

2013

No Universal Target: Distinguishing Between Terrorism and Human Rights Violations in Targeted Sanctions Regimes

Elizabeth Clark Hersey

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Elizabeth C. Hersey, *No Universal Target: Distinguishing Between Terrorism and Human Rights Violations in Targeted Sanctions Regimes*, 38 Brook. J. Int'l L. (2013).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol38/iss3/8>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

NO UNIVERSAL TARGET: DISTINGUISHING BETWEEN TERRORISM AND HUMAN RIGHTS VIOLATIONS IN TARGETED SANCTIONS REGIMES

INTRODUCTION

On December 14, 2012,¹ the White House enacted the “Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act,”² a seemingly innocuous piece of international trade legislation with an unprecedented attachment (the “Bill”). The Bill’s formal purpose was to establish “permanent normal trade relations” with Russia, following Russia’s admission to the World Trade Organization (“WTO”).³ During negotiations, however, a certain title of the Bill—that section called “the Magnitsky Act”—dominated the floor.⁴ The Magnitsky Act empowered the U.S. president to “determine[], based on credible information,” that individual Russian citizens had violated international human rights, and to then place them on a blacklist—starting with Russian officials associated with the imprisonment and death of Russian

1. Stephen Collinson, *Obama Signs Russia Rights Law Despite Putin Fury*, AGENCE FRANCE-PRESSE, Dec. 14, 2012, available at http://www.google.com/hostednews/afp/article/ALeqM5ifTJR_NiuSC0kkGDgBkKJjDDYSqQ?docId=CNG.1a7e217111e4906ef1b6b3e54e79e1b0.141.

2. Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, §§ 401–406.

3. Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act §§ 101–102; accord Jeremy W. Peters, *U.S. Senate Passes Russian Trade Bill, With a Human Rights Caveat*, N.Y. TIMES, Dec. 7, 2012, at B4. See also Madeleine Albright & Igor Ivanov, *A New Agenda for U.S.-Russia Cooperation*, N.Y. TIMES (Dec. 30, 2012), www.nytimes.com/2012/12/31/opinion/31iht-edalbright31.html (calling for renewed attempts at cooperation in recognition of the states’ mutual interests). The Jackson-Vanik Amendment adopted in 1974, imposed trade restrictions on Russia, denying Russia most-favored-nation status due to its emigration policy that severely restricted the movement of Jewish Russian nationals. Steven Lee Myers & David M. Herszenhorn, *Clinton Tells Russia that Sanctions Will Soon End*, N.Y. TIMES, Sept. 9, 2012, at A4; see *infra* Part I.B.ii.

4. Peters, *supra* note 3.

lawyer Sergei Magnitsky.⁵ These violators⁶ were prohibited from entering the United States, and any of their existing assets within U.S. jurisdiction were frozen.⁷ The Kremlin⁸ responded with Yakolev's Law, which included sanctions against U.S. citizens connected to mistreatment of Russian children adopted by Americans.⁹

These pieces of legislation have created targeted sanctions: instruments of a state's foreign policy "that are designed and implemented in such a way as to affect only those parties that are held responsible for wrongful, unacceptable, illegal, or reprehensible behavior," including individuals, legal entities, and other non-state actors that violate international law.¹⁰ Targeted sanctions are "an alternative to comprehensive sanctions" that are directed at a state as a whole and "that affect entire populations."¹¹ Although targeting an individual foreign national is not a wholly unprecedented foreign policy measure (being widely practiced against suspected terrorists in the last couple decades), the application of such measures against suspected human rights violators represents a deviation from ac-

5. Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act §§ 401–406.

6. Throughout this Note, there is a semantical difficulty regarding the term "human rights violators" as generally used. On the one hand, because the individuals were not formally convicted after a fair hearing in accordance with their rights under international law (discussed in Parts I and II), their guilt ought not to be assumed, and they would be properly referred to as "alleged" violators. However, the state actors here treat the individuals as convicts by inflicting punishment upon them. Therefore "human rights violators" in this Note refers to these accused individuals, bearing in mind these different perspectives and specifying which perspective is relevant where appropriate.

7. Peters, *supra* note 3.

8. The Moscow Kremlin, locus of the Russian Federation government. See David M. Herszenhorn & Andrew E. Kramer, *Russian Adoption Ban Brings Uncertainty and Outrage*, N.Y. TIMES, Dec. 29, 2012, <http://www.nytimes.com/2012/12/29/world/europe/russian-adoption-ban-brings-uncertainty-and-outrage.html>.

9. *Id.*

10. Anthonius W. de Vries, *European Union Sanctions against the Federal Republic of Yugoslavia from 1998 to 2000: A Special Exercise in Targeting*, in SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT 87 (David Cortright & George A. Lopez eds., 2002).

11. Joanna Weschler, *The Evolution of Security Council Innovations in Sanctions*, 65 INT'L J. 31, 39 (2010).

cepted principles of human rights and sovereignty in international law.

All types of economic sanctions have gained popularity since the 1990s.¹² Sanctions are “the tool of choice for the [United Nations Security C]ouncil in addressing threats to, or breaches of, international peace and security around the world,”¹³ because they are seen as a nonviolent instrument of foreign policy.¹⁴ Not all international organizations use sanctions regularly, however. The WTO, for example, has sought to deter the use of sanctions by its member states by requiring them to pursue resolutions to conflicts through arbitration within the WTO itself.¹⁵

12. In one study, researchers observed fifty-eight sanctions cases from 1990–1999, compared to thirty-two from 1980–1989, and only fourteen from 1914–1944. Gary Clyde Hufbauer & Barbara Oegg, *Reconciling Political Sanctions with Globalization and Free Trade: Economic Sanctions: Public Goals and Private Compensation*, 4 CHI. J. INT’L L. 305, 307 tbl. 1 (2003).

13. Jane Boulden & Andrea Charron, *Evaluating UN Sanctions: New Ground, New Dilemmas, and Unintended Consequences*, 65 INT’L J. 1, 7 (2010). See also Nikolay Marinov, *Do Economic Sanctions Destabilize Country Leaders?*, 49 AM. J. POL. SCI. 564, 564 (2005) (observing that “[i]n the last decade, virtually nowhere could democratic rights and freedoms be suspended, human rights grossly abused, or a civil war break out without causing a group of states to react with economic sanctions”).

14. Economic restrictions appeared, on their face, to be less harmful than military intervention. This idea was occasionally referred to as the “Wilsonian notion,” attributed to President Woodrow Wilson. Gary Clyde Hufbauer, *Policy Brief 98-4: Sanctions-Happy USA*, PETERSON INST. INT’L ECON. (July 1998), *available at* <http://www.piie.com/publications/pb/pb.cfm?ResearchID=83>. President Wilson’s opinion of sanctions was not wholly positive, however. As quoted by Professor W. Michael Reisman in a 2008 address, the president elaborated:

A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted, but it brings oppression upon the nation, which in my judgment no modern nation could resist.

W. Michael Reisman, Yale L. Sch., *Sanctions and International Law*, Keynote Address at the Intercultural Human Rights Law Review Annual Symposium (Oct. 24, 2008), *in* 4 INTERCULTURAL HUM. RTS. L. REV. 9, 12 (2009).

15. In comparison, WTO procedures favor “removal of trade barriers found to be inconsistent with covered agreements rather than imposition of a second trade barrier in retaliation.” ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 167 (2nd ed. 2008). Should a trade dispute arise, the Understanding on Dispute Settlement prohibits members from making an inde-

Recent international litigation has prompted analysts to re-examine the legality of targeted economic sanctions under accepted principles of international law. The methods employed by sending states¹⁶—usually freezing an individual's or entity's assets within the sanctioning party's jurisdiction, or denying a visa—generally lack the necessary elements to protect internationally recognized human rights principles and comply with customary international law. In the terrorism context, for example, U.N.-supported targeted sanctions that have frozen the assets of individuals associated with terrorism can directly violate the individuals' due process rights. Following substantial amounts of international litigation,¹⁷ and with the advice of numerous academic conferences,¹⁸ the U.N. Security Council (the "Security Council") attempted to preserve due process by creating procedures by which a targeted individual would have recourse against the U.N.-authorized sanctions regime.¹⁹ Several scholars believe that the efforts are "positive step[s] toward addressing the serious institutional problems that are inherent in the individual sanctions," but "not commensurate

pendent determination that their rights under an agreement have been denied, instead requiring them to employ the WTO's extensive arbitration options toward its resolution. The existence of viable options for dissatisfied parties "reduce[s] substantially the justification for unilateral trade remedies, and also increase[s] the downside risk" for the state using such "an unauthorized sanction which would itself violate a covered agreement." The WTO system has seen "great success" in securing compliance with its agreements. *Id.* at 161–211. For a discussion of how and why the WTO's method works, see generally Gregory Shaffer, *A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Center of the GMO Case*, 41 N.Y.U. J. INT'L L. & POL. 1 (2008) (explaining how the WTO's "comparative institution analytic frame" functions and serves to accommodate differences between state laws in dispute resolution).

16. In this Note, as in current discussion of sanctions, "sending state" or "sender" refers to the state enacting and/or enforcing the sanctions against another state or entity, called the "target." See Hufbauer & Oegg, *supra* note 12, at 305 n.2.

17. Cora True-Frost, *The Development of Individual Standing in International Security*, 32 CARDOZO L. REV. 1183, 1187 n.8 (2011). Examples of such litigation are discussed in Part I.B.

