

# Virtue Sanctioning

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*The war in Ukraine ushered in a new generation of critical sanctions scholarship. One line of criticism focuses on sanctions' rule of law deficits. Another highlights the risk of unintended consequences. And a third rejects the sanctions enterprise altogether as an artifact of unjust global power imbalances and colonial legacies. Mapping out these critiques, this essay asks if there is anything left to defend about the modern practice of economic statecraft. I argue that sanctions are not merely a form of opportunistic virtue signaling by the world's powerful. They serve important functions in the global order as one of the few remaining non-military avenues for articulating international norms. Yet the utility of sanctions does not negate their flaws. I argue that the debate that the Russia sanctions have spurred also charts a roadmap for reform.*

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## I. INTRODUCTION

Russia's invasion of Ukraine jumpstarted a dormant conversation about the legal and political underpinnings of economic warfare in international relations. The extensive sanctions that predominantly powerful western countries and private actors have levied against Russia—targeting its elites, financial system,

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energy sector and much more<sup>1</sup>—spurred numerous academic symposia and heralded a new generation of critical sanctions scholarship.<sup>2</sup>

The traditional argument against economic sanctions centered on their humanitarian costs and low effectiveness.<sup>3</sup> Commentators have long ago labeled reflexive and frequent use of sanctions in international politics as “[t]oo much of a bad thing.”<sup>4</sup> Yet Ukraine sparked a deeper reevaluation of sanctions governance, their unintended consequences and fundamental legitimacy.

Even those who deem sanctions an inescapable element of the stateswoman’s modern toolkit have raised concerns about their ever-expanding reach. One line of attack on sanctions, which I will call “the rule of law” critique, has its roots in earlier times but got reinvigorated after Ukraine.<sup>5</sup> It laments the dearth of legal constraints on the design and execution of sanctions, which in turn facilitates a laissez-faire approach among policymakers.<sup>6</sup> Scholars have documented the steady expansion of sanctions over time and the devolution of economic warfare into a thinly regulated decentralized system of self-help.<sup>7</sup>

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<sup>1</sup> Minami Funakoshi, Hugh Lawson & Kannaki Deka, *Tracking Sanctions Against Russia*, REUTERS, <https://www.reuters.com/graphics/UKRAINE-CRISIS/SANCTIONS/byvrjenzmve/> [<https://perma.cc/HU3X-NM3P>]; *Russia Sanctions Database*, ATL. COUNCIL, <https://www.atlanticcouncil.org/blogs/econographics/russia-sanctions-database/> [<https://perma.cc/DTY7-N2NF>].

<sup>2</sup> This symposium is, of course, one example. Others include Symposium, *The Future of Sanctions*, French Consulate in Boston, Ctr. on Transnat’l Bus. and the Law, & the Harv. Weatherhead Center (June 2022), <https://www.eventbrite.com/e/the-future-of-sanctions-law-diplomacy-tickets-339230456427> [<https://perma.cc/4J5S-HZ83>]; Symposium, *Ukraine and the Effectiveness of Financial Sanctions*, London Sch. of Econ. & Pol. Sci., (Mar. 2022), <https://www.lse.ac.uk/law/news/2022/ukraine-law-sanctions> [<https://perma.cc/9WC8-HH4Y>]; Elin Hellquist, *Unilateral and Extraterritorial Sanctions Symposium: The Future of Sanctions*, OPINIO JURIS (Mar. 1, 2022), <http://opiniojuris.org/2022/03/01/unilateral-and-extraterritorial-sanctions-symposium-the-future-of-sanctions/> [<https://perma.cc/3D2D-ZXAQ>]; see also, e.g., T. Clifton Morgan, Constantinos Syropoulos & Yoto V. Yotov, *Economic Sanctions: Evolution, Consequences, and Challenges*, 37 J. ECON. PERSPECTIVES 3, 3 (2023) (the Russia sanctions “have stirred a great deal of interest in sanctions as an instrument of foreign policy and in what we know about when and how they work”); Benjamin Raynor, *The Shadow of Sanctions: Reputational Risk, Financial Reintegration, and the Political Economy of Sanctions Relief*, 28 EUR. J. INT’L REL. 696, 697 (2022); Stavros Pavlou, Stella Strati & Eleni Dionysiou, *The Impact of Economic Sanctions on the Rule of Law and the Effective Administration of Justice*, INT’L BAR ASSOC. (2023).

<sup>3</sup> See *infra* Part III.

