

# Symposium | Third World Approaches to International Law & Economic Sanctions

## “Humanizing” Economic Sanctions? Lessons from International Humanitarian Law<sup>‡</sup>

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### INTRODUCTION

Despite their portrayal as peaceful substitutes to war, economic sanctions<sup>1</sup> often serve as a means of waging “economic warfare”<sup>2</sup> in an era of intensified geopolitical tension. However, the invocation of the language of warfare to describe sanctions is frowned upon, particularly in the policy circles of the major sanctioning powers. The apprehension over the comparison of sanctions to war also means that analogies to the international humanitarian law (IHL) rules that govern warfare are kept out of the discourse on the governance of sanctions. Economic sanctions, some have said, are nothing like war,<sup>3</sup> nor is their usage a form of weaponization.<sup>4</sup> The acceptable discourse, particularly in the policy circles of sanctioning states, is that economic sanctions are a peaceful norm-enforcement tool. The potential adverse effects they might produce outside of

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1. Our definition of economic sanctions here encompasses both lawful retorsions and unlawful-but-justified countermeasures governed under general international law but excludes those under self-contained regimes such as international trade law. For an overview, see, generally, Thomas Frank, *On Proportionality of Countermeasures in International Law*, 102 Am. J. Int’l L. 715 (2008).

2. Stephen C. Neff, *Boycott and the Law of Nations: Economic Warfare and Modern International Law in Historical Perspective*, 59 Brit. Y.B. Int’l L. 113, 113 (1988).

3. Drew S.J. Christiansen & Gerard F. Powers, *Economic Sanctions and the Just-War Doctrine*, in ECONOMIC SANCTIONS: PANACEA OR PEACEBUILDING IN A POST-COLD WAR WORLD? pg. 97, 101 (David Cortright & George Lopez eds., 1995).

4. These include submissions by the European Union, Denmark, and Ireland in response to a call by the UN Special Rapporteur on Unilateral Coercive Measures. Alena Douhan (Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights), *Unilateral coercive measures: notion, types and qualification*, U.N. Doc A/HRC/48/59 (July 8, 2021). The submissions commonly state: “EU sanctions ... [serve the objectives of] peace, democracy and the respect for the rule of law, human rights and international law ... [and] are not punitive or retaliatory in nature, but designed to bring about a change in policy or activity by the target . . . .” See also Joy Gordon, *A Peaceful, Silent, Deadly Remedy: The Ethics of Economic Sanctions* 13 ETHICS & INT’L AFFS. (1999).

the targeted entities are “unintended consequences/impacts.”<sup>5</sup> Metaphors from peaceful arenas of life are preferred to express the essential mechanics of sanctions, such as the use of plumbing terminology referring to “leakages” of sanctions that need to be “stopped,”<sup>6</sup> or communications analogies of “sending” and “receiving” sanctions.

This apprehension toward the war analogy is not well founded. The governance trajectory of economic sanctions parallels the long journey of IHL toward “humanizing” war,<sup>7</sup> despite some crucial divergences between the two areas of law. The codification of international law rules on countermeasures, which generally govern the use of sanctions, and recent state practice on sanctions reflect increased attention to civilian harm. This development, however, is only an improvement from pre-UN Charter conceptions of self-help that gave states greater leeway in protecting their interests, including through uses of force.<sup>8</sup> The rules on countermeasures developed within the prism of interstate disputes and, as such, proceed from the presumption that the protagonists are actors who are equally capable of self-help. The rules are developed to enable the injured state to “restore equality of position between the parties” within the bounds of peaceful relations and some basic humanitarian principles. The humanizing element is only a supplementary feature, not the core business of countermeasures law.<sup>9</sup> In contrast, IHL’s central preoccupation is humanitarian matters, and the law is animated by the dialectic between military necessity and the demands of humanity.<sup>10</sup> In this sense, the law and discourse on economic sanctions could be said to be well behind IHL’s trajectory of humanizing war.

This paper illuminates the gaps in this respect between the regulation of economic sanctions and warfare. It will show that in terms of minimizing negative impacts on civilians, warfare appears more rigorously regulated than economic sanctions. This is not to imply that IHL should apply to economic sanctions, but rather to draw analogies that illuminate how sanctions, which are thought to be less harmful than war but still produce enormous harm to civilian populations around the world,<sup>11</sup> are currently governed by regimes with scant

5. See, e.g., U.S. DEPARTMENT OF THE TREASURY, THE TREASURY 2021 SANCTIONS REVIEW (October 2021), <https://home.treasury.gov/system/files/136/Treasury-2021-sanctions-review.pdf>.

6. ESFANDYAR BATMANGHELIDJ AND ZEP KALB, COERCION AND INEQUALITY: THE DISTRIBUTIONAL EFFECTS OF SANCTIONS IN IRAN (AUGUST 2023), <https://www.phenomenalworld.org/analysis/iran-sanctions-inequality/>.

7. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 240 (2000); SAMUEL MOYN, HUMANE: HOW THE UNITED STATES ABANDONED PEACE AND REINVENTED WAR (2021).

8. THOMAS FRANK, *Countermeasures and Self-help*, in RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 109 (2002).

9. Eliza Fitzgerald, *Helping States Help Themselves: Rethinking the Doctrine of Countermeasures*, 16 Macquarie L. J. 67, 71 (2016).

10. Matthew Craven, *Humanitarianism and the Quest for Smarter Sanctions*, 13 Eur. J. Int’l L. 43, 57 (2002). For a view critical of this predominant understanding, see Abhimanyu George Jain, Fig Leaf: A Critical Analysis of the Balancing of Military Necessity and Humanity (July 23, 2023) (Ph.D. dissertation, University of Geneva) (on file with author).

11. In Syria, sanctions inhibit humanitarian activity and key public service and reconstruction works are viewed as “propping-up the regime” and blocked. See HEND ANNIE CHARIF ET AL., THE

humanitarian guardrails. And although humanizing sanctions may suffer from the same pitfall as IHL—i.e., indefinitely postponing the question of the legitimacy of war in the first place—the humanization current must still be seized upon to mitigate the harmful impacts of sanctions here and now.

