguez discusses in his chapter, these two laws targeted several of Cuba's major economic sectors. Companies from third-party countries, such as Spain and Italy, that invested in Cuba's newly resurgent tourism sector could be subject to litigation in US courts. Goods that could contribute to Cuba's burgeoning biotech industry were prohibited. Third-party countries could not sell any goods in the US made with even trace amounts of Cuban materials, including sugar and nickel, Cuba's major exports. In addition, any ship that docked in Cuba was subject to severe penalties if it docked in the US within 180 days, significantly disrupting imports and exports for an island nation. To some extent, these measures directly affected the humanitarian situation in Cuba, since, for example, the restrictions on shipping affected the import of food and medicine. But they also affected the population indirectly as well. In Cuba, of all those employed, approximately 60 percent are employed by the state.[24] In addition, of the Cuban government's annual expenditures, about half of these go to healthcare, social security, social assistance, and education.[25] Consequently, if revenues to the state are significantly disrupted, the large portion of the population that is dependent upon the state in one form or another would certainly be impacted.

In addition to the humanitarian impact, the unilateral sanctions against Cuba are widely viewed as illegal in that they are extraterritorial, intervening in Cuba's trade with nationals of third countries, in matters that are not properly within the jurisdiction of the US. These measures have been broadly denounced by the international community in annual resolutions of the UNGA.

[21] Charlotte Beaucillon, "An Introduction to Unilateral and Extraterritorial Sanctions: Definitions, State of Practice and Contemporary Challenges," *Research Handbook on Unilateral and Extraterritorial Sanctions*, ed. Charlotte Beaucillon (Cheltenham: Edward Elgar, 2021), 8.

[22] Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575 (1992) (Codified at 22 U.S.C.S. §§ 6001–10 (1993)).

[23] Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms–Burton Act), Pub. L. 104–114.

[24] Government of Cuba, ONEI, *Anuario estadístico de Cuba 2023: Empleo y salarios* (Havana: Government of Cuba, 2024).

[25] Government of Cuba, ONEI, *Anuario estadístico de Cuba 2023: Finanzas* (Havana: Government of Cuba, 2024).

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The most recent vote, in October 2024, was 187 to 2 (the US and Israel), with one abstention.[26]

In the 1990s, Canada, Mexico, and the EU responded with retaliatory legislation,[27] allowing for countersuits to collect any judgments levied in the US under the Cuba statutes, as well as a suit against the US before the WTO.[28] In response, the Clinton administration agreed to suspend the most controversial provision of the Helms–Burton Act, Title III, and successive administrations did the same, until the first Trump administration reinstated it, and President Biden continued that practice. But since the adoption of these statutes in 1992 and 1996, Congress has shown little interest in repealing them, despite the repeated and nearly unanimous call by the international community to do so.

The EU also introduced blocking legislation, responding to both the Helms–Burton Act and similar legislation targeting Iran and Libya,[29] which prohibited EU nationals from complying with extraterritorial measures such as these. In 2018, the EU amended and reinstated the blocking statute after the US withdrew from the Iran nuclear deal (the JCPOA) and continued to maintain sanctions prohibiting third-country nationals from engaging in trade with Iran.[30] This then put EU nationals in an untenable position: if they complied with US law, they would run afoul of EU law; but if they violated US law and pursued business relations with Iran, they would risk severe penalties from the US, including the possible exclusion from the US market. A number of major international companies chose to resolve this dilemma by severing ties to Iran, but did so citing general business considerations, rather than US sanctions.[31]

Thus, in the face of humanitarian or legal concerns, while sanctioners have sometimes responded to political pressure and public condemnation by changes in their practices, that does not happen with any consistency. The private sector, including major international corporations, are loathe to challenge sanctions measures, even those whose legality is questionable. And while the condemnation by the international community might in some circumstances operate as a form of accountability, in many cases it is ineffectual, or simply falls on deaf ears.

[26] UN, "General Assembly Overwhelmingly Adopts Resolution Calling on United States to End Economic, Commercial, Financial Embargo against Cuba," October 30, 2024, accessed December 1, 2024, https://press.un.org/en/2024/ga12650.doc.htm.