18. Weschler, *supra* note 11, at 40; see *infra* note 67 and accompanying text.

19. True-Frost, *supra* note 17, at 1215–16.

with the serious lack of due process and transparency inherent in [the targeted sanctioning as a whole].”²⁰

Although questions surrounding the legality of using targeted economic sanctions as a weapon against terrorism remains unresolved, the Magnitsky Act and Yakolev’s Law demonstrate that the use of targeted economic sanctions is expanding from the context of terrorism to that of human rights violations, producing new difficulties in the international legal sphere. This Note argues that collective targeted sanctions against suspected terrorists are theoretically and practically different from a state’s unilateral use of targeted sanctions against a foreign national suspected of violating international human rights law because the latter directly violates a state’s sovereignty as well as the individual’s due process rights. Therefore, international actors must approach the two situations differently, and thereby bring themselves into relative compliance with international law. Part I of this Note describes general sanctions regimes and targeted sanctions, their differences, and how the principles of universal jurisdiction, state sovereignty, and individual rights are implicated by the use of targeted sanctions. Part II argues that using targeted sanctions against individuals affiliated with a recognized state government (as opposed to non-state groups, such as terrorist organizations), infringes on the target state’s exclusive internal jurisdiction, in violation of international law. It also explains how targeted sanctions may, and often do, violate individuals’ due process rights. Part III suggests that, given its unique position in the international legal system, the U.N. is obligated to protect both types of rights, and further recommends that the U.N. protect those rights by regulating the use of unilateral targeted sanctions by member states.

I. BACKGROUND

To understand targeted sanctions, it is necessary to understand their origins, the principles of international law that permit or restrict their use, and the impetus behind the inter-

20. Adeno Addis, *Targeted Sanctions as a Counterterrorism Strategy*, 19 TUL. J. INT’L & COMP. L. 187, 197 (2010); see also True-Frost, *supra* note 17, at 1243 (concluding that, even if the U.N.’s new procedures for review do not actually ensure a fair hearing, people benefit from perceiving that their rights are protected).

national community's ongoing struggle to find a perfect approach. Here, "general sanctions" will refer to the traditional concept of sanctions employed in the twentieth century: a combination of economic measures directed against a target government. Targeted sanctions (specific measures against individuals, as opposed to against the government) were originally one branch of these general sanctions regimes—in other words, one piece of the overall plan. They have since grown, as outlined below.

A. Description and History of Economic Sanctions

Sanctions—a major instrument of international relations²¹—are varied, complex, and ill-defined.²² This Note focuses on economic sanctions,²³ which Professors W. Michael Reisman and Douglas L. Stevick described as "involv[ing] a purposive threat or actual granting or withholding of economic indulgences, opportunities, and benefits by one actor or group of actors in order to induce another actor or group of actors to change a policy."²⁴ In theory, these measures would impose sufficient costs on the target state's government to effect that change.²⁵ Economic sanctions include trade restrictions, embargoes, blocks

21. W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT'L L. 86, 87 (1998).

22. See MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE 11–16 (1990); see also LOWENFELD, *supra* note 15, at 850. Some scholars hold that if a state revokes a benefit it previously conferred, this too would constitute a sanction, while others consider this a neutral practice not within the purview of the term "sanction." In a similar vein, the International Monetary Fund has denied states access to its funds for limited types of misconduct while maintaining that such denial is not an economic "sanction." *Id.*

23. Sanctions may also consist of military (involving the use of armed force), diplomatic (political admonishments), or ideological (propaganda) measures. Reisman, *supra* note 14, at 10–11.

24. Reisman & Stevick, *supra* note 21, at 87.

25. A. Cooper Drury, *Revisiting Economic Sanctions Considered*, 35 J. PEACE RES. 497, 508 (1998); see also Michael Ewing-Chow, *First Do No Harm: Myanmar Trade Sanctions and Human Rights*, 5 NW. U. J. INT'L HUM. RTS. 153, 153 (2007) (criticizing the theory as "too simplistic a view that does not take into account the likelihood of such an event based on the history, culture and power differential of each country").

on monetary loans, suspending economic assistance, and travel restrictions (such as visa bans).²⁶

All sanctions begin with a plan by the sending state. Multiple sender states may unite to negotiate a multilateral agreement or collective decision in an international organization to enforce a regime of sanctions against a target state.²⁷ With a few exceptions,²⁸ collective sanctions regimes are on the rise. Since 2000, the EU has initiated and collaborated on more sanctions regimes than any other international organization; the U.N. comes in second, having played a major role in six out of seventeen major sanctions regimes since 2000.²⁹ States may, though less frequently do, attempt to unilaterally sanction another state.³⁰

i. General Economic Sanctions

Traditionally, general sanctions target the state as a whole in order to reach the target state's government.³¹ The theory is that the sender's actions will cause sufficient hardship in the target state, such that the target's government will alter its behavior.³² The sanctioning measures were purportedly pre-

26. Richard N. Haass, *Introduction* to COUNCIL ON FOREIGN RELATIONS, ECONOMIC SANCTIONS AND AMERICAN DIPLOMACY 1, 2 (Richard N. Haass ed., 1998).

27. LOWENFELD, *supra* note 15, at 849.

28. The furthest outlier is the United States, which uses unilateral sanctions more frequently than any other state, in addition to participating in multilateral and collective sanctions regimes. Hufbauer, *supra* note 14.

29. Gary Clyde Hufbauer, Jeffrey J. Schott, Kimberly Ann Elliott & Julia Muir, *Post-2000 Sanctions Episodes*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (May 2012), <http://www.piie.com/publications/papers/sanctions-timeline-post-2000.pdf>.

30. Hufbauer, *supra* note 14.

31. Sarabeth Egle, *The Learning Curve of Sanctions—Have Three Decades of Sanctions Reform Taught Us Anything?*, 19 CURRENTS INT'L TRADE L.J. 34, 37 (2011).

32. See THOMAS J. BIERSTEKER & SUE E. ECKERT, WATSON INST. TARGETED SANCTIONS PROJECT, STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES 5 (2006), http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf. Analysts ascribe to sanctions a number of purposes: to express disapproval, to punish, and to effect change; see also Roger Normand & Christoph Wilcke, *Human Rights, Sanctions, and Terrorist Threats: The United Nations Sanctions Against Iraq*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 299, 304–05 (2001).

ventative, not punitive.³³ Desired changes include removal of a leader or party, reorganization of governmental structure (usually toward democracy), cessation of nuclear testing, and greater protection for human rights, etc.³⁴ For example, in response to the human rights abuses and seemingly nondemocratic elections in Haiti in 2000, the United States cut financial assistance to the country, and the EU temporarily halted economic aid. Aid was restored incrementally from 2004 to 2006, following the previous leader's removal and the occurrence new elections.³⁵ This "withdrawal of a current preference" is not violative of international law (and by some definitions, not a sanction at all).³⁶

General economic sanctions owe a large part of their popularity to the perception that they are peaceful, "seem[ing] to offer wholly non-violent and non-destructive ways of implementing international policy."³⁷ Also, they can be inexpensively executed and thus gain domestic support easily.³⁸

33. The U.N. General Assembly formally stated that "the purpose of sanctions is to modify the behaviour [sic] of a party that is threatening international peace and security and not to punish or otherwise exact retribution." U.N. Secretary-General, *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, ¶ 66, U.N. Doc. A/50/60-S/1995/1 (Jan. 25, 1995). This perspective, common among sending parties, is not widely held in the scholarly community, which tends to focus on the ad hoc, coercive nature of sanctions. See, e.g., Normand & Wilcke, *supra* note 32, at 305; and Vanessa Ortblad, Comment, *Criminal Prosecution in Sheep's Clothing: The Punitive Effects of OFAC Freezing Sanctions*, 98 J. CRIM. L. & CRIMINOLOGY 1439 (2008) (criticizing the low evidentiary standards used to place individuals on terrorism blacklists in the United States).

34. PETERSON INST. INT'L ECON., *Case Studies in Sanctions and Terrorism: Summary of Economic Sanctions Episodes, 1914-2006*, <http://www.piie.com/research/topics/sanctions/sanctions-timeline.cfm> (last visited Jan. 12, 2013) [hereinafter *Economic Sanctions 1914-2006*].

35. This sanctions episode received a score of nine out of twelve on the Peterson Institute's effectiveness scale, indicating the Peterson analysts consider it an unusually successful example of economic sanctions implementation. Hufbauer et al., *supra* note 29, at 1.

36. See MALLOY, *supra* note 22, at 18.

37. Reisman & Stevick, *supra* note 21, at 94.

38. *Id.* at 94. Another factor resulting in the increased use of sanctions may have been the increased activity of "single-issue constituencies" like nongovernmental organizations, known for demanding governmental attention to specific issues "when no equally focused countervailing force exist[ed]" and thus influencing foreign policy. Haass, *supra* note 26, at 3.

In practice, general sanctions suffer two major drawbacks.³⁹ First, their success rates are dubious; answers to questions of their effectiveness range from “yes, approximately one-third of the time,”⁴⁰ to “rarely,” and “no.”⁴¹ In past sanctions episodes, the targeted government often managed to substantially evade the measures taken against it, since “globalization . . . made it easier for target countries to tap international trade and capital markets and find alternative suppliers of goods and capital.”⁴² Unilateral sanctions are particularly ineffective.⁴³ As of early 2013, any apparent success is hard to qualify and quantify, making the effects of economic sanctions difficult to assess.⁴⁴

Second, sanctions can cause harm to innocent civilians in the receiving state.⁴⁵ Indeed, sometimes—often enough to incite anger in the international community—the receiving state’s

39. Analysts have identified additional potential effects of sanctions. Gary Clyde Hufbauer and Barbara Oegg contend that economic sanctions may marginally depress the sending state’s trade, but “individual firms and communities in the sending countries may experience severe economic dislocation,” and the effects on a state’s foreign investment may be dramatic. Hufbauer & Oegg, *supra* note 12, at 314. They also consider the difference in means of enforcement of sanctions, observing that “economic sanctions imposed by the public sector pose a relatively limited threat On the other hand, private litigation . . . carries an enormous potential to limit trade and capital flows between developed and developing countries.” *Id.* at 328. See generally Kimberly Ann Elliott, *Evidence on the Costs and Benefits of Economic Sanctions*, PETERSON INST. INT’L ECON. (Oct. 23, 1997), <http://www.piie.com/publications/testimony/testimony.cfm?ResearchID=294> (breaking down the economic costs and benefits of U.S. sanctions, concluding that sanctions may be “costing the United States \$15 billion to \$19 billion annually in potential exports”).