The paper proceeds as follows. Section I discusses the international law literature on sanctions and international humanitarian law. It retraces a robust debate on the intersection of sanctions and war in the past two decades and reveals that as sanctions have become more humane with the advent of “smart” targeting, their analogy to war has become more taboo. Sections II and III will then delve into an in-depth comparative assessment of the laws governing sanctions and war in terms of the principles of distinction and proportionality. The concluding section, Section IV, advances the need for a code of conduct regulating the use of economic sanctions to supplement the broader rules on countermeasures. This recommendation is advanced, not because we naively believe that the mere adoption of such a code will lead to the humanization of economic sanctions. The idea, rather, is to add a significant resources to the repertoire available to those working to achieve this result.

## I. TWO DECADES OF DEBATE ON SANCTIONS AND WAR

It is important to note that comparison and analogy between the governance of economic sanctions and that of warfare is not alien to international law. Neither is it as heretical as it is now being made to appear, particularly by sanctioning states.<sup>12</sup> A number of scholarly works have picked up this topic in the past two decades, reaching varying conclusions. The debate was livelier around the turn of the century but has largely waned in recent years.

As far back as 1995, the International Committee of the Red Cross (ICRC) released statements underscoring the applicability of IHL with respect to economic sanctions levied “in the context of” armed conflict.<sup>13</sup> The “context”

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CARTER CTR., SYRIA: FROM PUNITIVE SANCTIONS TO AN INCENTIVE-BASED APPROACH (April 2022). In Venezuela, sanctions are reported to have exacerbated the socio-economic crisis and migration, significantly delayed life-saving humanitarian assistance, and broadly hindered the government’s action against poverty and disease. FRANCISCO RODRÍGUEZ, FOURTH FREEDOM F., SANCTIONS, ECONOMIC STATECRAFT, AND VENEZUELA’S CRISIS (January 2022). In Iran, sanctions contribute to sharp inflation on consumable items, disrupt the supply chains for importation and domestic production of essential goods, decrease the value of the local currency, and increase the poverty gap. ESFANDYAR BATMANGHELIDJ, FOURTH FREEDOM F., THE INFLATION WEAPON: HOW AMERICAN SANCTIONS HARM IRANIAN HOUSEHOLDS (January 2022).

12. This sentiment is reflected in (closed) policy consultation forums that the authors participated in with the United States, European Union (E.U.), United Kingdom (U.K.), and other Western sanctions policy officials. A related piece of evidence: the Swiss government vehemently defends its adoption of E.U. sanctions against Russia as compatible with its longstanding policy of neutrality on the grounds that the use of sanctions should not evoke any sense of participation in warfare. *See* Questions and answers on Switzerland’s neutrality, Swiss Fed’n Dep’t Foreign Affs. (Sept. 9, 2022), <https://www.eda.admin.ch/eda/en/dfa/dfa/aktuell/newsuebersicht/2022/03/neutralitaet.html>.

13. International committee of the Red Cross [ICRC], *The Humanitarian Consequences of Economic Sanctions*, in PRINCIPLES OF AND RESPONSE IN INTERNATIONAL HUMANITARIAN ASSISTANCE AND PROTECTION - REPORT OF THE 26<sup>TH</sup> INTERNATIONAL CONFERENCE OF THE RED CROSS & RED CRESCENT (Oct. 9, 1995), <https://www.icrc.org/en/doc/resources/documents/report/26th-conference-report-100995.htm#chapter12>.

limitation in the ICRC's statement may seem to restrict the proposed applicability of IHL to economic sanctions to the duration of an armed conflict and the actions of the parties to the conflict. However, commentary by former ICRC legal counsel Hans-Peter Gassen, also based on the practice of the Security Council, implies that the applicability of IHL extends to economic sanctions adopted by non-parties to the armed conflict, such as the UN Security Council and other states when acting in implementation of a Security Council measure.<sup>14</sup> This suggests that even autonomous sanctions adopted 'in the context of' armed conflict, such as sanctions adopted by Western states in response to the war in Ukraine, would be governed by IHL principles.

Others have elaborated on the international legal basis for the claim that international organizations such as the Security Council are bound by IHL rules in applying economic sanctions during armed conflicts.<sup>15</sup> In 2001, August Reinisch claimed that while IHL does not deal with economic sanctions per se, relevant applicable rules could be "deduced from the general rules on protection of the civilian population."<sup>16</sup>

Around the same time, Michael Reisman and Douglas Stevick called the failure to transpose IHL principles and assessment into the contexts of equally destructive economic sanctions a "blind spot" in international legal analysis.<sup>17</sup> They explicitly argued that "non-military instruments should be tested rigorously against the criteria of the international law of armed conflict and other relevant norms of contemporary international law *before* a decision is made to initiate or to continue to apply them."<sup>18</sup> In his 2002 piece, Mathew Craven observed that the "linguistic and performative structure" of IHL has much in common with that of sanctions, referring to sanctions terminology such as "targeting" and reducing "collateral damage."<sup>19</sup> The discourse has, of course, moved on since the time of Craven's writing, the softer language of "unintended consequences" replacing the now taboo "collateral damage." While ultimately problematizing the adoption of an IHL framework to address excesses in economic sanctions (discussed later), Craven nevertheless recognized that sanctions historically originated from the practice of blockade in war and that the terms of IHL have "considerable salience" in regulating sanctions.<sup>20</sup> This premise was indeed not much disputed.<sup>21</sup>

Others went a step further to argue for the application of IHL concepts to

14. Hans-Peter Gassen, *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 Heidelberg J. Int'l L. 871, 885, 889 (1996).

15. August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, 853 (2002).

16. *Id.* at 860.

17. Michael Reisman & David L Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Program*, 9 EUR. J. INT'L L. 86, 95 (1998).

18. *Id.*

19. Craven, *supra* note 10, at 57.

20. *Id.*

21. Boris Kondoch, *The Limits of Economic Sanctions under International Law: The Case of Iraq*, 7 J. Int'l Peacekeeping 267, 284 (2001); Gassen, *supra* note 14, at 877-878.

regulate sanctions directly or indirectly. The prominent IHL jurist Marco Sassòli argued in 2001 that IHL should apply to economic sanctions by analogy, even though the latter technically falls outside the context of armed conflict.<sup>22</sup> Sassòli invoked a comparable move by the International Court of Justice (ICJ) in support of this analogy. In the *Corfu Channel Case*, the ICJ observed that Albania had an obligation to inform approaching ships of the existence of a minefield in its territorial waters during peacetime. This duty was not based on the 1907 Hague Convention on the Laws and Customs of War on Land, which would be applicable only during an armed conflict, but on "general and well-recognized principles," which included "elementary considerations of humanity."<sup>23</sup> Sassòli posited that applying IHL concepts to sanctions is only a minimum standard as the safeguards during wartime are much weaker than what is expected during peacetime.