[27] Marcin Menkes, "Special Purpose Vehicles and International Trade Sanctions," in *Economic Sanctions under International Law: Trade Continuity with Special Purpose Vehicles*, ed. P. Sean Morris (London: Routledge, 2024), 90–91.

[28] Joaquín Roy, *Cuba, the United States, and the Helms–Burton Doctrine International Reactions* (Gainesville: University Press of Florida, 2000).

[29] Iran and Libya Sanctions Act of 1996, 50 U.S.C. § 170.

[30] Patrick C. R. Terry, "Secondary Sanctions, Public International Law, and the EU," in *Economic Sanctions under International Law*, 163–164.

[31] Sinéad Baker, "British Airways and Air France Are Stopping All Flights to Iran, Just before Crushing New US Sanctions Kick in," Business Insider, August 23, 2018, accessed August 23, 2024, bit.ly/4krlv9f.

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BLACKLISTING AND THE ISSUE OF DUE PROCESS

As the practices relating to targeted sanctions developed, the introduction of blacklists, designating individuals for measures such as travel restrictions and asset freezes, was widely hailed as nearly an ideal form of sanctions: Freezing the personal assets of an individual would surely compel him or her to comply; and it would have no possible impact on anyone else, particularly the broader civilian population. In practice, both of these claims are problematic. On the one hand, individuals and companies can hide their assets and circumvent sanctions, just as criminal networks can. On the other hand, when key government officials and national enterprises are blacklisted – such as a national oil company or shipping lines, or government ministers responsible for critical imports or exports – then the listing of an "individual" in fact functions as a means of crippling an entire sector of the economy. Thus, the blacklisting of blocked persons or SDNs appears at first glance to be inherently narrow in its scope, and would seem to have no possible applications that are indiscriminate or disproportionate; but in fact such listings can have sectoral impact, with severe and widespread humanitarian consequences.

However, the listings have mostly been criticized for the lack of due process. This has been the case in regard to listings by the UNSC and by the US; although other sanctioners, notably the EU, follow higher due process standards. In this context, legality, legitimacy, and accountability all come into play.

Within the UNSC, the sanctions regime that has been most prominent in the use of listings has been the one established under Resolution 1267, adopted in 1999 under Chapter VII of the UN Charter, regarding the Taliban, al-Qaida, and Usama bin Laden. The resolution required all member states to freeze the funds or other resources of those listed by the UNSC for their ostensible involvement with these entities. The impact on an individual person or company would in principle be global, since every member state would be obliged to require all of their banks to freeze all of the assets of anyone who was listed. However, Resolution 1267 (and Resolution 1373, adopted later in September 2001) offered no clear standards for determining which persons or organizations should be listed, did not explicitly provide an evidentiary requirement, and did not clearly indicate how someone might contest their inclusion on this list.[32]

Within a few weeks, the US added some 200 names to the list, offering little by way of detail or evidence. But there was little opposition within the UNSC. This was unsurprising, given the context of the 9/11 attacks. It was also the case

[32] Yvonne Terlingen, "The United States and the UN's Targeted Sanctions of Suspected Terrorists: What Role for Human Rights?" *Ethics and International Affairs* 24, no. 2 (2010): 131–142, 135–138.

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that the other member states of the UNSC were given only forty-eight hours to challenge a listing, but "since states were usually given no more details than a name, those put on the list were usually there to stay."[33]

One of those listed was a Saudi businessman, Yassin Abdullah Kadi. Once Kadi was listed, all member states of the UN were required to freeze his assets, including the members of the EU. However, the UNSC offered no process in which Kadi might review the evidence against him, offer proof against it, or substantively challenge the validity of his listing. He responded by bringing suit in the European courts, on the grounds that the ECHR required European states to follow principles of due process. However, Article 103 of the UN Charter provides that where there is a conflict between the UNSC's powers and international treaties, the UNSC's powers would prevail. After more than a decade of litigation, the ECJ ruled in favor of Kadi, finding that the European states were obligated to abide by principles of due process, as articulated in the ECHR, even when implementing a UNSC resolution.[34]