40. See Hufbauer & Oegg, *supra* note 12, at 307; accord David Lektzian & Mark Souva, *An Institutional Theory of Sanctions Onset and Success*, 51 J. CONFLICT RESOL. 848, 848 (2007) (citing GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT & KIMBERLY ANN ELLIOTT, *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY*, INSTITUTE FOR INTERNATIONAL ECONOMICS (1990)).

41. Marinov, *supra* note 13, at 565 (offering a notably positive assessment of economic sanctions’ ability to induce change by destabilizing targeted leaders).

42. Jeffrey J. Schott, *US Economic Sanctions: Good Intentions, Bad Execution*, PETERSON INST. INT’L ECON. (Jun. 3, 1998), <http://www.piie.com/publications/papers/paper.cfm?ResearchID=314>.

43. *Id.*

44. Marinov, *supra* note 13, at 565.

45. Grant L. Willis, *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, 42 GEO. J. INT’L L. 673, 678 (2011).

population suffers greatly despite senders' attempts to protect basic necessities of life and provide humanitarian aid.⁴⁶ Although not the norm,⁴⁷ such devastating cases commanded international attention.⁴⁸ Owing to the centralization of governmental power in many targeted nations, civilian populations can feel the sting of sanctions first and to the greatest degree because "[t]hose who have no voice in the allocation of resources are the most dependent on them."⁴⁹ These humanitarian problems have been dubbed "collateral damages."⁵⁰

An infamous general sanctions regime that was both disastrously harmful and woefully ineffective was the U.N. and United States' concerted attack on Iraq in the 1990s.⁵¹ In response to the Iraqi invasion of Kuwait and Iraq's refusal to comply with previous Security Council demands, the Security Council imposed a near-total ban on Iraqi imports and exports.⁵² This ban lasted from 1990 to 1997, when trade restrictions were relaxed under the Oil-for-Food Program, only to be tightened again in 2001.⁵³ Deprived of important trade, the Iraqi economy ground to a halt.⁵⁴ Civilians faced unemployment, malnourishment, and disease while "the very wealthy, those politically connected to the regime, and the political leadership itself . . . remained largely immune to the shortages of food and consumer goods."⁵⁵ Limited humanitarian aid was "far from perfect and led to one of the most extensive outside reviews of any of the UN's activities . . ."⁵⁶ The sanctions against

46. Weschler, *supra* note 11, at 37.

47. See Hufbauer & Oegg, *supra* note 12, at 315 ("[I]n terms of economic costs of sanctions to target countries, the comprehensive UN sanctions regime against Iraq is a clear outlier.").

48. David Cortright & George A. Lopez, *Introduction to SANCTIONS AND THE SEARCH FOR SECURITY: CHALLENGES TO UN ACTION 1* (David Cortright & George A. Lopez eds., 2002) [hereinafter Cortright & Lopez, *SEARCH FOR SECURITY*].

49. Normand & Wilcke, *supra* note 32, at 313; see also Eric D. K. Melby, *Iraq in COUNCIL ON FOREIGN RELATIONS, ECONOMIC SANCTIONS AND AMERICAN DIPLOMACY*, *supra* note 26, at 107, 112 (detailing the economic effects on Iraq).

50. Reisman & Stevick, *supra* note 21, at 92.

51. Melby, *supra* note 49.

52. S.C. Res. 661, U.N. Doc. S/RES/661 (Aug 6, 1990).

53. Normand & Wilcke, *supra* note 32, at 310.

54. *Id.* at 311.

55. *Id.* at 311-15.

56. Weschler, *supra* note 11, at 37.

Iraq proved to be both harmful and largely ineffective at destabilizing the government of Saddam Hussein.⁵⁷ In retrospect, this sanctions episode has been decried as blatantly violative of international law.⁵⁸

ii. The Advent of Targeted Sanctions

Targeted sanctions were an attempt to solve the problems of humanitarian “collateral damage” and general ineffectiveness prevalent in comprehensive sanctions regimes and broadly applied economic restrictions.⁵⁹ As stated earlier, targeted sanctions “are measures that are designed and implemented in such a way as to affect only those parties that are held responsible for wrongful, unacceptable, illegal, or reprehensible behavior”—meaning individuals, legal entities, and other non-state actors.⁶⁰ A refinement of the general sanctions concept, targeted sanctions are implemented by national legislation, authorizing the appropriate governmental body to freeze the assets of a selected individual and prohibit his travel within the sanctioning state.⁶¹

Targeted sanctions, initially used in combination with other sanctioning measures,⁶² are theorized to substantially reduce the amount of collateral damage incidental to a general sanctions regime.⁶³ Additionally, because targets are selected on the basis of an individual’s actions (for example, engaging in terrorism or piracy), targeted sanctions can be used to hold non-state actors accountable for their actions without emphasizing

57. *Economic Sanctions 1914–2006*, *supra* note 34.

58. Some commentators contend that the sanctioning parties’ activity in Iraq amounted to war crimes. For a philosophical analysis of this opinion, see Joy Gordon, *When Intent Makes All the Difference in the World: Economic Sanctions on Iraq and the Accusation of Genocide*, 5 YALE HUM. RTS. & DEV. L.J. 57 (2002).

59. Cortright & Lopez, *SEARCH FOR SECURITY*, *supra* note 48, at 4.

60. de Vries, *supra* note 10.

61. See Andrew Hudson, *Not a Great Asset: The UN Security Council’s Counter-Terrorism Regime: Violating Human Rights*, 25 BERKELEY J. INT’L L. 203, 208–09 (2007) (referring to the multilateral 1267 procedures). Logically, unilateral targeted sanctions such as the Magnitsky Act and Yakolev’s Law are also implemented by national legislation.

62. Peter L. Fitzgerald, *Smarter “Smart” Sanctions*, 26 PENN ST. INT’L L. REV. 37, 38 n.5 (2007).

63. Addis, *supra* note 20, at 192 n.22 (2010).

affiliation to a state or geographical region.⁶⁴ Thus, targeted sanctions have been designed to allow sanctioning parties to manipulate the effects of a measure (such as financial controls) to simultaneously narrow its scope and increase its intensity.⁶⁵

In practice, however, the procedures associated with targeted sanctions are inadequate. This was particularly true of the U.N. Security Council's Resolution 1267, which targeted individuals suspected of supporting terrorism (outlined in detail in Part I.B).⁶⁶ Analysts and scholars sharply criticized the Security Council for this, and many academic conferences were convened to dissect the Security Council's methods.⁶⁷ Their major concern was a targeted individual's right to due process under international law.⁶⁸ Individuals who found themselves unexpectedly denied access to their property and deemed a terrorist brought numerous cases before national and regional courts in which they had standing, drawing international attention.⁶⁹ In response, the Security Council created the office of an Ombudsperson to independently review the basis for each individual's placement on the list.⁷⁰ The establishment of this office moder-

64. Peter L. Fitzgerald, "If Property Rights Were Treated Like Human Rights, They Could Never Get Away with This": Blacklisting and Due Process in U.S. Economic Sanctions Programs, 51 HASTINGS L.J. 73, 107 (1999).

65. Kimberly Ann Elliott, *Analyzing the Effects of Targeted Sanctions*, in SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT *supra* note 10, at 171.

66. Addis, *supra* note 20, at 193–94; *see, e.g.*, Joined Cases C-402/05 and C-415/05, Kadi & Al Barakat v. Comm'n, 2008 E.C.R. I-06351 (2008).

67. Weschler, *supra* note 11, at 40. The reports themselves are available on the Swiss Confederation State Secretariat for Economic Affairs' website. *See* Archive of Documents on Targeted Sanctions, STATE SECRETARIAT ECON. AFFAIRS (June 17, 2005) <http://www.seco.admin.ch/themen/00513/00620/00639/00641/index.html?lang=en>.

68. Willis, *supra* note 45, at 675. The discussion regarding Security Council sanctions' effects on human rights is expansive and ongoing. *See, e.g.*, Padraic Foran, *Why Human Rights Confuse the Sanctions Debate: Towards a Goal-Sensitive Framework for Evaluating United Nations Security Council Sanctions*, 4 INTERCULTURAL HUM. RTS. L. REV 123 (2009) (arguing that human rights is an inappropriate justification for the implementation of sanctions); Hudson, *supra* note 61 (arguing that the 1267 procedures deny the right to a fair trial, and that the Security Council is bound to protect that right).

69. True-Frost, *supra* note 17, at 1187 n.8.

70. Thomas J. Biersteker, *Targeted Sanctions and Individual Human Rights*, 65 INT'L J. 99, 115 (2010); *accord* True-Frost, *supra* note 17, at 1215–16.

ately ameliorated the situation.⁷¹ Therefore targeted sanctions may be a step in the right direction,⁷² but their main feature—narrow applicability—is not sufficient by itself to prevent conflict with international law.

B. Current International Law on Targeted Sanctions

i. Security Council Resolution 1267: Collective Targeted Sanctions Against Suspected Terrorists

In the late 1990s, as part of its ongoing sanctions regime against Iraq, the Security Council used targeted sanctions (as noted in Part I.A.i).⁷³ With Resolution 1267,⁷⁴ the Security Council created the Taliban Sanctions Committee (“Committee”), which maintains “the Consolidated List” of “members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings, and entities associated with them.”⁷⁵ The legally binding resolution requires each member state to freeze the assets (located within the member state’s jurisdiction) of listed individuals or entities and deny those individuals entry into the member state’s territory.⁷⁶

The listing procedures are logical, but have become complicated as they have grown.⁷⁷ As of late 2012, member states were tasked with proposing names for the Consolidated List to the Sanctions Committee, providing

as much detail as possible on the basis(es) for the listing, including: (i) specific information supporting a determination that the individual or entity [is a member of a terrorist organ-

71. True-Frost, *supra* note 17, at 1189.

72. Addis, *supra* note 20.

73. Hudson, *supra* note 61.

74. S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999). Subsequent Security Council resolutions built upon 1267, expanding the list of prohibited items and allowing for greater degrees of separation between the sanctioned individual and the terrorist organization.

75. S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 16, 2002).

76. S.C. Res. 1267, *supra* note 74; accord Bardo Fassbender, TARGETED SANCTIONS AND DUE PROCESS 16 (2006), http://www.un.org/law/counsel/Fassbender_study.pdf.