Other international law scholars have taken positions that put economic sanctions in varying degrees of proximity to war. They largely subscribe to Reisman and Stevick's premise that the two subject matters share similar attributes and can, in principle, be dealt with using a shared box of legal tools. The debate primarily centers on whether the invocation of IHL enhances or degrades the governance of economic sanctions. Some, like Sassòli, see merit in this analogy; others see danger.

Amichai Cohen has observed that states often use sanctions as a viable option during armed conflicts with other states and argued that such use of economic sanctions as part of an armed conflict should be regulated by a special set of rules derived from IHL.<sup>24</sup> Drawing from IHL provisions, particularly those concerning obligations to maintain essential humanitarian supplies necessary for the survival of populations, Cohen deduced that certain economic sanctions that cause "very severe effects" on civilian populations are categorically prohibited.<sup>25</sup>

Cohen, however, rejected the idea that the IHL principles of distinction and proportionality directly apply to economic sanctions. Instead, he suggested the development of a special framework of principles derived from IHL.<sup>26</sup> He argued that the direct application of IHL principles, such as the principle of distinction that requires not targeting civilians, would effectively outlaw almost all types of economic sanctions except those that are highly targeted.<sup>27</sup> Likewise, with respect to the principle of proportionality, Cohen submitted that applying the specific IHL formula of balancing collateral damage and expected military advantage is an impossible exercise in the context of economic sanctions, but the general notion of balancing harms against benefits would apply. According to

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22. Marco Sassoli, *Sanctions and International Humanitarian Law- Commentary*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 241, 244 (Vera Gowlland-Debbas ed., 2021).

23. *Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 4, 22 (April 9).

24. Amichai Cohen, *Economic Sanctions in IHL: Suggested Principles*, 42 ISR. L. REV. 117, 121-122(2009).

25. *Id.* at 126.

26. *Id.* at 117.

27. *Id.* at 138.

Cohen, calculating the “exact damage” that sanctions cause and the “specific gains” they bring is impossible.<sup>28</sup>

Others have opposed the analogy between sanctions and war on more doctrinal legal grounds. Mary Ellen O’Connell has argued that although the tendency to equate sanctions to warfare is understandable, deriving humanitarian rules for sanctions from IHL is erroneous as it poses the dangers of simultaneously applying the exceptions found in IHL to sanctions.<sup>29</sup> O’Connell states that while the IHL exceptions are built on the presumption that both sides in a conflict are armed adversaries and legitimate targets to each other, the peaceful context of sanctions does not fulfill this presumption.<sup>30</sup>

Craven also cautions us, from a moral theory perspective, that approaching sanctions similarly to armed conflict would mean taking an agnostic position regarding the “legitimacy of recourse to sanctions” and focusing on sharpening the rules of engagement to reduce humanitarian impact. He points to the UN Security Council sanctions regimes’ reform toward “smarter” targeting and increased humanitarian exemptions as a reflection of this approach.<sup>31</sup> The adoption of an IHL framework, in other words, normalizes the institution of sanctions, and the strategic question of whether and under which conditions the use of sanctions is justified slowly fades away.

This criticism aligns broadly with similar lines of argument in critical international law—that humanization projects lead to the managerial depoliticization of moral issues.<sup>32</sup> Samuel Moyn has echoed a similar argument concerning the laws of war.<sup>33</sup> Craven’s warning is indeed immediately revealed when we look at analysis such as the former ICRC legal counsel urging the application of IHL in relation to economic sanctions adopted in the context of armed conflict, with the caveat that such undertaking would be “without calling in question or even discussing the legitimacy of such measures as a tool for enforcement on the international level...”<sup>34</sup> The late ICJ judge James Crawford, in the course of his work as the International Law Commission’s (ILC) Rapporteur on the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), remarked that “[T]he risk of legitimizing countermeasures by regulating them was a very present factor in the ILC debates.”<sup>35</sup>

As Crawford lamented, however, “[I]t is one thing to advance across a

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28. *Id.* at 139.

29. Mary Ellen O’Connell, *Debating the Law of Sanctions*, 13(1) EUR. J. INT’L L. 63, 75 (2002).

30. *Id.*

31. Craven, *supra* note 10, at 59.

32. Martti Koskeniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT’L L. 7, 15 (2009).

33. *See generally* Moyn, *supra* note 7.

34. Gessen, *supra* note 14, at 899.

35. James Crawford, *The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT’L L. 874, 882 (2002).

wobbly bridge and quite another, having crossed it, to decide to retreat.”<sup>36</sup> The use of economic sanctions is currently a firmly established practice, and it is no longer realistic to expect this development to be reversed. Emerging powers that were vocal in opposing “economic coercion” in earlier decades are now themselves practitioners of sanctions.<sup>37</sup> There is still debate on the delimitation of the legitimate circumstances under which economic sanctions could be adopted and by whom; but the usage of sanctions, as such, is now almost beyond legal debate.

Under these circumstances, this paper builds on the line of work that examines sanctions from the perspective of, or in analogy to, warfare and illuminates where the legal framework and discourse on sanctions fails to match the basic safeguards applicable in IHL. To illustrate this point, we discuss the principles of distinction and proportionality as they relate to both IHL and customary rules on countermeasures, which generally govern sanctions.

## II. THE PRINCIPLE OF DISTINCTION

The principle of distinction in IHL prohibits the targeting of civilian persons and objects, including the destruction of civilian infrastructure. This principle is articulated both under the Geneva Conventions<sup>38</sup> and customary international law.<sup>39</sup> The protection of civilians and non-combatants (*hors de combat*) from attack is indeed one of the “cornerstones” of international humanitarian law.<sup>40</sup>

Currently, economic sanctions are not subject to a comparable requirement of distinction. Customary international rules on state responsibility, which generally govern the use of economic sanctions as countermeasures, do not operate with a belligerent vs. civilians/non-combatants categorization that one finds in the laws of war. States generally use the concept of targets and non-targets in sanctions practice. But this is not a fixed categorization; today’s non-targets could become tomorrow’s targets—there is no categorical exclusion of civilian persons or objects as untouchable in sanctions.