<sup>4</sup> See, e.g., Richard N. Haass, *Economic Sanctions: Too Much of a Bad Thing*, BROOKINGS (June 1, 1998), <https://www.brookings.edu/articles/economic-sanctions-too-much-of-a-bad-thing/> [<https://perma.cc/B5T8-QEFJ>].

<sup>5</sup> See, e.g., Elena Chachko & J. Benton Heath, *A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield*, 116 AM. J. INT’L L. UNBOUND 135, 135–37 (2022).

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

<sup>7</sup> See J. Benton Heath, *The Possible Worlds of Economic Sanctions*, 51 GA. J. INT’L & COMPAR. L. 629, 634–35 (2023); Edoardo Saravalle, Note, *Recasting Sanctions and Anti-Money Laundering: From National Security to Unilateral Financial Regulation*,

Novel extensions of sanctions, like secondary sanctions and potential seizure of frozen Russian assets to help fund Ukraine's recovery,<sup>8</sup> are at odds with even the minimal legal constraints that do exist.<sup>9</sup>

Another line of criticism highlights the unintended consequences of sanctions.<sup>10</sup> The world's interconnectedness means that sanctions may have unpredictable spillover effects on global financial and economic networks. They can backfire against those who impose them. Moreover, sanctions over-compliance distorts ostensibly carefully calibrated sanctions regimes and may chill far more economic activity than policymakers intend.

Scholars have therefore argued that overreliance on sanctions could undermine the very financial and economic mechanisms that currently benefit the key sanctions-imposing players, namely, the United States and the European Union.<sup>11</sup> While the dominance of those actors in the post-Cold War era meant that they could wage economic war with relative impunity, that dominance is now under threat from rivals like China and challengers like India. China, India and others can now exert economic pressure on the West by forming alternative economic partnerships and, down the road, opting out of the dollar-dominated global financial system.<sup>12</sup> U.S. and European sanctions practices are a useful precedent for China and other non-Western actors to imitate. The West's economic weapon could eventually be turned against those who made it what it is today.

A third emerging strand of scholarship fundamentally rejects the whole sanctions enterprise.<sup>13</sup> The political economy critique of sanctions highlights the global power imbalances that sanctions encapsulate. It focuses on how dominant global actors take advantage of their position to use sanctions against the world's weaker nations and groups. On that view, global injustices and a history of Western exploitation of large swaths of the world render the entire sanctions project profoundly hypocritical and illegitimate.<sup>14</sup> The United States

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2022 COLUM. BUS. L. REV. 550, 564–66 (2022); Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1076 (2020); Lori Fisler Damrosch, *The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts*, 37 BERKELEY J. INT'L L. 249, 254 (2019); Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 4–5 (2001). *See generally* NICHOLAS MULDER, *THE ECONOMIC WEAPON: THE RISE OF SANCTIONS AS A TOOL OF MODERN WAR* (2022).

<sup>8</sup> Chimène Keitner, *What You Need to Know: Asset Seizure in Russia's War in Ukraine*, REISS CTR. ON L. & SEC. (Apr. 3, 2023), <https://www.lawandsecurity.org/what-you-need-to-know-chimene-keitner-on-asset-seizure-in-russias-war-in-ukraine/> [<https://perma.cc/9NW5-84LS>].

<sup>9</sup> *See infra* Part III.A.

<sup>10</sup> *See infra* Part III.B.

<sup>11</sup> *See id.*

<sup>12</sup> *See generally* DANIEL McDOWELL, *BUCKING THE BUCK: US FINANCIAL SANCTIONS AND THE INTERNATIONAL BACKLASH AGAINST THE DOLLAR* (2023).

<sup>13</sup> *See infra* Part III.C.

<sup>14</sup> *See, e.g.*, Chris McGreal, *U.S. Accused of Hypocrisy for Supporting Sanctions Against Russia but Not Israel*, GUARDIAN (Mar. 7, 2022),

in particular, the argument goes, uses sanctions against others prolifically for violations of international law and norms that the U.S. and its allies themselves commit frequently.<sup>15</sup>

It is becoming increasingly clear, then, that sanctions have severe rule of law deficits, a legitimacy problem, and far-reaching unintended consequences. This adds to well-documented humanitarian costs and the problem of limited effectiveness. Why do Western powers continue to rely on sanctions as a primary mode of statecraft? Are sanctions best understood as an instrument for virtue signaling?