77. This is a greatly simplified summary of the procedures. For an accessible summary with greater depth, see Willis, *supra* note 45, or Kalyani Munshani, *The Essence of Terrorist Finance: An Empirical Study of the U.N. Sanctions Committee and the U.N. Consolidated List*, 19 MICH. ST. J. INT’L L. 229 (2010).

ization or associated with one]; (ii) the nature of the information; and (iii) supporting information or documents that can be provided,” as well as “details of any connection between the proposed designee and any currently listed individual or entity.”⁷⁸

Once names were added to the Consolidated List, a small team oversaw state compliance and reported back to the Committee.⁷⁹ The Committee was required to provide ad hoc notice of an individual’s listing to the individual’s state, and the Security Council beseeched states to “take reasonable steps” to notify the individual himself.⁸⁰ But initially, individuals generally had no notice of their addition to the list, nor was there a simple way to be removed from it.⁸¹

ii. The United States’ Magnitsky Act and Russia’s Yakolev’s Law: Unilateral Targeted Sanctions against Human Rights Violators

As implied, the primary purpose of the United States’ “Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012” was to remove the restrictions of the preexisting Jackson-Vanik Amendment and establish “permanent normal trade relations” with Russia.⁸² The old Jackson-Vanik Amendment was an outdated “Cold War relic,”⁸³ but given recent incidents of corruption, political prosecution, and human rights abuses in Russia,⁸⁴ Congress

78. S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006).

79. S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004).

80. *Id.*

81. Hudson, *supra* note 61, at 221.

82. Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112–208, §§ 401–406.

83. David Harris, Op-Ed., *End a Cold War Relic*, N.Y. TIMES (July 15, 2010), <http://www.nytimes.com/2010/07/16/opinion/16iht-edharris.html>; see also Myers & Herszenhorn, *supra* note 3. In the years after the fall of the Soviet Union the restrictions were consistently waived. Yet their mere existence conflicted with U.S. international obligations when Russia became a member of the WTO, which requires free trade between its members. Harris, *supra*.

84. The Magnitsky Act portion of the Bill notes Russia’s ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights (“ICCPR”), and the U.N. Convention against Corruption, then alleges

was loathe to grant Russia any favors.⁸⁵ The Magnitsky Act was a way for Congress to give with one hand while taking with the other.

The Magnitsky Act requires the president to

submit to the appropriate congressional committees a list of each person who the President determines, based on credible information . . . is responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals seeking to expose illegal activity carried out by officials of the Government of the Russian Federation; or to obtain, exercise, defend, or promote internationally recognized human rights and freedoms . . . or acted as an agent or on behalf of a person in a manner relating to [those activities].⁸⁶

Specific senators and representatives may propose additional names, which are added after presidential review and submission to the committees.⁸⁷ The list is to be unclassified and published publicly in the *Federal Register* (unless the president shows a need for classification to protect national security interests), but does not mention effecting notice to listed par-

numerous violations thereof by the Russian government. Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act § 402.

85. The lingering support for Jackson-Vanik came from the U.S. Congress's view of the amendment as "an all-purpose vehicle for expressing opposition to particular Russian policies." Harris, *supra* note 83. The U.S. Executive Branch has opposed Jackson-Vanik since 1992, *id.*, but it was not until the Magnitsky Act appeared that Congress was willing to repeal the amendment. See, *Lavrov Calls Magnitsky Act "Demonstrative" Anti-Russian Move*, RIA NOVOSTI (Feb. 10, 2013), <http://en.ria.ru/russia/20130210/179328797.html>. Russian foreign minister Sergei Lavrov commented, "I am strongly convinced that [the Magnitsky Act] was designed to show that life is not all honey [for Russia] after the Jackson-Vanik amendment was abolished." *Id.*

86. Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act § 404. The implementation of targeted sanctions by Congressional action is different from other U.S. targeted sanctions, such as those against individuals associated with Somali piracy, which were established by executive order pursuant to the International Emergency Economic Powers Act. See OFFICE OF FOREIGN ASSETS CONTROL, SOMALIA: WHAT YOU NEED TO KNOW ABOUT SANCTIONS AGAINST PERSONS CONTRIBUTING TO THE CONFLICT IN SOMALIA 2 (Sept. 20, 2010), <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/somalia.pdf>.

87. Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act § 404.

ties.⁸⁸ A listed individual is prohibited from entering the United States (or has his existing visa revoked).⁸⁹ His assets are frozen; that is, “all transactions in all [of the listed individual’s] property and interests in the property” are “[frozen] and prohibit[ed],” to the extent that the property is under U.S. control.⁹⁰ The president has discretion to remove an individual from the list if he finds that the individual did not engage in the aforementioned activities, if “the person has been prosecuted appropriately,” or if “the person has credibly demonstrated a significant change in behavior, has paid an appropriate consequence . . . and has credibly committed not to engage in [such activities].”⁹¹ The Act does not include any means for the individual himself to contest his listing, nor does it provide any guidance as to what constitutes sufficient “credible information.”

In direct response, the Russian government enacted legislation titled “On measures against individuals involved in violations of fundamental human rights and freedoms, the rights and freedoms of citizens of the Russian Federation,” known as Dima Yakolev’s Law.⁹² The beginning of the law is similar to the Magnitsky Act. Article 1 bans from entering Russia any U.S. citizen who violates fundamental rights and freedoms, is involved in the commission of “crimes against Russian citizens living abroad” either by direct participation or while acting in an official capacity, or violates the rights of Russian citizens by means of “unfounded and unjust sentences,” “undue legal persecution,” or “arbitrary decisions.”⁹³ Article 2 imposes property-related restrictions⁹⁴ like those of the Magnitsky Act. The list of offenders is to be compiled by “the federal executive branch responsible for the formulation and implementation of public pol-

88. *Id.*

89. *Id.* § 405.

90. *Id.* § 406.

91. *Id.* § 404.

92. *Polnii tekst “zakona Dimi Yakoleva”* [Complete Text of “Dima Yakolev’s Law”], RIA NOVOSTI (Dec. 21, 2012), <http://ria.ru/politics/20121221/915806320.html> [hereinafter *Yakolev’s Law*]. Dima Yakolev was a Russian “toddler who died of heatstroke in Virginia in 2008 after his adoptive father left him in a parked car for nine hours.” Herzenhorn & Kramer, *supra* note 8.

93. *Yakolev’s Law*, *supra* note 92, art. 1.

94. *Id.* art. 2.

icy and legal regulation in the sphere of international relations.”⁹⁵

But Yakolev’s Law goes further than its American counterpart. The Russian law suspends the activity of all non-profit organizations that operate in Russia and receive support from U.S. entities (citizens or organizations) if the organization’s activities are deemed to threaten Russia’s interests.⁹⁶ U.S. citizens are prohibited from occupying leadership roles in non-profit organizations as well.⁹⁷ Most famously, it suspends the activities of adoption organizations and prohibits the adoption of Russian children by U.S. citizens.⁹⁸ Yakolev’s Law contains no removal provisions, although it does provide for waivers under specific conditions, at the discretion of the aforementioned governmental body.⁹⁹ Overall, the two documents are procedurally and substantively similar, creating a list of targeted individuals with few procedural safeguards and specious criteria for listing.

C. Principles of International Law Implicated by Targeted Sanctions

i. State Sovereignty and the Problem of Extraterritoriality

The objectives of sanctions regimes are antithetical to concepts of sovereignty in international law. Recent scholarship has recognized a distinction between state sovereignty (the rights and duties of states) and the emerging concept of individual sovereignty (the rights of people) under international law.¹⁰⁰ At times, the two appear to be in contention with each other.¹⁰¹

95. Presumably the Ministry of Foreign Affairs, headed by Sergei Lavrov. *Id.*

96. *Id.* art. 3.

97. *Id.* art. 2, art. 3.

98. *Id.* art. 4.

99. *Yakolev’s Law*, *supra* note 92, art. 2.

100. Kendall Stiles & Wayne Sandholtz, *Cycles of International Norm Change*, in *INTERNATIONAL NORMS AND CYCLES OF CHANGE* 323, 335 (Wayne Sandholtz & Kendall Stiles eds., 2009).

101. Edith Brown Weiss, *Rethinking Compliance with International Law*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES* 134, 139 (Eyal Benvenisti & Moshe Hirsch eds., 2004) (describing the rise of “individualist paradigm,” in which “the individual [is] the key participant and sovereign unit in the international system . . .

A state's sovereignty, meaning a state's "exclusive authority over their territory and population" and its equal position in regard to other states, is the foundational principle of traditional international law.¹⁰² One pillar of this sovereignty is a state's exclusive internal jurisdiction—the right to prescribe, enforce, and adjudicate disputes arising from actions that have sufficient ties to the state itself, free from interference by another state.¹⁰³ Thus, a state has territorial jurisdiction over persons, property, and events existing or occurring within its physical boundaries.¹⁰⁴ This is the most common, and least controversial, means to assert authority.¹⁰⁵

A state may also exercise jurisdiction extraterritorially, provided it substantiates its claim with a recognized principle of international law.¹⁰⁶ After World War II and throughout the Cold War, states largely favored the collective action of international law over extraterritorial action by individual states.¹⁰⁷ In the last twenty years, however, some states have exhibited more isolationist tendencies, avoiding the mutual commitments of treaties and returning to extraterritorial means to combat international issues.¹⁰⁸ Extraterritoriality has been called "the

It follows then that we are witnessing the demise of the sovereignty of states and the rise of the sovereignty of individuals and the protection of their rights . . ."). See also Stiles & Sandholtz, *supra* note 100, at 336.

102. Wayne Sandholtz, *Explaining International Norm Change, in* INTERNATIONAL NORMS AND CYCLES OF CHANGE 1, *supra* note 100, at 1, 20–21. Though this indubitably represents the standard concept of state sovereignty, it has been challenged. See, e.g., ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 311 (2005); Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, The European Way of Law)*, 47 HARV. INT'L L.J. 327, 327–28 (2006) (noting that this Westphalian view of state sovereignty, in which states are "defined physical territories," exclusive and isolated, may no longer be appropriate in the wake of globalization).