Article 49(1) of ARSIWA, which largely codifies international customary rules, states that countermeasures are to be taken “against a state” responsible for the original international wrongdoing. The focus of the rules on countermeasures is state-to-state action.<sup>41</sup> As such, ARSIWA does not restrict

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36. *Id.*

37. Nathanael Tilahun, *Resisting (US) Sanctions: A Comparison of Special Purpose Vehicles, Blocking Statutes and Countermeasures*, 17 *Global Trade & Customs J.* 380, 386 (2022).

38. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 48, 52, June 8, 1977, 1125 U.N.T.S. 3.

39. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 3-7, 25-8 (2005).

40. Amichai Cohen & David Zlotogorski, Proportionality in International Humanitarian Law Consequences, Precautions, and Procedures 3-4 (2021).

41. David Bederman, *Counterintuiting Countermeasures*, 96 *AM. J. INT’L L.* 817, 827 (2002); Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 *AM. J. INT’L L.* 798,

the domestic scope of countermeasures or explicitly identify impermissible targets within a state. In other words, there is no international obligation to adopt so-called “smart” sanctions that target specific individuals and entities from the perspective of the rules on state responsibility. Sanctions affecting a particular state as a whole or significant sectors of its economy—such as termination of banking relationships with all actors in that state or prohibition of trade in natural resources originating from that state—could, in principle, be adopted. One could interpret the use of “against a state” in article 49(1) of ARSIWA as merely denoting the type of countermeasure in discussion (i.e., state-to-state countermeasures) and not necessarily the scope of such countermeasure (i.e., endorsing measures that affect the targeted state as a whole, instead of particular actors within it). However, from the ILC Commentary, we can infer that the reference to a state also implies an acceptance of the effect on any actor within the state or even incidentally outside of it. The ILC Commentary accepts as a matter of fact that countermeasures against a state affect actors within it by framing the question of the scope of sanctions only with respect to their effects outside the target state. The Commentary recognizes that sanctions may “incidentally affect the position of third states and third parties.”<sup>42</sup> It went on to give an illustration: “[I]f, as a consequence of suspension of a trade agreement, trade with the responsible state is affected, and one or more companies lose business or even go bankrupt . . . such indirect or collateral effects cannot be entirely avoided.”<sup>43</sup> The companies referred to here are those of third states, not the target state. The ILC also referred to the *Cysne*<sup>44</sup> arbitration where the Tribunal described as “indirect and unintentional” sanctions reaching states other than the targeted state, which the sanctioning state is expected to “endeavor to avoid or limit as far as possible.”<sup>45</sup>

ARSIWA Article 50 prohibits countermeasures that infringe upon the human rights obligations of sanctioning states and those that amount to reprisals against protected persons under IHL.<sup>46</sup> The human rights stipulation under article 50 (1)(b) of ARSIWA offers robust protections to civilians against sanctions. Commentators have suggested that this stipulation is a derivative of a general “requirement of humanity” identified in the earliest judicial pronouncements on countermeasures.<sup>47</sup>

The interpretation of this general stipulation is, however, beset with tension between the efficacy and reach of sanctions. If the interpretation is such that sanctions that harm civilians are prohibited, only highly targeted sanctions

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799-801 (2002).

42. Int’l Law Comm’n [ILC], Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 49, comment. ¶ 5 at page 130 U.N. Doc. A/56/10 (Oct. 24, 2001) [hereinafter ILC Commentary].

43. *Id.*

44. Portuguese Colonies case (Naulilaa incident, Portugal v. Germany), Reports of International Arbitral Awards, United Nations, vol. II, p. 1035, at p. 1052 (1930)

45. ILC Commentary, *supra* note 42, at 76.

46. ILC Commentary, *supra* note 42, art. 50(1)(b), (c).

47. Bederman, *supra* note 41, at 827.



become lawful. That is, all civilians, as protected persons, are to be spared from the reach of sanctions. The ILC hinted at this interpretation when it referred to the Committee on Economic, Social and Cultural Rights, which called for taking "full account" of the provisions of the International Covenant on Economic, Social and Cultural Rights in adopting sanctions.<sup>48</sup>

Sanctioning states oppose this interpretation as too restrictive. As economic sanctions are, by definition, tools that target many of the economic resources and infrastructure on which civilians rely, they "would almost always be forbidden" per this interpretation.<sup>49</sup> The ILC's commentary appears to also disavow the interpretation that categorically protects civilians from the reach of countermeasures. When illustrating the types of prohibited countermeasures, the ILC only mentions extreme examples of deprivation. It notes specifically non-derogable human rights (not all human rights) and the IHL prohibitions of starvation of civilians and deprivation of peoples' own means of subsistence as humanitarian principles applicable to sanctions.

The stipulation against "reprisals against protected persons" under Article 50 (1)(c) of ARSIWA is also a narrower construction than the general principle of distinction under IHL. The prohibition of reprisal outlaws economic and material acts of retaliation against civilian populations, such as denying essential provisions needed for human survival.<sup>50</sup> This rule prohibits attacks against civilians under a specific circumstance: i.e., in retaliation for wrongful conduct by a party to a conflict. In contrast, the principle of distinction categorically prohibits targeting civilians for any reason. That is also why IHL provisions speak of civilian "attack" and "reprisal" distinctly.<sup>51</sup> In this light, the rules on countermeasures do not prohibit all measures that target civilians but specifically prohibit measures that could be characterized as retaliation against civilians. The practical consequence of this differentiation becomes important when one takes into account the fact that contemporary sanctions are adopted for a variety of purposes other than retaliation, such as signaling, constraining, and coercing.<sup>52</sup>

In this interpretation, sanctions that systematically harm civilians would not necessarily be prohibited; it is the most extreme forms of sanctions, which result in the denial of means of survival and the right to life, that are prohibited. As such, it could be possible to use sanctions that systematically immiserate a population and leave some humanitarian corridors open for the most essential needs without violating the rules on countermeasures.

Long-standing state practice on sanctions also flies in the face of the notion of categorical civilian protection. States routinely target dual-use or even

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48. ILC Commentary, *supra* note 42, art. 50, comment. 7.

49. Cohen, *supra* note 24, at 138.

50. Veronica Bílková, *Belligerent Reprisals in Non-International Armed Conflicts*, 63 Int'l & Compar. L. Q. 31, 34 (2014).

51. *See, e.g.*, Article 52(1) of Protocol I to the Geneva Convention which states, "civilian objects shall not be the object of attack or of reprisal." Protocol I, *supra* note 38, art. 52(1).