As the Kadi case worked its way through the European courts, and as hundreds more persons and entities were added to the UNSC's various sanctions regimes lists, there was growing criticism from leading international law scholars of the lack of even basic due process,[35] such as the right of the individual to be informed of their listing; to be informed of the specific acts that were the basis for the listing; to see and respond to the evidence against them; and to have their appeal heard by a court or other independent and impartial body. In the face of the growing pressure, the UNSC made some concessions with regard to the Resolution 1267 sanctions regime. But these came slowly, and with apparent reluctance. And for the most part, these concessions also fell well short of offering significant due process protections. The first such measure was the establishment of a "Focal Point," which would receive appeals from those who were listed, and circulate the individual's materials to the members of the UNSC. However, the "Focal Point" had no authority to make substantive recommendations, much less a judgment regarding the validity of the listing. The listed individual remained unable to gain access to some or all of the evidence on which the listing was based. Eventually, the UNSC established an Ombudsperson, who reviewed the materials related to the contested listing, and was empowered to make a recommendation to the UNSC as to whether the listing should be maintained or should be lifted. But there

[33] Terlingen, "What Role for Human Rights?" 134.

[34] ECJ, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *Council of the European Union and Commission of the European Communities*, Judgment in Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, July 18, 2013.

[35] See, for example, Bardo Fassbender, "Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to Ensure That Fair and Clear Procedures Are Made Available to Individuals and Entities Targeted with Sanctions under Chapter VII of the UN Charter," *International Organizations Law Review* 3 (March 20, 2006): 437–485.

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were also significant limitations to the Ombudsperson's authority;[36] and in any event, such an office, which was subsidiary to the UNSC, still did not provide offer the independence and legitimacy that would be found in judicial review. And while the UNSC did eventually establish an ombudsperson in the context of the Resolution 1267 sanctions, it did not do so for any of the other fifteen sanctions regimes established by the UNSC under Chapter VII, which have only "Focal Points," essentially performing a clerical function of gathering and distributing de-listing petitions to the same committees that blacklisted the individual in the first place.[37]

Within the unilateral sanctions regimes of the US, there are similar concerns. When the US blacklists a person or an entity, then any bank, company, or individual who provides them with services or funds can find itself subject to penalties in the US. They may be subject not only to monetary penalties, but may also find themselves excluded from the US market or financial system. Someone in the Congo, or Nicaragua, or Beirut may learn of their listing for the first time when they seek to make a financial transaction, and discover that their bank account is frozen, and that they cannot buy a plane ticket, cash a check, purchase goods with a credit card, or enter a foreign country.

While the US asserts the right to list foreign nationals, even those who have never entered the US or engaged in any acts that can plausibly be said to impact the US, there is no reciprocal right to challenge these listings. SDNs who have ties to the US, such as owning property, may have constitutional due process rights. However, those who are listed, but have no such ties, are largely relegated to the remedies available through the APA. In either case, they are likely to have difficulty getting access to the evidence on which their listing is based, and may find that they cannot even obtain the details of their supposed wrongful acts. Where listings are based on classified materials, the SDNs are very unlikely to ever be given access to the evidence.[38] As Erich Ferrari discusses in his chapter in this volume, under the APA, there is a high bar for judicial review, and deference to the agency is built in at multiple levels. The courts have shown an additional degree of deference in national security contexts, and the "high" degree of deference can look more like absolute deference.

Thus, in the contexts of both the UNSC and the US's unilateral measures, there are issues of legality, legitimacy, and accountability in regard to the sanctioning of individual persons and entities. In regard to the UNSC

[36] See Kimberly Prost, "Security Council Sanctions and Fair Process," in *Research Handbook on UN Sanctions and International Law*, ed. Larissa van den Herik (Cheltenham: Edward Elgar, 2017), 213–235.

[37] UNSC Resolution 1730 (2006) and Resolution 2744 (2024).

[38] Rachel Barnes, "United States Sanctions: Delisting Applications, Judicial Review and Secret Evidence," in *Economic Sanctions and International Law*, ed. Matthew Happold and Paul Eden (Oxford: Hart Publishing, 2016), 197–226.

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measures, the public outcry over the lack of due process, in violation of basic principles of the rule of law, raised concerns about the legitimacy of these measures, while the final ruling by the ECJ found that the process ran afoul of international law. It might be said that the litigation, as well as the public criticism, operated as a form of accountability, at least to the degree that the UNSC responded to these pressures by making procedural changes, such as the establishment of an ombudsperson for the Resolution 1267 sanctions regime. But it took years for even that to happen; and the lack of a comparable office in the other sanctions regimes speaks to the UNSC's continued unwillingness to cede the enormous, and potentially arbitrary, discretion that it wields in these cases.