103. Daniel W. Drezner, *On the Balance Between International Law and Democratic Sovereignty*, 2 CHI. J. INT'L L. 321, 323 (2001).

104. BARRY E. CARTER & ALLEN S. WEINER, INTERNATIONAL LAW 640 (6th ed. 2011).

105. CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 42 (2008); see *id.* at 83 (noting that "common law countries have put far more emphasis on the territoriality principle than [civil law countries]").

106. RYNGAERT, *supra* note 105, at 85.

107. See Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 852–53 (2009).

108. *Id.* at 842–43.

greatest affront to democratic sovereignty,” because the sending state is effectively attempting to restrict the receiving state’s exercise of its internal authority.¹⁰⁹

That is not to say that all extraterritorial actions are impermissible; in fact, several theories exist to justify one state’s involvement in another state’s affairs, to some degree.¹¹⁰ For example, a state usually maintains some degree of control over its nationals acting outside its territory, a notion known as the “personality principle.”¹¹¹ Treaties, being agreements between states prescribing the law between them, may formally confer adjudicatory authority, enforcement authority, or both, on one or more forums.¹¹²

Neither aforementioned jurisdictional foundation is as controversial as the effects doctrine, which stipulates that a state may exercise authority over specific extraterritorial conduct that has “substantial, direct, and foreseeable effect[s]” in the state, provided the state acts reasonably in light of its own and other states’ interests.¹¹³ This “reasonableness test” supposedly prevents otherwise extraterritorial jurisdiction from running afoul of the territoriality principle.¹¹⁴ For example, the United

109. *Id.* at 860. Some scholars contend that international law, as an alternative to extraterritorial national jurisdiction, is itself an attack on state sovereignty because it restricts states’ exercise of their independent authority. *Id.*

110. LOWENFELD, *supra* note 15, at 901.

111. The personality principle may be active (when the national is acting abroad) or passive (when the national is being acted upon—usually harmed—by a non-national abroad). It actually predated the territoriality principle as a basis for jurisdiction; the latter, however, surpassed the former in significance around the seventeenth century. RYNGAERT, *supra* note 105, at 47.

112. Treaties may confer adjudicative jurisdiction upon national courts explicitly, or “implicitly oblige[] states to vest their courts with jurisdiction to hear claims based on such rules.” ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 35 (2011).

113. Restatement (Third) of Foreign Relations Law § 403(2)(a), (g) (1987). See also J. Troy Lavers, *Extraterritorial Offenses and International Law: The Argument for the Use of Comity in Jurisdictional Claims*, 14 SW. J.L. & TRADE AM. 1, 18 (2007).

114. *Cf.* Lavers at 17. Professor J. Troy Lavers argues that the multifactor reasonableness test, as commonly applied in the United States, underemphasizes the importance of comity in international relations and “removes the requirement of a real and substantial link with the forum state.” *Id.* at 24. Thus the effects doctrine is not necessarily a safe harbor for states exercising extraterritorial authority.

States has argued that international business affects its domestic economy so greatly that U.S. financial and trade regulations should apply to foreign parties.¹¹⁵ This particular example of extraterritorial prescription has been ill-received by the international community, but the effects doctrine itself is “the linchpin to understanding the geographic reach of domestic laws.”¹¹⁶

Another possible justification is the universality principle,¹¹⁷ which is commonly invoked to support human rights intervention.¹¹⁸ The universality principle reasons that, if a law is truly international, then it binds all states equally.¹¹⁹ One state’s assertion of that law in the territory of another state is not “extraterritorial,” because the law is the same in both locations.¹²⁰ However, the shared jurisdiction is not unlimited.¹²¹ For example, Belgium attempted to use universality to charge foreign officials with war crimes, including Yasir Arafat, Fidel Castro, Saddam Hussein, and, eventually, George H.W. Bush and other U.S. officials.¹²² The U.S. government reacted strongly by effectively threatening Belgian interests.¹²³ In this situation the Belgian court was applying “universal” international law,

115. See Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 269–73 (2006).

116. Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1458 (2008).

117. RYNGAERT, *supra* note 105, at 101.

118. Universal jurisdiction is used to justify prosecution of universal crimes, a list which currently includes piracy, genocide, torture, and “certain crimes of terrorism.” Anthony J. Colangelo, *Universal Jurisdiction as an International “False Conflict” of Laws*, 30 MICH. J. INT'L L. 881, 888–89 (2009).

119. *Id.* at 886.

120. *Id.* at 883.

121. See RYNGAERT, *supra* note 105, at 9. “While States are entitled to prescribe laws that govern situations which may be located wholly or partly abroad under rules of prescriptive jurisdiction, it is generally accepted that they are not entitled to enforce their laws outside their territory, ‘except by virtue of a permissive rule derived from international custom or from a convention.’”

122. Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 A.J.I.L. 888, 889–90 (2003).

123. The United States’ argument was fairly coercive. Belgium is the host state for the North Atlantic Treaty Organization (“NATO”). Then-Secretary of State Colin Powell, one of the officials charged, pointed out that he and others would be risking arrest if they visited Belgium, therefore NATO would have to be relocated. Not wanting to lose its diplomatic position, the Belgian government amended its laws. *Id.*

but by convicting absent foreign nationals of those “universal” crimes, was extraterritorially asserting its authority to enforce and adjudicate that law.

Conflicting opinions exist regarding the role of territorial sovereignty in the international community, but it remains a valid and necessary element of international law.¹²⁴ Some scholars support extraterritoriality and believe territorial sovereignty to be an outdated notion, citing globalization and the growth of human rights law¹²⁵ as reasons to dismiss the idea.¹²⁶ Yet states and international organizations often reaffirm territorial sovereignty’s importance as a principle in international law. For example, the U.N. limits its own influence “in matters which are essentially within the domestic jurisdiction of any state,”¹²⁷ and the U.N. General Assembly has formally asked for the “repeal of unilateral extraterritorial laws that impose sanctions on corporations and nationals of other States.”¹²⁸ From a domestic perspective, the U.S. judiciary often presumes federal legislation to be bounded by the territory of the U.S.¹²⁹ Thus, when one looks at the bigger picture, the need for a “strong [territorial] nation-state”—the actor in international law that commands the most power and is the most accountable among other actors—is apparent.¹³⁰

124. Parrish, *supra* note 116, at 1503–04.

125. Fernando R. Teson, *Collective Humanitarian Intervention*, 17 MICH. J. INT’L L. 323, 323 (1996).

126. See Parrish, *supra* note 116, at 1469–70; see also Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT’L L.J. 321, 322–23 (2011). *But cf.* Parrish, *supra* note 107, at 819–20 (contending that the view of extraterritoriality “as an inevitable . . . byproduct of globalization” is undesirable because it overlooks the negative effects of extraterritoriality).

127. U.N. Charter, art. 2, para. 7.

128. G.A. Res. 53/10, ¶ 4, U.N. Doc. A/RES/53/10 (Nov. 3, 1998).

129. John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 A.J.I.L. 351, 351 (2010). Professor Knox explains that the presumption against extraterritoriality is an “offshoot of the *Charming Betsy* canon,” which stipulates that federal legislation should be interpreted so as not to conflict with international law, as long as the resulting interpretation is reasonable. If this is so, the reason laws are interpreted not to apply extraterritorially is because such an extraterritorial interpretation would conflict with international law. *Id.* at 352. This lends further support to the position that territorial sovereignty remains a respected element of international law.

130. Austen Parrish, *Rehabilitating Territoriality in Human Rights*, 32 CARDOZO L. REV. 1099, 1106 (2011).

ii. The Individual Rights to Property and Due Process

The list of human rights protected by international law has grown considerably since World War II.¹³¹ Targeted sanctions specifically implicate two individual human rights that are conferred by customary international law and recognized by numerous treaties and national legislatures. First is the substantive right to own property, free from interference. Second is the procedural right to a fair hearing. If an individual's property right is threatened or violated—or if an individual is charged with a crime under international law—that procedural due process right is triggered.

The long-recognized right to own property is codified in many treaties. The Universal Declaration on Human Rights (“UDHR”) provides that “[e]veryone has the right to own property alone as well as in association with others,” and “[n]o one shall be arbitrarily deprived of his property.”¹³² The UDHR recognizes the right to a remedy upon violation of a legally con-

131. See *id.* at 1114.

132. Universal Declaration of Human Rights [UDHR], G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(III), at 74 (Dec. 10, 1948). This first piece of the “international bill of rights” was adopted in the U.N. General Assembly in 1948. The UDHR is praised as the basis of human rights in the world today. In addition to the states party to the UDHR, many are parties to other treaties that include principles from the UDHR, and many of those principles have been incorporated into domestic constitutions and legislation. Additionally, a number of the stipulated rights are treated as rights under customary international law. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1995). There exists a lively debate about the origins of the rights, whether they are truly universal, and which if any should be customary international law. See, e.g., Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUST. Y.B.I.L. 82 (1988) (advocating an approach to expanding international human rights law that does not rely exclusively on treaty law, but also custom and other consensual bases); Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?*, 41 CORNELL INT'L L.J. 251, 255 (2008) (arguing that the rights should be re-evaluated, because negotiations were tainted by “attempts to co-opt the Declaration to the service of political goals”). The inclusion of UDHR principles in customary international law has additional significance regarding non-state actors, who might not otherwise be bound to respect those rights. See Adam McBeth, *Every Organ of Society: The Responsibility of Non-State Actors for the Realization of Human Rights*, 30 HAMLINE J. PUB. L. & POL'Y 33, 60 (2008).

ferred right.¹³³ The International Covenant on Civil and Political Rights (“ICCPR”), adopted by the U.N. General Assembly in 1966, likewise contains a provision codifying an individual’s right to due process if faced with a criminal charge, including specifically the rights to “a fair and public hearing by a competent, independent and impartial tribunal,” to notice of the charges against him, and to an opportunity to defend himself.¹³⁴

None of these agreements, however, create a venue for individuals to assert these rights. The classical view of international law, in which sovereign states are the principal actors, does not confer standing on individuals—they “lack the power to set in motion the machinery of international law for sanctioning violations of the obligations international law imposes.”¹³⁵ The individual must rely on a state to defend his rights and, if the state is successful, he can only reap the benefits secondarily.¹³⁶ Yet individuals may be prosecuted for violating international law (as seen in the prosecution of officials for war crimes in the Nuremberg trials).¹³⁷ This creates an “asymmetry” in the system.¹³⁸

Most doors to adjudication of international law claims are closed to individuals. National courts are responsible for enforcing most of international law,¹³⁹ but the ability of those courts’ to adjudicate—and individuals’ ability to access them—is limited by the courts’ jurisdiction.¹⁴⁰ Treaties rarely specifi-

133. “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” UDHR, *supra* note 132, at 73.