52. *See generally* FRANCESCO GIUMELLI, COERCING, CONSTRAINING AND SIGNALLING: EXPLAINING UN AND EU SANCTIONS AFTER THE COLD WAR (2011).

decidedly civilian objects through their sanctions. Although comprehensive sanctions are supposed to be things of the past, studies of heavily sanctioned states have shown that broadly “targeted” sanctions regimes, in effect, re-enact the older practices of comprehensive sanctions.<sup>53</sup> States also adopt sanctions that are either not targeted or formally targeted but still manifestly broad in their impact. Examples of non-targeted sanctions include denial of access to foreign currency or the Society for Worldwide Interbank Financial Telecommunications (SWIFT) interbank system to banks from a particular state en masse or blocking all assets of a foreign government. Examples of nominally targeted sanctions include measures that restrict trade and activities in a single but decisive sector with reverberating effects throughout the entire economy of a country, such as sanctions on the Venezuelan oil industry.<sup>54</sup> Research has shown that these broad sanctions regimes predictably lead to macroeconomic destabilization, such as currency depreciation, hyperinflation in consumables, and broader economic meltdown, inevitably immiserating broad swaths of civilians.<sup>55</sup>

These state practices have been partly enabled by the fact that important contemporary sanctions tools, some of which constitute critical gridworks of the global economy, fall within the domestic prerogatives of a few (of the most powerful) sanctioning states. To the extent that the dollar is a U.S. currency, or the SWIFT<sup>56</sup> and Euroclear<sup>57</sup> are technically Belgium-incorporated financial services entities, they are largely beyond international regulation. In the case of the U.S. dollar, it is—of course—formally subject to such strictures as International Monetary Fund (IMF) regulation, but the states that most frequently deploy economic sanctions tend to be those that are *de facto* immune to negative pressures by such global institutions.<sup>58</sup> As such, the restriction of access to either the U.S. dollar or critical financial services could be legally justified as a “denial of privilege.”<sup>59</sup> As Ruys and Ryngaert put it, because international law, in

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53. Erica Moret, *Humanitarian Impacts of Economic Sanctions on Iran and Syria*, 24 EUR. SEC. 120, 132, 134(2015); Joy Gordon, *The Not So Targeted Instrument of Asset Freezes*, 33 ETHICS & INT’L AFFS. 303, 304(2019).

54. Rodriguez, *supra* note 11, at 22, 27, 28.

55. Esfandyar Batmanghelidj & Erica Moret, *The Hidden Toll of Sanctions: Why Washington Must Reckon With the Devastating Inflation Its Policies Cause*, FOREIGN POL’Y (Jan. 17, 2022), <https://www.foreignaffairs.com/articles/world/2022-01-17/hidden-toll-sanctions>; Bryan R. Early & Dursun Peksen, *Does Misery Love Company? Analyzing the Global Suffering Inflicted by US Economic Sanctions*, 2 GLOB. STUD. Q. 1,3 (2022).

56. SWIFT is the world’s leading financial messaging service provider that most inter-bank transactions depend on.

57. Euroclear is a major clearinghouse that currently sits on more than \$200 billion of Russian central bank assets. The European Union Council adopted a decision on Feb. 12, 2024, requiring central securities depositories such as Euroclear to set aside revenues generated from the frozen Russian sovereign assets (mostly by way of interests) with a view to utilizing them in future recovery and reconstruction needs in Ukraine. See European Council Decision (CFSP) No. 2024/577 of 12 Feb. 2024, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L\\_202400577&qid=1715990380058](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202400577&qid=1715990380058).

58. Henry Farrell & Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44 INT’L SEC. 42, 45,46 (2019).

59. Tom Ruys & Cedric Ryngaert, *Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, BRIT. Y.B. INT’L L., Sept. 22, at 12.

general, does not entitle foreign actors "financial, economic or physical access" to another state, such access is left to the prerogative of the jurisdictional state unless a specific obligation to the contrary arises, for example by virtue of a treaty.<sup>60</sup> This means sanctions that restrict access to a state's financial services would, generally, not constitute countermeasures, and their use would be unrestrained by international law.

Interestingly, while the negative impact of economic sanctions is often more heavily felt in the Global South, criticism of financial infrastructure sanctions has not come exclusively from that part of the world. Just a few years ago, policy proposals within the European Union (EU) strategic sovereignty debate called for excluding critical financial infrastructure (in particular, SWIFT) from the purview of sanctions and preserving the "independence and political neutrality" of such infrastructure in the global economy.<sup>61</sup>

Another problem of distinction is the practical entanglement of domains of the economy that fall inside and outside the reach of economic sanctions. Sanctions regimes increasingly attempt to incorporate humanitarian exemptions and to avoid targeting essential agri-food and medical transactions. In reality, however, these sectors are all too often subjected to the same restrictions as other sectors of the targeted country's economy because the humanitarian economy cannot be disentangled from the market economy.<sup>62</sup> For example, the Trump administration's reimposition of secondary sanctions on Iran in 2018 led to 186 percent and 125 percent price increases in the food and healthcare sectors, respectively, despite the inclusion of humanitarian exemptions.<sup>63</sup> Indeed, it is difficult to imagine a scenario in which a particular economy is strangled for years without impacting the socio-economic rights of the individuals living within the country.

Even with respect to the activities of specifically excluded humanitarian organizations, the legal operation of sanctions makes their work impossible. The ICRC's senior legal advisor has aptly summarized the practical problem as follows:

The payment of utilities taxes, the hand-over of humanitarian items (such as medicines), the rehabilitation of medical or other essential civilian public infrastructure (such as water treatment or power plants), and certain humanitarian activities such as large-scale food assistance operations can fall within the scope of [sanctions'] prohibition. When financial sanctions target governments, ministries, or non-State armed groups exercising governmental functions (such as in Eastern Ukraine or Gaza) or controlling parts of a country (such as in Syria, Somalia, or Yemen), they increase the likelihood that a number of humanitarian activities may

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60. *Id.*

61. Ellie Geranmayeh & Manuel Lafont Rapnouil, *Meeting the Challenge of Secondary Sanctions*, EUR. COUNCIL ON FOREIGN RELS. (June 25, 2019), [https://ecfr.eu/publication/meeting\\_the\\_challenge\\_of\\_secondary\\_sanctions/](https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/).