The EU has adopted higher standards for due process, and its courts have on many occasions intervened in the listings of individuals and companies. However, in regard to the US measures, there has been far less inclination to incorporate more substantial due process protections, particularly for those who do not have sufficient ties to the US to engage constitutional protections. The courts have consistently treated the US agencies involved with a high degree of deference, and rarely deviate from that. Barring a US Supreme Court ruling, it seems unlikely that the courts will change direction. There is no public outcry of the sort that is sometime seen when sanctions trigger a humanitarian crisis. Neither Congress nor the executive branch have shown any inclination toward greater restraint. On the contrary, the number of entities being listed by OFAC and other agencies continues to expand. As of July 2025, OFAC's list of SDNs and blocked persons was 3,041 pages long.[39]

WHAT IS NEEDED?

Since the humanitarian catastrophe in Iraq in the 1990s, there have been calls for sanctions reform, even as the use of sanctions continues to grow almost exponentially – currently US sanctions alone target one-third of all nations in the world, and two-thirds of all low-income nations.[40] The list of reform initiatives is extensive, from the "smart" sanctions movement, to calls within the UN for humanitarian monitoring, to the UNSC's efforts to incorporate greater humanitarian exemptions in its sanctions regimes,[41] to the recent project "Advancing Humanitarianism through Sanctions Refinement" that seeks to develop a set of global principles for the use of sanctions.[42] If we look at the motivations for reform, there are certain themes we see repeatedly. Since the

[39] U.S. Department of the Treasury, OFAC, "Specially Designated Nationals and Blocked Persons List," July 5, 2025, accessed July 5, 2025, www.treasury.gov/ofac/downloads/sdnlist.pdf.

[40] Jeff Stein and Federica Cocco, "How Four U.S. Presidents Unleashed Economic Warfare across the Globe," *The Washington Post*, July 25, 2024.

[41] UNSC Resolution 2664 (2022).

[42] Advancing Humanitarianism through Sanctions Refinement (website), accessed August 18, 2024, https://ahsrproject.org/team/.

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1980s, sanctions have been criticized for their lack of effectiveness. The 1990s saw the emergence of calls to reduce the humanitarian impact. More recently, there have been strategic concerns by US policymakers that sanctions may lose their utility through overuse.[43] But these concerns, and reform initiatives, do not address what are in fact more fundamental questions.

To begin with, regardless of claims that sanctions are driven by the commitment to peace, security, counter-terrorism, and human rights, sanctions are, at every juncture, highly politicized. They are used with blatant inconsistency: most obviously, because of the veto power they wield, the permanent members of the UNSC, and their client states, will never be subject to UN sanctions, however egregious their acts may be, and regardless of the threats they pose to international peace and security. Unilateral sanctions are often imposed arbitrarily, sometimes with little or no relation to peace, security, terrorism, or any other legitimate justifications; unilateral measures may be presented as responses to global issues such as terrorism, even when they are simply a means to serve the sanctioner's economic interests, assert global dominance, or appease a domestic constituency.

Further, what appear as reform attempts addressing humanitarian concerns are often ineffectual or unusable, suggesting that expressions of humanitarian concern may be little more than political damage control. The ineffectiveness is not incidental; rather, it is built into the design of these measures. We see this, for example, in the design of humanitarian exemptions, whose onerous requirements create such costs and burdens that aid organizations have little choice but to minimize the goods they send, or give up altogether, as Ryder, Ham, and Park describe in regard to North Korea. We see this as well when humanitarian exemptions are vitiated by other measures imposed by the sanctioner; this can be seen, for example, in the case of the US's sanctions against Cuba, where a broad range of humanitarian exemptions were announced in 2022,[44] but because Cuba remained on the US list of State Sponsors of Terrorism, the humanitarian exemptions were largely unusable.