134. International Covenant on Civil and Political Rights [ICCPR], G.A. Res. 2200 (XXI) A, Annex, at 54, U.N. Doc. A/RES/2200 (XXI) (Dec. 16, 1966).

135. Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1087 (1992).

136. In a recent example, Switzerland came to the aid of two of its citizens. Professor Mohamend Mansour and his wife were added to the Resolution 1267 Consolidated List by the U.S. in 2001. After Switzerland negotiated with the Security Council on Dr. Mansour’s behalf, the couple was delisted in 2006. True-Frost, *supra* note 17, at 1186, 1186 n.5.

137. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2378 (1991).

138. Addis, *supra* note 20, at 189–90.

139. NOLLKAEMPER, *supra* note 112, at 25; *accord* True-Frost, *supra* note 17, at 1188–89.

140. True-Frost, *supra* note 17, at 1188.

cally confer jurisdiction on national courts.¹⁴¹ Meanwhile the few international courts, such as the International Court of Justice (“ICJ”)¹⁴² and International Criminal Court (“ICC”), have very limited jurisdiction.¹⁴³ To bring his claim, the aggrieved individual must navigate the complex system of international adjudicative jurisdiction—if the combination of theories, codified law, and exceptions can be called a system—to access an appropriate national or international forum, if one can be found.

II. APPLICATION OF THOSE PRINCIPLES TO TARGETED SANCTIONS

A. Unilateral Use of Targeted Sanctions by States in Violation of International Law

The three types of legislation outlined in Part I—the U.N. Security Council’s Resolution 1267, the United States’ Magnitsky Act, and Russia’s Yakolev’s Law—are fundamentally different examples of targeted economic sanctions. Although theoretically permissible under international law, the U.N.-supported, state-implemented targeted sanctions against terrorists constitute a dubious use of targeted sanctions, and arguments supporting unilateral targeted sanctions are even less tenable. Terrorist supporters present novel problems, such as the accountability of non-state organizations,¹⁴⁴ but the misconduct of

141. NOLLKAEMPER, *supra* note 112, at 35.

142. Only states may be parties in ICJ adjudications. Statute of the International Court of Justice art. 34, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

143. Parrish, *supra* note 107, at 833 n.80 (citing Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 458 (1997)).

144. Sarah E. Smith, *Blaming Big Brother: Holding States Accountable for the Devastation of Terrorism*, 56 Okla. L. Rev. 735, 739 (2003) (describing terrorists’ lack of “political status” and imperviousness to traditional sanctions); see also NATIONAL RESEARCH COUNCIL, DISCOURAGING TERRORISM: SOME IMPLICATIONS OF 9/11, at 16 (Neil J. Smelser & Faith Mitchell eds., 2002) [hereinafter DISCOURAGING TERRORISM]. Terrorism is comparable to piracy, the crime that the universality principle was originally conceived to combat. See Colangelo, *supra* note 118, at 898. Interestingly, “terrorism” is cited as having governmental roots, beginning with the French government and the French Revolution. Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT’L & COMP. L. REV. 23, 27–28 (2006).

human rights violators does not. Indeed, since the Nuremburg trials, there have been increasing instances of individuals held personally accountable for violations of international human rights.¹⁴⁵ Therefore the governing principles of international law are firmly established, and need only be applied to the case at hand.

i. The Lack of Justification for Extraterritoriality

Differences in the criminal acts at issue generate relevant distinctions between unilateral and multilateral targeted sanctions. “[T]he crime creates jurisdiction,” such that the legitimacy of extraterritorial prescription and enforcement often depends upon the prescription at issue.¹⁴⁶ Both terrorism and human rights violations as described in the Magnitsky Act and Yakolev’s Law (torture and inhumane treatment) are recognized as crimes under international law.¹⁴⁷ Therefore in all of those cases, the sanctioning parties are not prescribing the law in a foreign territory, but rather, merely seek to adjudicate and enforce those laws.¹⁴⁸

Due to the nature of the terrorist organization, it is uncertain whether targeting suspected terrorists necessarily runs afoul of state sovereignty. Definitions of terrorism focus on the individual perpetrator and his liability, rather than the state that (knowingly or unknowingly) hosts him.¹⁴⁹ Such non-state organizations do not possess the “attributes of statehood,” therefore targeting individuals associated with those organizations is not necessarily violative of state sovereignty.¹⁵⁰ To the extent

145. See Koh, *supra* note 137, at 2378.

146. Colangelo, *supra* note 118, at 891 (referring to jurisdiction under the universality principle).

147. *Id.* at 888; accord UDHR, *supra* note 132, at 73. The specific incidents described in relation to each statute are presumed, if true, to constitute a violation of human rights.

148. See RYNGAERT, *supra* note 105, at 9–10 (outlining the differences between the three types of jurisdiction).

149. See Fassbender, *supra* note 76, at 4 (noting that “after the Taliban were removed from power in Afghanistan, there is no particular link between the targeted individuals and entities and a specific country”); see also Young, *supra* note 144, at 61–62, 64 (“Group action or involvement is not a requirement, but the act must be perpetrated by a sub-state actor.”).

150. Cf. Smith, *supra* note 144, at 739. That is not to say there is no connection between sovereign states and terrorist organizations, because the organizations necessarily exist within sovereign states. States that are themselves

that targeted sanctions (whether multilateral or unilateral) do threaten state sovereignty, the effects doctrine may justify their use. The substantial effects of terrorist attacks are often felt beyond the borders of the terrorists' host state.¹⁵¹

Conversely, the human rights violators of the Magnitsky Act and Yakolev's Law are identified by their activities within their home states.¹⁵² In this situation, the universality principle does not permit unilateral state action. As described in Part I.C, if the crime being prosecuted is truly international, the sending state's exercise of authority seems to be not truly extraterritorial because it and the receiving state theoretically have identical laws.¹⁵³ Thus, the sending state is not "thwarting choices by the target state that must remain free under international law."¹⁵⁴ However, prescription of law and enforcement of law

thoroughly terrorist may exist, and "the flexibility involved in holding terrorist States accountable has also provided significant basis to shift the international community's focus away from terrorists to their State sponsors." *Id.* at 739. However, "it is logical that more States merely tolerate terrorist organizations than actively participate in State-sponsorship of terrorism." *Id.* at 742. *But cf.* DISCOURAGING TERRORISM, *supra* note 144, at 23 (emphasizing state involvement with terrorist organizations to further the state's own political ends). A state that supported terrorism would be itself in violation of international law, implicating international law on state-to-state relations, which is different from and beyond the scope of the argument presented here.

151. "Although a significant proportion of terrorism is intrastate, terrorism is frequently international in character: by crossing borders (as in Kashmir), by the nationality of the participant and/or victim (as in September 11), or by target despite being geographically intra-state (for example, attacks on foreign visitors in Bali by Indonesia-based terrorists)." Young, *supra* note 144, at 31.

152. Both legislative acts specify the nationality of the individuals to be targeted for human rights violations. The U.S. legislation specifically targets persons who violate the human rights of "individuals seeking to expose illegal activity carried out by officials of the Government of Russian Federation; or obtain, exercise, defend or promote internationally recognized human rights and freedoms" Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, § 404. Given the statute's reference to numerous events in which the Russian government allegedly restricted those "recognized human rights and freedoms," the obvious implication is that the statute applies to Russians. Alternatively, Senator Ben Cardin (a major proponent of the Bill) has stated that the statute has broader reach. "This bill is our standard," he told the *New York Times*, and "[t]he world is on notice." Peters, *supra* note 3.

153. See Colangelo, *supra* note 118, at 895.

154. Summarizing the ICJ's criteria for defining "acts of prohibited intervention." Teson, *supra* note 126, at 325.

are separate and distinct powers.¹⁵⁵ Though both the United States and Russia appear to agree on the criminality of the alleged conduct by their respective nationals,¹⁵⁶ each maintains a right to determine how to address the crime within its own borders. International law even appears to recognize a hierarchy of state interests in prosecution of universal crimes: states with territorial or national jurisdiction have “jurisdictional priority” to adjudicate and enforce international law, over states with universal jurisdiction.¹⁵⁷

Nor does the effects doctrine justify the unilateral actions. The crimes punished by the Magnitsky Act—the torture and death of Sergei Magnitsky and similar political dissidents—had no tangible effect on U.S. citizens, property, economy, or other interest. Whether abuse of Russian children by U.S. citizens on U.S. territory has a substantial effect on Russian interests is debatable; however, because Dima Yakolev was a Russian national, the personality principle could justify Yakolev’s Law as the state may protect its nationals abroad.

ii. Protection of the Individual Right to Due Process

By requiring targeted sanctions against suspected terrorists, Security Council Resolution 1267 created due process problems

155. Karinne Coombes, *Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?*, 43 GEO. WASH. INT’L L. REV. 419, 423–24 (2011); see RYNGAERT, *supra* note 105, at 9–10.

156. Both the United States and Russia have held their citizens accountable for the crimes, to some degree. For example, two Russian doctors were indicted for their participation in the lack of medical treatment in prison that allegedly caused the death of Sergei Magnitsky. Andrew E. Kramer, *Russian Acquittal Escalates Human Rights Feud with U.S.*, N.Y. TIMES (Dec. 29, 2012), <http://www.nytimes.com/2012/12/29/world/europe/russian-acquittal-escalates-human-rights-feud-with-us.html>. The Russian prosecutor dismissed charges against one, while the other was acquitted. *Id.* Dmitri (“Dima”) Yakolev’s adoptive American father was indicted for involuntary manslaughter in the United States—and also acquitted. Ellen Barry, *Russian Furor Over U.S. Adoptions Follows American’s Acquittal in Boy’s Death*, N.Y. TIMES (Jan. 4, 2009), <http://www.nytimes.com/2009/01/04/world/europe/04adopt.html>.