Virtue signaling is “the act of engaging in public moral discourse in order to enhance or preserve one’s moral reputation.”<sup>16</sup> The act is not objectionable as such. There is nothing inherently wrong with insisting that a nation that invades the territory of another, violating a core international law norm, should be condemned. Rather, what makes the act an example of virtue signaling “is not the content of the moral expression itself, but rather the status seeking desires of the person or corporate entity making it.”<sup>17</sup> The negative valence of virtue signaling as opportunistic self-righteousness has prompted theorists to rebrand it as “moral grandstanding.”<sup>18</sup>

Translated to economic statecraft, the use of sanctions in furtherance of objectives such as reversing an invasion into a neighboring country in violation of international law (Russia), preventing a violent regime from cracking down on civilian population (Syria, Myanmar), or dissuading a nation from pursuing a nuclear weapons program (Iran, North Korea) could all be recast as forms of virtue signaling. Sanctions are imposed not primarily because they are an effective way to realize these objectives, but because they communicate and reinforce a Western, liberal, and self-interested view of the international order, its rules, its proper power distribution, and its outlaws.<sup>19</sup>

What follows considers how the use of economic statecraft in response to the Russian invasion of Ukraine informs this debate about the utility and legitimacy of economic sanctions. I argue that sanctions, while flawed, are not merely instances of virtue signaling. They fulfill important functions in the modern global order. Key among those functions is making more aggressive policy options, such as the use of force to settle geopolitical conflict, less appealing by redirecting pressure on powerful actors to respond to actual and perceived violations of international norms without resorting to military force.

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<https://www.theguardian.com/world/2022/mar/07/us-sanctions-against-russia-but-not-israel>  
[<https://perma.cc/7SXX-UBQ4>].

<sup>15</sup> See, e.g., *id.*

<sup>16</sup> Evan Westra, *Virtue Signaling and Moral Progress*, 49 PHIL. & PUB. AFFS. 156, 156 (2021).

<sup>17</sup> *Id.*

<sup>18</sup> Justin Tosi & Brandon Warmke, *Moral Grandstanding as a Threat to Free Expression*, 37 SOC. PHIL. & POL. 170, 170 (2020).

<sup>19</sup> C.f. Kelsey Peden, *Sanctions as Virtue-Signaling: Transitioning from Symbolism to Reparations for Rohingya Genocide Victims*, 37 AM. U. INT’L L. REV. 841, 841 (2022).

The international response to Russia illustrates that economic statecraft also retains other important advantages in making it harder for Russia to press on with its invasion.

Although we must study and make salient the historical and political context of modern sanctions practice, treating it as wholly illegitimate may prove self-defeating. The challenge instead is to develop better mechanisms for sanctions governance with Ukraine's lessons in mind. Sanctions governance mechanisms should aim to reduce the likelihood of indefinite extension of sanctions regimes untethered to their effectiveness, provide far more concrete guidance than what is available today to the private sector on the scope of sanctions to minimize undesired overcompliance, create robust options for individuals and entities subject to sanctions to challenge them, and build consensus around the rules that should apply to novel and particularly extraterritorial extensions of sanctions such as secondary sanctions or permanent seizure of frozen assets.

Likewise, the time has come for a serious international effort to regulate sanctions with global systemic effects. A new initiative is necessary because existing institutions like the United Nations Security Council are paralyzed and progress there is unlikely. Examples of practices with global systemic effects from the Ukraine case include the removal of large economies from financial mechanisms like the SWIFT international transaction clearinghouse or imposing energy sanctions on a key global supplier like Russia. To date, such measures have largely been imposed ad hoc without any broader collective assessment of the circumstances in which they are appropriate, limitations on their scope, mandatory humanitarian exceptions and measures to mitigate impact on global markets.

In previous work with J. Benton Heath not long after Russia's February 2022 invasion, we asked whether the Ukraine war would prove to be a "watershed moment for sanctions".<sup>20</sup> It turns out it has in at least one meaningful way. Although we have yet to see significant concrete sanctions governance reforms being pushed, the war has generated a broad reassessment of sanctions as an instrument of economic statecraft.<sup>21</sup> Symposia, articles, and research networks are proliferating, and new ideas are constantly being generated. Whether renewed intellectual interest will effectuate actual sanctions governance reform remains to be seen. If and when global political circumstances allow it, such reform will now have a far richer set of ideas and proposals to build on.

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<sup>20</sup> Chachko & Heath, *supra* note 5, at 135.