62. Vasuki Nesiiah, *Sanctions and 'Bio-Necro Collaboration'*, YALE J. INT'L L. ONLINE, May 2024.

63. Esfandiyar Batmanghelidji, *To Make Sanctions Policy More Humane, Limit Food and Medicine Inflation*, JUST SEC. (Jan. 26, 2022), <https://www.justsecurity.org/79974/sanctions-policy-humane-limit-food-medicine-inflation/>.

be deemed to constitute a proscribed provision of assets or support to listed entities.<sup>64</sup>

### III. THE PRINCIPLE OF PROPORTIONALITY

Current economic sanctions regimes lack clarity on proportionality rules, which has essentially opened the door to the limitless levying of sanctions in terms of both severity and temporal scope.<sup>65</sup> This limitless imposition of sanctions is possible because proportionality is interpreted in a way that privileges the goals of sanctions over their negative impacts.

#### A. Severity

Given that sanctions are adopted for a myriad of purposes relating to the interests of the sanctioning states, third states, and the international community in general, there is no “uniform legal limit” on the severity of the measures that can be applied across the board.<sup>66</sup> Although the ILC has stipulated that countermeasures should be proportional to the original injury that the sanctioning state has suffered,<sup>67</sup> Cannizaro has shown that this injury equivalence approach contradicts the ILC’s own premise that countermeasures serve to induce the offending state to comply with its international law obligations.<sup>68</sup> The ILC’s premise implies that the injured state can apply countermeasures of the scope and severity necessary to sufficiently induce the offending state into compliance. Other scholars have also submitted that the injury equivalence approach would work only if the purpose of countermeasures were reparations, which is not the case.<sup>69</sup>

The ILC Commentary contradicts the injury equivalence standard stipulated in Article 51 of ARSIWA by stating that proportionality should encompass not merely quantitative equivalence between injuries but also the qualitative weighing of the importance of the originally infringed rule and the seriousness of the breach of international law conducted as a countermeasure.<sup>70</sup> In other words, the severity of sanctions should be limited based on the

64. Tristan Ferraro, *International humanitarian law, principled humanitarian action, counterterrorism and sanctions: Some perspectives on selected issues* International Review of the Red Cross, 109, 132 (2021); See generally: FRANCISCO RODRÍGUEZ, CTR. FOR ECON. POL’Y RSCH., THE HUMANITARIAN CONSEQUENCES OF ECONOMIC SANCTIONS. (May 2023).

65. On different categories/contexts of proportionality, see David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 Eur. J. Int’l L. 235, 238 (2013); 8 E. SCrawford, *Proportionality*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Wolfrum ed., 2012).

66. Alexandra Hofer, *The Proportionality of Unilateral “Targeted” Sanctions: Whose Interests Should Count?*, 89 NORDIC J. INT’L L. 399, 411 (2020).

67. M N Schmitt, *“Below the Threshold” Cyber Operations: The Countermeasures Response Option and International Law*, 54 VA. J. INT’L L. 697, 724 (2014).

68. Enzo Cannizaro, *The Role of Proportionality in the Law of International Countermeasures*, 12 EUR. J. INT’L L. 889, 891 (2001).

69. Nicolas Tsagourias, *The Law Applicable to Countermeasures against Low Intensity Cyber Operations*, 14 Baltic Y.B. Int’l L. Online 105, 117 (2015); Nigel White & Ademola Abass, *Countermeasures and Sanctions*, in INTERNATIONAL LAW 529-30 (Malcolm Evans ed., 5th ed. 2018).

70. ILC Commentary, *supra* note 42, art. 51 comment. 6.

importance of their objectives. Alena Douhan, the UN Special Rapporteur on Unilateral Coercive Measures, has noted that states have repeatedly operated with the notion that “legitimate purpose or motive can justify the use of coercion.”<sup>71</sup> It must be noted that this is one of the more contested provisions of the ARSIWA that “embody a series of compromises between arguably irreconcilable positions” of powerful and weaker states.<sup>72</sup> Naturally, more powerful states contend that the injury equivalence test under article 51 of ARSIWA goes “beyond the limits actually observed in state practice.”<sup>73</sup>

The practice of sanctioning states has leaned toward the “purpose test,” as ensuring a change of behavior in the targeted state has become the standard guiding objective in imposing and lifting sanctions.<sup>74</sup> Furthermore, injury equivalence often becomes elusive as non-injured states adopt sanctions in response to violations of collective or universal norms.<sup>75</sup>

The EU Basic Principles on Restrictive Measures speaks of a commitment to “effective use of sanctions” to maintain international peace and security.<sup>76</sup> The document states that sanctions should be used in a way that has “maximum impact on those whose behavior we want to influence.”<sup>77</sup> A sanctions policy note by the United Kingdom (U.K.) Foreign, Commonwealth and Development Office states that one of the purposes of sanctions is coercion for a change of behavior.<sup>78</sup> Another policy note by the U.K. Treasury further defines this purpose as coercing “a regime, or individuals within a regime, into changing their behavior (or aspects of it) by increasing the cost on them *to such an extent that they decide to cease the offending behavior.*”<sup>79</sup> The U.S. Department of State Office of Economic Sanctions Policy similarly defines the purpose of sanctions management work as maximizing economic impact on targets and minimizing the damage to U.S. economic interests.<sup>80</sup>

This “purpose test” allows states to apply sanctions at any level of intensity against targeted states so long as they deem their purposes unfulfilled. This can become a blank check, as the objectives of sanctions regimes are often not

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71. Douhan, *supra* note 4, ¶ 24.

72. LORI FISLER DAMROSCH, INTERNATIONAL LAW: CASES AND MATERIALS 521 (2014).

73. Lori Fidler Damrosch, *The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts*, 37 BERKELEY J. INT’L L. 249, 260 (2019).

74. Niccolò Ridi & Veronika Fikfak, *Sanctioning to Change State Behaviour*, 13 J. Int’l Disp. Settlement 210, [pg. #] (2022).

75. Tom Ruys, *Sanctions, Retortions and Countermeasures: Concepts and International Legal Framework*, in RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW 19, 25 (Larissa van den Herik ed., 2017).

76. COUNCIL OF THE EUROPEAN UNION, BASIC PRINCIPLES ON THE USE OF RESTRICTIVE MEASURES (SANCTIONS) Annex I, ¶ 1 (June 7, 2004).

77. *Id.* Annex I, ¶ 6.

78. UK Foreign & Commonwealth Off., *Sanctions and Anti-Money Laundering Bill: Policy Note on Exceptions and Licenses* ¶ 3 (May 1, 2018).

79. *UK financial sanctions general guidance*, Off. of Fin. Sanctions Implementation (May 16, 2024), <https://www.gov.uk/government/publications/financial-sanctions-general-guidance/uk-financial-sanctions-general-guidance>.