157. “Perhaps an appropriate model here . . . is a complementary jurisdiction similar to that contained in the Rome Statute for the International Criminal Court, which precludes jurisdiction by the ICC where States with territorial or national links to the crime prosecute in good faith.” Colangelo, *supra* note 118, at 900–1. See Rome Statute of the International Criminal Court art. 17, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90.

and raised novel issues of U.N. accountability.¹⁵⁸ As described in Part I.C, initially only an individual who had citizenship of, or was physically located in, a sanctioning state had a cause of action for his property deprivation by that government.¹⁵⁹ One possible justification for this lack of process might have been that the consequences of terrorism qualified as “emergencies” under the ICCPR, which stipulates that an individual’s right to trial is not absolute and may be suspended in certain situations.¹⁶⁰ However, the Ombudsperson represents, at the very least, U.N. recognition of the due process problem and an attempt to solve it.¹⁶¹

Currently, no procedural protection for targets of unilateral sanctions exists. As described previously, an individual targeted by the Magnitsky Act or Yakolev’s Law has no ability to contest his placement on the government’s list.¹⁶² Since judicial standing requires a substantial connection with the adjudicato-

158. See *supra* Part I.C.ii.

159. Courts expanded their jurisdiction to include temporary residence in state-controlled camps abroad, perhaps to address this inequity. See, e.g., *Al-Jedda v. U.K.*, App. No. 27021/08, 30 Eur. Ct. H.R. 637 (2011) (relating that a former immigrant to the United Kingdom, whose citizenship had been revoked, fell under U.K. jurisdiction by virtue of internment in U.K. military facility abroad); *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that internees at Guantanamo Bay, the U.S. detention center in Cuba, were subject to the U.S. Constitution and thus could bring federal habeas corpus petitions to contest their detentions).

160. *True-Frost*, *supra* note 17, at 1203; see ICCPR, *supra* note 134, at 53, 54. The European Court of First Instance took a similar position, stating that “the [individuals’] interest in having a court hear their case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified” Carmen Draghici, *Suspected Terrorists’ Rights between the Fragmentation and Merger of Legal Orders: Reflections in the Margin of the Kadi ECJ Appeal Judgment*, 8 WASH. U. GLOBAL STUD. L. REV. 627, 639 (2009). The European Community Treaty permits no derogation from the right, bringing the treaty into conflict with U.N. mandates. European courts and the international community remain divided regarding whose legislation takes supremacy. For a thorough discussion of the conflict as it relates to the *Kadi* case, see *id.* at 649.

161. *But cf.* *True-Frost*, *supra* note 17, at 1229–30 (contending that the U.N. did not intend to actually provide due process, but rather merely “signal” respect and desire to protect procedural rights, without allowing itself to be held accountable by individuals for breaches of international law).

162. See Part I.B, *supra*.

ry body,¹⁶³ a targeted individual within his home state would struggle to access a foreign sender state's court,¹⁶⁴ and the travel ban would prevent him from entering the state's territory. Furthermore, all removal decisions are wholly committed to the discretion of the same subdivision of government that initially listed the individual.¹⁶⁵

In modern practice, however, individuals have successfully brought claims¹⁶⁶ arising from codified international law, such as a treaty obligation.¹⁶⁷ Regardless of whether they are the primary actors, as some scholars contend,¹⁶⁸ the individuals' ability to seek redress under international law comports with the interpretation of international law in which individuals are recognized as legitimate actors.¹⁶⁹ Thus international law on standing has changed significantly.

III. SOLUTION: GREATER REGULATION, OVERSIGHT, AND BINDING SECURITY COUNCIL ACTION

Provisions governing the use of targeted sanctions must be formally regulated by a legitimate, collective, international body and must be transformed from an expression of extraterritoriality to one of international law. International law presents a viable means to safeguard rights worldwide and ad-

163. See Rudolph Lehrer, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Policy in Its Economic War on International Terrorism*, 10 TUL. J. INT'L COMP. L. 333, 351 (2002) (citing Nat'l Council of Resistance of Iran v. Dep't of State, 251 F. 3d 192 (D.C. Cir. 2001), as rare case in which a group with U.S. bank accounts and an office in Washington, D.C. was deemed to have sufficient connections to the United States to warrant the protection of constitutional due process).

164. See *id.*

165. See *supra* notes 88–89, 93, 97 and accompanying text.

166. Here referring to claims brought to a judiciary for litigation, as it is most common, though sometimes other remedies are available. See generally NOLLKAEMPER, *supra* note 112, at 37.

167. Vazquez, *supra* note 135, at 1093.

168. Anne-Marie Slaughter, *International Law in a World of Liberal States*,

169. See Vazquez, *supra* note 135, at 1094–95. This can be inferred from much of the scholarship cited herein. As Professor Adeno Addis described, “[t]he Council reaches directly to individuals and private entities for purposes of sanctioning them, but without giving those individuals and entities a corresponding right of access to it for purposes of challenging the accuracy of the basis on which the designation is made.” Addis, *supra* note 20, at 195.

dress issues presented by globalization.¹⁷⁰ The alternative, “[e]xtraterritorial application of domestic law[,] threatens democratic sovereignty in a more profound way than international treaties and their institutions.”¹⁷¹ Targeted sanctions may yet prove to be a valuable tool for influencing the behavior of select individuals with the power to effect the desired change. The Security Council should agree upon a regulatory scheme for unilateral targeted sanctions, one that accounts for the nature of the crime to be prevented or punished and that provides procedural protection to the targeted individual.

Unfortunately, it is probable that, left unchecked, stronger states will use targeted financial sanctions to pursue their unilateral foreign policy goals, because “[t]he efficiency of assertions of extraterritorial jurisdiction is a function of relative power Powerful States will be able to impose their legislation on weaker States, while weaker States will almost never be able to impose their legislation on more powerful States.”¹⁷² A state’s claim that it is trying to protect the human rights of the people within the sanctioned state should not allow them to use means that are likewise in violation of international law.

A. The Basis for the U.N.’s Obligation to States and Individuals

For most, the U.N. was traditionally viewed as “an autonomous subject of international law,” free to exercise its discretion in legal actions.¹⁷³ In the last two decades, however, “a trend can be perceived widening the scope of customary law . . . to include direct ‘governmental’ action of international organizations vis-à-vis individuals.”¹⁷⁴ The U.N.’s anti-terrorist sanctions “have a direct impact on the rights and freedoms of individuals.”¹⁷⁵ When the Security Council issued Resolution 1267, which required states to freeze the assets of foreign individuals believed to be supporting terrorism, the U.N. definitively ex-

170. Parrish, *supra* note 107, at 817 (describing the different perspectives of “Sovereignists” and “modern Internationalists”).

171. *Id.* at 859.

172. RYNGAERT, *supra* note 105, at 34.

173. Fassbender, *supra* note 76.

174. *Id.* at 19; see True-Frost, *supra* note 17, at 1201. This change is apparent in other international organizations, such as the EU. Fassbender, *supra* note 76, at 18.

175. Fassbender, *supra* note 76, at 22.

panded its control over state action, incurring additional obligations to states and individuals.¹⁷⁶

Resolution 1267 is not the only basis for U.N. responsibility regarding economic sanctions. From its creation, the U.N. delineated a role for itself that included affirmative efforts to establish and maintain peace internationally. The purposes of the U.N., outlined in Article 1 of the Charter, are as follows:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace¹⁷⁷

The U.N. likewise committed itself to the protection of human rights by codifying those rights in the UDHR and mandating active protection of those rights in the “Responsibility to Protect” declarations.¹⁷⁸ It expressed a commitment to defend civil and political rights under the ICCPR, which includes a number of procedural rights.¹⁷⁹

The U.N. has power over more states and with regard to more issues than any other international organization. The Security Council has the power to definitively regulate state behavior, and broad discretion to determine when and how to do so.¹⁸⁰ Its statutory grant of power allows it to take action where it finds “a threat to the peace, breach of the peace, or act of aggression,” the existence of which the Security Council itself determines.¹⁸¹ Once established, the Security Council crafts what

176. *See id.* at 19 (analogizing EU expansion and internalization of Member States’ rights to recent changes within the U.N. and concluding that “there is an increasingly broader basis for referring to the constitutional traditions and values common to the Member States of the United Nations as a source of U.N. law”).

177. U.N. Charter art. 1, para. 1.

178. *See generally* UDHR, *supra* note 132, at 73; Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J INT’L L. 319, 323–24 (2012).

179. *See generally* ICCPR, *supra* note 134.

180. LOWENFELD, *supra* note 15, at 854–55; *see* True-Frost, *supra* note 17, at 1200.

181. U.N. Charter art. 39, para. 1.

it considers an appropriate response,¹⁸² which is legally binding on U.N. member states.¹⁸³ Despite the difficulty of reaching a consensus among its permanent members, the Security Council possesses a level of authority unrivaled in international law.

The U.N.'s obligation also stems from a lack of alternative defenders of rights, because it cannot be assured that self-interested states will implement the proper procedures and regulate themselves.¹⁸⁴ The idea that states would willingly restrict their actions, presumably for no greater benefit than the diplomatic approval for not over-extending themselves, is implausible. As the use of unilateral targeted sanctions increases,¹⁸⁵ states seem more eager to use these means to protect their interests. Additionally, states are not always open in their use of sanctions against one another, as Professors Reisman and Stevick have noted, "[u]nilateral sanctions are often used as a unilateral technique in international politics, though not necessarily explicitly."¹⁸⁶ The lack of openness in state relations in this area demands U.N. scrutiny, because "[e]nsuring a 'level playing-field,' with just benefits for every party and for the system as a whole, requires the imposition of norms and continued regulation."¹⁸⁷

Finally, control of sanctions by an international organization is also necessary to increase sanctions' general efficiency. Analysts notice that popularly-supported sanctions, such as collective and multilateral sanctions, are less likely to be circumvented and more likely to have the intended effect than unilateral sanctions, where targets have more alternative providers of the goods the sender is restricting.¹⁸⁸ Indeed, some argue that unilateral sanctions are virtually useless, as discussed in Part I.A.¹⁸⁹

182. *Id.* art. 41.