And while it is often difficult to disaggregate the particular harm caused by sanctions when there are other factors at play, if a sanctioner succeeds in disrupting a country's imports, exports, transnational financial transactions, foreign investment, infrastructure, or access to fuel, any of these will be likely to trigger or worsen a cascade of negative consequences – for industrial production, employment, food security, potable water, access to health care, and education. It is unsurprising that the research has overwhelmingly found "that sanctions have negative effects on outcomes ranging from per capita income to

[43] U.S. Department of the Treasury, "Remarks of Secretary Lew on the Evolution of Sanctions and Lessons for the Future at the Carnegie Endowment for International Peace," Press Release, March 30, 2016, accessed July 15, 2025, https://home.treasury.gov/news/press-releases/jl0398.

[44] U.S. Department of the Treasury, OFAC, "Treasury Implements Historic Humanitarian Sanctions Exceptions," Press Release, December 20, 2022.

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poverty, inequality, mortality, and human rights."[45] There may be some measures the target state may take to mitigate the impact of sanctions, or there may not. But if the sanctions compromise key economic sectors and bankrupt or cripple state functions essential to the country's economy and social services, the sanctions will, with certainty, worsen the lives of many people who have no responsibility for the actions that the sanctions purport to address.

In the face of the humanitarian crises brought about by sanctions, it is common to hear these described as "unintended consequences," whereby sanctioners can assert their concern for those who are harmed, while sidestepping the question of the sanctioner's responsibility. If there were genuine commitment to avoid indiscriminate harm to vulnerable populations, it has long been known what measures would accomplish this. Since the 1990s, for example, there have been calls for pre-sanctions humanitarian assessments and ongoing humanitarian monitoring, conducted by qualified and impartial observers. But these have been done only rarely by the UNSC, and almost never in unilateral sanctions. While sanctioners routinely claim that the many ways in which their measures trigger or worsen malnutrition, impoverishment, unemployment, and forced migration are all "unintended," the reality is that the very design of sanctions ensures these outcomes. To cut a country out of the global banking system, to disrupt shipping, to cut off fuel, to target key sectors of the economy – all of these ensure that the impact will be widespread, severe, and indiscriminate.

Likewise, in regard to SDNs and blacklisting, if there were a genuine commitment on the part of the UNSC or the US to fairness and accuracy in the imposition of sanctions on individuals, we would see a very different design to ensure that: those sanctioned would at the very least be entitled to see and respond to the evidence against them, and would be able to appeal to an independent and impartial body. Instead, at least in regard to the UNSC and the US, we have seen a consistent and deep resistance to implementing even the most basic forms of due process.

While sanctioners have been concerned with the issues of compliance and enforcement, those who witness sanctions and those who suffer from them would articulate a very different set of concerns: that regardless of their claim to be acting on behalf of international law and global peace, sanctioners, particularly the US, with regularity act in blatant disregard of international law, and disregard the condemnation of nearly the entire international community. This implicates not only legality but also legitimacy and moral authority. At the same time, accountability is elusive. Where sanctioners run afoul of law and norms, judicial venues sometimes offer significant forms of relief, as in the EU; while they provide very little restraint in the US. Political opposition within the UN, as well as public protest, sometimes force sanctioners to make

[45] Francisco Rodríguez, "The Human Consequences of Economic Sanctions," Center for Economic and Policy Research, May 2023, 4.

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concessions; but sometimes these concessions are only marginal, and sometimes there are none at all.

Whether framed as administrative measures or rationalized as a means of stopping terrorism and securing human rights, the fact is that sanctions are, at the most basic level, a form of violence, in roughly the same way and for the same reasons as underdevelopment and impoverishment, which cause illness and death in infants and young children, reduced life expectancy, increased maternal mortality, and hardship in its many forms. I do not claim that all forms of sanctions have these outcomes, or that these outcomes are always manifested in the same manner or to the same degree. But we know, and have known for decades, that this is what sanctions are, and that this is what they may do.

In thinking about which mechanisms of accountability might provide more effective tools for articulating the abuses of sanctions and their consequences, we should question the longstanding narrative of what sanctions are – a peaceful alternative to war; and what sanctions can offer – a means of achieving peace and security. On the contrary, we should acknowledge that the legitimacy of sanctions cannot be assumed, and that the question of legality cannot be dismissed. If we are committed to human rights, the right to economic development, the right to freedom from want, respect for sovereignty, and a world order that is both just and stable, then this is the conversation that needs to take place.

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