80. *Economic Sanctions Policy and Implementation*, U.S. DEP’T OF STATE, <https://www.state.gov/economic-sanctions-policy-and-implementation/> (last visited, May 17, 2024).

concrete enough for an “independent second opinion,”<sup>81</sup> to use Thomas Frank’s term, to determine when their goal(s) have been fulfilled.

*B. Temporal scope*

A problem related to proportionality is the absence of a temporal limit on the use of sanctions. Although countermeasures are supposed to be temporary measures, their use is also tied to the objective of behavioral change, as mentioned above. The ARSIWA states that countermeasures serve to “induce” the original offending state into compliance with its obligations and are to be taken “for the time being” and “in such a way as to permit the resumption” of the obligations involved.<sup>82</sup> As such, temporality stretches to mean the continuation of sanctions until the target changes behavior. In sanctions regimes with loosely defined objectives, this construction allows sanctioning states to shift the goalposts for the termination of sanctions.<sup>83</sup> Sanctions adopted in response to, say, an instance of election violence as in the case of Zimbabwe,<sup>84</sup> often live on for years to serve reinterpreted purposes of further democratization or deeper government reform.

When states maintain economic sanctions for protracted periods, the cumulative effect may be debilitating to the targeted state. However, there is currently no adequate legal category to cumulatively capture the impact of protracted sanctions, as the requirement of proportionality assessments when deploying countermeasures is static. In practice, proportionality is assessed (by the sanctioning state or third-party adjudicators) by taking the sanction as one integrated phenomenon and weighing it against the original injury the state suffered.<sup>85</sup> Adjudicators scrutinize sanctioning states for what they should have foreseen at the time of adopting the measures, but not necessarily for failing to re-evaluate their proportionality assessments after a period of time. There is, indeed, nothing in customary international law, as articulated in ARSIWA, suggesting that proportionality must be assessed continuously. The closest thing in the ARSIWA is Special Rapporteur Crawford’s elaboration that concurrent collective countermeasures should be aggregated to assess their overall proportionality with the original injury suffered by the sanctioning state(s), which does not say much about the duration of sanctions.<sup>86</sup> Furthermore, in light of the fact that countermeasures were conceptualized as temporary and reversible measures, the need for continuous assessment of proportionality may

81. Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L L. 715, 717, 718 (2008).

82. ILC Commentary, *supra* note 42, art. 49.

83. George Lopez, *It’s Time to End Senseless, Endless Sanctions*, RESPONSIBLE STATECRAFT (Aug. 7, 2020), <https://responsiblestatecraft.org/2020/08/07/its-time-to-end-senseless-endless-sanctions/>.

84. Council Common Position of 18 February 2002 concerning restrictive measures against Zimbabwe, 2002 O.J. (L 50) 1,1.

85. Thomas Frank, *On Proportionality of Countermeasures in International Law* 102 AM. J. INT’L L. 715, [pg.#] (2008).

86. James Crawford (Special Rapporteur on State Responsibility), *Third report on State Responsibility*, Addendum 1-4, A/CN.4/507 (Mar. 15, 2000).

understandably not have commanded attention in the ILC deliberations.

The assessment of proportionality must not be static: research shows that even those economic sanctions designed to impose costs on “elites and crucial regime supporters” affect the general public over time, as elites adjust to the sanctions and shift their burdens onto more vulnerable groups.<sup>87</sup> Thus, what is deemed proportional at a certain point may no longer be the case after a sufficient time lapse, i.e., after a sufficient amount of harm is transferred onto the population.

Iraq’s experience has been a powerful illustration of the impact of protracted sanctions, with hundreds of thousands of civilians, including children, estimated to have been killed by disease and starvation during roughly a decade of sanctions.<sup>88</sup> In Sudan,<sup>89</sup> Libya,<sup>90</sup> Cuba,<sup>91</sup> and other countries, sanctions have been or were in place for decades. Although the Iraq case has been particularly catastrophic because of the comprehensiveness of the sanctions, it may become less unique as there is now a slow shift toward more comprehensive sanctions (e.g., against Russia) in the context of intensified geopolitical rivalries.

### C. *Ex-ante and Continuous Assessment*

To the extent that the proportionality of sanctions is assessed in a purposive approach (i.e., tested against the objective sought), it resembles the conception of proportionality in IHL.<sup>92</sup> But, unlike in the law of sanctions, there is a growing academic acceptance in IHL that proportionality entails an obligation to undertake both *ex-ante* and continuous assessment of civilian harm. There is expert consensus in IHL that applying the principle of proportionality requires an assessment of “direct economic harm” from an attack, particularly if it “involves long-term loss or damage to infrastructure.”<sup>93</sup> This includes assessing foreseeable long-term and reverberating civilian harm.<sup>94</sup> According to the ICRC, states increasingly recognize this position in IHL proportionality assessments.<sup>95</sup>

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87. Jin Mun Jeong, *Do Sanctions Types Affect the Duration of Economic Sanctions? The Case of Foreign Aid*, 40 Int’l Pol. Sci. Rev. 231, 232, 235, 242 (2019).

88. *Iraq: 1989-1999, a Decade of Sanctions*, ICRC (Dec. 14, 1999), <https://www.icrc.org/en/doc/resources/documents/report/57jqap.htm>.

89. *Sudan’s listing as sponsor of terrorism ended by US*, BBC (Dec. 14, 2020), <https://www.bbc.com/news/world-africa-55300252>.

90. *UN lifts sanctions against Libya*, THE GUARDIAN (Sept. 12, 2003), <https://www.theguardian.com/uk/2003/sep/12/lockerbie.libya>.

91. *Cuba Sanctions*, U.S. Department of State, <https://www.state.gov/cuba-sanctions/>, (last visited May 17, 2024).

92. For a comprehensive treatment of proportionality under IHL, see generally AMICHAH COHEN AND DAVID ZLOTOGORSKI, *PROPORTIONALITY IN INTERNATIONAL HUMANITARIAN LAW: CONSEQUENCES, PRECAUTIONS, AND PROCEDURES* (2021); JEROEN VAN DEN BOOGAARD, *PROPORTIONALITY IN INTERNATIONAL HUMANITARIAN LAW: REFOCUSING THE BALANCE IN PRACTICE* 13-35, 51-87(2023).