183. *See id.* art. 48, para. 1.

184. "Traditionally States . . . have been regarded as the main potential violators of human rights." Fassbender, *supra* note 76.

185. Lehrer, *supra* note 163, at 347.

186. Reisman & Stevick, *supra* note 21, at 87.

187. Peter Ingram, *Procedural Justice and the Problem of Voluntarism*, in 3 THE LEGAL AND MORAL ASPECTS OF INTERNATIONAL TRADE: FREEDOM AND TRADE 56, 66 (Geraint Parry, Asif Qureshi & Hillel Steiner eds., 1998).

188. Lektzian & Souva, *supra* note 40, at 850.

189. Hufbauer, *supra* note 14.

Agreement can solve the problem of extraterritoriality, or at least mitigate its effects,¹⁹⁰ whereas unilateral economic sanctions can themselves pose a threat to international peace and security.¹⁹¹ Because sanctions are coercive, they often provoke retaliation and escalation of disputes.¹⁹² Russia's Yakolev's Law, a direct response to the U.S.' Magnitsky Act,¹⁹³ is a perfect example of unilateral targeted sanctions exacerbating a strained relationship between two states. In comparison, multilateral treaties rarely cause such conflict, because they are the "product of negotiation and consent."¹⁹⁴ More direct U.N. involvement may be necessary for the success of international law overall.¹⁹⁵

B. Proposed Considerations for a Regulatory Approach

The simplest solution might be for the Security Council to impose severe restrictions, or an outright ban, on states' use of unilateral targeted sanctions; however, this is both impractical and undesirable. Member states have already expressed concern over the Security Council's expansion of its power into the realm of targeted sanctions,¹⁹⁶ and the permanent members of the Security Council would have little reason to surrender this popular foreign policy tool. Therefore the regulations must, as international law often does, take smaller steps toward greater goals. Specificity and certainty on the target lists is a chronic problem with targeted sanctions.¹⁹⁷ Therefore, regulations

190. "Two methods to render jurisdictional principles more efficient in delimiting spheres of competence, and thus to render the exercise of jurisdiction more reasonable at a more intricate level, could be conceived of. Either States agree upon a convention that precisely sets out on what ground, for what purpose, and under what conditions they could exercise jurisdiction." RYNGAERT, *supra* note 105, at 135.

191. Parrish, *supra* note 107, at 857–58.

192. *Id.*

193. Herszenhorn & Kramer, *supra* note 9.

194. Parrish, *supra* note 107, at 857–58.

195. *See* Slaughter, *supra* note 168, at 503. "If, for instance, the primary actors in the system are not States, but individuals and groups represented by State governments, and international law regulates States without regard for such individual and group activity, international legal rules will become increasingly irrelevant to State behaviour." *Id.* at 504.

196. True-Frost, *supra* note 17, at 1197.

197. Fitzgerald, *supra* note 62, at 41. A mutual definition of "terrorism," as an international crime, also eludes the international community. National

ought to establish evidentiary standards for listing and minimum procedural safeguards for individuals. Ideally the Security Council would require member state compliance with the terms of the regulations; however, should that prove infeasible, the General Assembly or a committee thereof could compose a guidance document, to "create a framework for further trans-governmental cooperation."¹⁹⁸ This may even be preferable, because states, knowing they are not legally bound by the terms, may be willing to concede certain points. This would result in a more comprehensive and specific document that more accurately represents the views of the international community.

The first goal is substantive. It is imperative that the regulations distinguish between types of crimes (be they human rights violations, terrorist activities, or others) and types of suspected perpetrators.¹⁹⁹ The drafters should agree, with as much specificity as possible, which types of individuals are deserving of targeted sanctions for which types of crimes. Since targeted sanctions supposedly work by inducing hardship on individuals, such that the individual will perform actions to effect the desired change,²⁰⁰ whether an individual has the *ability* to cause the change must be considered.

When considering the citizens of a recognized state, as in the cases of unilateral legislation examined here, the target's role in sanctioned government is a crucial determinant of whether sanctioning the individual will be effective at influencing the receiving government.²⁰¹ For example, governments that are

and international actors ascribe varying levels of importance to the elements of the crime, with substantial overlap, but no meaningful consensus. For an informative summary of these issues, see generally Young, *supra* note 144.

198. Slaughter, *supra* note 168, at 530. "Increased interaction breeds mutual confidence, allowing further interaction to take place on the basis of imprecise and open-ended agreements, to be filled in good faith." *Id.*

199. Fitzgerald, *supra* note 62, at 52. Professor Fitzgerald considered a similar possibility, noting that there has been some effort to make similar distinctions within U.S. programs. The U.S. Judicial Review Commission suggested "distinguishing between what it called Tier I designees, the primary targets of the sanctions, and Tier II designees, those who indirectly deal with the targeted parties." *Id.* The recognition of "primary" and "secondary" targets, in the context of sanctions against terrorist supporters, supports the proposition a different crime (human rights violations) must be sanctioned with different measures as well.

200. See *supra* note 25 and accompanying text.

201. See Lektzian & Souva, *supra* note 40, at 849, 852.

more democratic rely heavily on public approval for their power, whereas political elites dominate less democratic governments.²⁰² In theory the more democratic government would respond better to non-targeted, broad sanctions,²⁰³ while the “decisionmaking elites” of a less democratic government are appropriately singled out with targeted sanctions.²⁰⁴ Since the public holds its power in aggregate, there is little to be gained by targeting individual members of the public, such as average citizens and lower officials of a state. Therefore, regardless of whether the government is more or less democratic, the individual members of its public are inappropriate targets for sanctions.

The terrorist organization is a different animal. It is defined by its purpose, rather than physical location, and is comprised of only its members and assets.²⁰⁵ Its membership is united by common ideals and is in a sense voluntary, as compared to citizens who were merely born into a state.²⁰⁶ The organization is a close-knit community based on secrecy.²⁰⁷ Therefore, every individual member or entity is capable of having some effect on the terrorist organizations’ activities, and every individual or entity may be held accountable to some degree for acts of the organization as a whole. Additionally, if correctly applied, financial targeted sanctions deprive the organization of its means of executing undesirable acts—the prevention of which is the sanctions’ purpose.²⁰⁸ In fact, financial targeted sanctions seemed well suited for combating terrorist activity, because monitoring the assets may provide additional information regarding the activities of the terrorists themselves.²⁰⁹

202. *Id.* at 852. The failure of general sanctions to affect the powerful elite is commonly criticized (as occurred in the case of Iraq). *Interlaken I*, *supra* note 67, at 6.

203. Lektzian & Souva, *supra* note 40, at 849.

204. See Cortright & Lopez, SEARCH FOR SECURITY, *supra* note 48, at 93.

205. DISCOURAGING TERRORISM, *supra* note 144, at 22–23.

206. *Cf. id.* at 16–17 (describing how terrorists are recruited from no particular class and, though they often have similar religious and educational histories, each terrorist’s path is different).

207. *Cf. id.* at 22–23.

208. See Fitzgerald, *supra* note 62, at 38 n.4 (quoting the general counsel of the U.S. Treasury Department as saying, “[t]he primary source of the stealth and mobility necessary [to conduct terrorist acts] is money. . . . If we stop the money, we stop the killing”).

209. *Id.* at 40–41.

The second goal is procedural: the regulations should include a means for targeted individuals to contest their listing. If a review committee similar to the office of the Ombudsperson were created, states could be required to submit to the committee their lists of targeted individuals for review, including a means for exception upon showing secrecy was necessary to protect national security interests. The committee could then notify the targeted individuals of the charges against them. Preference could be given for pre-deprivation notice, particularly if the alleged crime is a human rights violation. The sending state would also benefit from careful review, by saving the costs of overseeing compliance of its institutions.²¹⁰ An exception could be made for exigent circumstances, because sometimes expedience is necessary, particularly in light of a credible threat of terrorist attack.²¹¹ In such cases, ad hoc review might comport with international law's "emergency" exception to due process.

CONCLUSION

The current trend toward numerous and extensive blacklists of targeted individuals is a dangerous one, because procedures of current international law are failing to keep pace with state actors' expanding unilateral assertions of authority. The relevant principles of international law—state sovereignty and individual rights—bar such expansion without appropriate procedural safeguards. Appropriate use of unilateral targeted sanctions may yet be feasible, but their legitimacy is dependent on particularized inquiries that consider the nature of the alleged crime and the role of the targeted individual. Furthermore, international actors must establish a unified approach in order to comply with international law, increase the potential effectiveness of their efforts, and not antagonize other states. The U.N. stands in the best position to instigate and oversee this process. If left unchecked, the unilateral targeted sanc-

210. See generally *id.* (describing the host of difficulties present in ensuring domestic parties comply with targeted sanctions).

211. Due to money's liquidity, the asset freeze may be worthless if not executed immediately, before the target has an opportunity to transfer his funds. Cortright & Lopez, SEARCH FOR SECURITY, *supra* note 48, at 103 (emphasizing that even a few week's delay to allow the target a chance to comply with the provisions, as has been Security Council policy, undermines the effectiveness of the sanction).

tions trend will do little to prevent terrorist attacks, less to protect human rights, and much to increase animosity between states—in general, they will contravene the very purposes of international law.

*Elizabeth Clark Hersey**

* B.A., Johns Hopkins University (2009); J.D., Brooklyn Law School (expected 2014); Managing Editor of the *Brooklyn Journal of International Law* (2013–2014). An enormous thank you to the staff of the Journal for their help in the preparation of this Note, to William Hersey and Lisa Clark for their unwavering support, and to Natalie McCauley for providing her superior Russian language skills. Any errors or omissions, in translation or otherwise, are my own.