93. Cohen & Zlotogorski, *supra* note 91, at 80.

94. Noam Lubell & Amichai Cohen, *Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts*, 96 INT’L L. STUD. 159, 174 (2020).

95. LAUREN GISEL, ICRC, *THE PRINCIPLE OF PROPORTIONALITY IN THE RULES GOVERNING THE CONDUCT OF HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW: INTERNATIONAL EXPERT*

IHL experts also agree that post-attack mitigation efforts, such as humanitarian assistance and international damage recovery work, should not be considered in *ex-ante* proportionality assessments.<sup>96</sup> Proportionality should be assessed based on the prevailing facts at the time of attack, without taking into account the post-attack rehabilitation measures as mitigating factors. Scholars have noted that the shift in consensus has particularly accelerated in the past few years. A 2009 study did not find any expert consensus or state practice as to what, if any, non-direct effects should be taken into account for proportionality purposes.<sup>97</sup> Currently, “only a few commentators” and virtually no states argue that proportionality in IHL is confined to direct, first-order effects of an attack.<sup>98</sup>

In IHL, there is also work documenting emerging state practices and general principles of law in support of an obligation to undertake cumulative or strategic proportionality assessments. This includes an evaluation of the impact of not only individual military operations and tactics but also of the grand pattern of casualties over time.<sup>99</sup>

There is no comparable legal development or documentation of state practice in the domain of economic sanctions. The principle of proportionality under ARSIWA is not interpreted as entailing an ongoing or temporally cumulative impact assessment requirement. Reisman and Stevick have argued that countermeasures law should be interpreted as requiring pre-adoption collateral damage assessment.<sup>100</sup> In practice, however, states seldom undertake impact assessment prior to the adoption or even during and after the lifetime of economic sanctions. Calls for long-term monitoring of the impact of sanctions on human rights, and the recognition of such monitoring exercise as states’ duty emanating from human rights law,<sup>101</sup> have yet to find reception by sanctioning states.

## CONCLUSION

Contemporary international rules applicable to economic sanctions appear to uphold a contradictory situation whereby they permit all-encompassing economic measures against states while ostensibly seeking to insulate

MEETING REPORT 44, 47 (Sept. 2018).

96. *Id.* at 49-50.

97. IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I 207-10 (2009).

98. Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The Reasonable Military Commander Standard and Reverberating Effects*, 51 VAND. J. TRANSNAT’L L. 835, 849 (2018).

99. Lubell & Cohen, *supra* note 94, at 169, 174, 193, 194. A major new international research project titled ‘Cumulative Civilian Harm in War: Addressing the Hidden Human Toll of the Law’s Blind Spot’, funded by UK Research and Innovation (UKRI) is underway that aims to solidify the documentation and conceptualization of this development in IHL. See, UKRI website, <https://gtr.ukri.org/projects?ref=ES/X01097X/1>.

100. Reisman & Stevick, *supra* note 17, at 130.

101. Robin Geiss, *Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-Up Assessment of Long-Term Effects*, 18 Harv. Hum. Rts. J. 167, 198-199 (2005).



individuals within that state. This regime is contradictory in that the systematic strangulation of economies by many economic sanctions regimes should be reasonably expected to, and does in fact, create humanitarian c from which it is hardly possible to insulate vulnerable individuals. In other words, while the official line from the most powerful sanctioning states tends to be that the sanctions they impose are targeted and the accompanying protective provisions for civilians are broad, it seems the reverse is true: sanctions are, in reality, often broad measures that systematically impact economies, and it is post-sanctions mitigation measures, in the form of exemptions, that attempt to surgically pick out particular sectors (humanitarian activities) and actors (specifically designated humanitarian organizations) for special protection. In this sense, the regulation of economic sanctions lags behind legal developments in IHL that protect civilians categorically.

The proportionality assessment in sanctions has evolved in state practice to tack closer to IHL's yardstick of measuring attacks against the expected "military advantage," a less protective standard than countermeasure law's yardstick of measuring responses against the "original injury" suffered. Yet, while IHL has evolved to encompass requirements of *ex-ante* and continuous assessment of the proportionality of an attack, including its reverberating economic impact, comparable requirements are undeveloped with respect to economic sanctions. In other words, in terms of proportionality, the governance of economic sanctions mirrors the worst parts of IHL and leaves out the better parts.

There is recent momentum toward bringing humanitarian reform to sanctions, spurred by the adoption of Security Council Resolution 2664, establishing a permanent humanitarian carve-out across all UN sanctions regimes.<sup>102</sup> Similar carve-outs are also being introduced at the national level by leading sanctioning states and organizations, both as part of implementing the Security Council Resolution and autonomously.<sup>103</sup> The U.S. General Licenses for humanitarian activities, for example, go further than the Security Council's measure by covering a wider range of humanitarian organizations beyond those affiliated with the United Nations.<sup>104</sup> This momentum indicates a political opening for reform. However, more systemic conceptualization, perhaps in the form of an international code of conduct, is needed to effectively articulate the humanitarian principles that will govern sanctions praxis and provide a

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102. S.C. Res. 2664, ¶ 1 (Dec. 9, 2022).

103. See Department of the Treasury Office of Foreign Asset Control, General Licenses for the Official Business of the United States Government and Certain International Organizations and Entities 87 Fed.Reg. 78, 470 (December 21, 2022); General Licenses for Certain Transactions of Nongovernmental Organizations and Related to Agricultural Commodities, Medicine, Medical Devices, Replacement Parts and Components, or Software Updates for Medical Devices, 87 Fed. Reg. 78, 484 (December 21, 2022); The UK Sanctions (Humanitarian Exception) (Amendment) Regulations 2023, [legislation.gov.uk, https://www.legislation.gov.uk/uksi/2023/121/contents/made](https://www.legislation.gov.uk/uksi/2023/121/contents/made) (last visited May 17, 2024); EU Council Decision (CFSP) 2023/2686 of 27 November 2023, O.J. L; EU Council Decision (CFSP) 2023/726 of 31 March 2023, O.J. (L 94).

104. General Licenses for the Official Business of the United States Government and Certain International Organizations and Entities *Id.*

significant additional resource for those working to humanize economic sanctions. Some of the advances in IHL noted above could be useful models for this work. A contextual articulation and reaffirmation of the fundamental principles of distinction and proportionality could, for example, take the form of an exclusionary rule with respect to critical economic infrastructure, a precautionary obligation (*ex-ante* impact assessment), and an obligation to undertake continuous and cumulative assessments of harms caused by sanctions over time.