<sup>21</sup> See *supra* note 2 and accompanying text.

## II. THE RUSSIA UKRAINE SANCTIONS

### A. *The Economic Response to the Russian Invasion*

In the months leading to the Russian invasion of Ukraine many expected that the international response would be no more severe than the response to Russia's 2014 unilateral annexation of Crimea.<sup>22</sup> In 2014, the West deployed a combination of diplomatic condemnation,<sup>23</sup> symbolic gestures of support for Ukraine,<sup>24</sup> and a limited set of economic sanctions.<sup>25</sup>

Yet what transpired after the invasion was different. The target of upward of 13,000 economic restrictions—more than Iran, Cuba, and North Korea combined—Russia is now one of the most heavily sanctioned countries in the world.<sup>26</sup> Never before have such comprehensive economic sanctions been imposed on a G-20 economy, with the United States, the EU, other G7 powers, and allies imposing a cascade of economic restrictions.<sup>27</sup> The Ukraine war also strengthened public-private sanctions coordination. The government-led sanctions campaign against Moscow prompted an exodus of private companies from Russia beyond what sanctions strictly required. Companies from Visa to McDonald's exited Russia after the Ukraine invasion.<sup>28</sup>

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<sup>22</sup> See Max Bergmann, *How the United States Should Respond if Russia Invades Ukraine*, CTR. FOR AM. PROGRESS (Jan. 25, 2022), <https://www.americanprogress.org/article/how-the-united-states-should-respond-if-russia-invades-ukraine/> [<https://perma.cc/6ZJJ-UBQV>] (stating that “Russia is likely anticipating the Western response to pass fairly quickly . . . as [it] did after the 2014 invasion of Ukraine”).

<sup>23</sup> Press Release, General Assembly, General Assembly Adopts Resolution Calling Upon States Not to Recognize Changes in Status of Crimea Region, U.N. Press Release GA/11493 (Mar. 27, 2014), <https://press.un.org/en/2014/ga11493.doc.htm> [<https://perma.cc/GD8Z-PJKC>].

<sup>24</sup> Press Release, U.S. Embassy and Consulates in Italy, U.S. Embassies and Consulates General Illuminated with Colors of the Ukrainian Flag (Feb. 23, 2023), <https://it.usembassy.gov/u-s-embassies-and-consulates-general-illuminated-with-colors-of-the-ukrainian-flag/> [<https://perma.cc/WXM4-LAQZ>].

<sup>25</sup> Exec. Order No. 13660, 3 C.F.R. 226–27 (2014); *Timeline—EU Restrictive Measures Against Russia Over Ukraine*, EUR. COUNCIL, <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/history-restrictive-measures-against-russia-over-ukraine/> (on file with the *Ohio State Law Journal*).

<sup>26</sup> Alexandra Prokopenko, *How Sanctions Have Changed Russian Economic Policy*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 9, 2023), <https://carnegieendowment.org/politika/89708> [<https://perma.cc/T9CV-J4BZ>].

<sup>27</sup> Funakoshi, Lawson & Deka, *supra* note 1. The G7 includes Canada, France, Germany, Italy, Japan, the United Kingdom and the United States, in addition to the European Union.

<sup>28</sup> *Over 1,000 Companies Have Curtailed Operations in Russia—But Some Remain*, YALE SCH. OF MGMT. (Aug. 1, 2023), <https://som.yale.edu/story/2022/over-1000-companies-have-curtailed-operations-russia-some-remain> [<https://perma.cc/P7BM-VDC5>];

As of this writing, the United States has imposed more than 3,126 individual sanctions against Russian entities and individuals.<sup>29</sup> The U.S. Treasury Department created the multilateral Russian Elites, Proxies and Oligarchs (REPO) Task Force to coordinate a global hunt for sanctioned Russian assets and sanctions evaders together with the other G-7 partners, targeting anything from bank accounts to luxury goods and yachts.<sup>30</sup> The Task Force recently announced that its members have successfully blocked or frozen more than \$58 billion in sanctioned Russian assets, adding to \$300 billion in blocked Russian Central Bank assets in the EU and other G7 countries.<sup>31</sup> Similarly, the EU has imposed travel restrictions or frozen the assets of close to 1900 Russian and affiliated individuals and entities.<sup>32</sup> This translates to 21.5 billion euros in Russian assets frozen in the EU.<sup>33</sup>

A large portion of these individual sanctions target President Vladimir Putin and Russia's economic and political elite, as well as companies in the Russian military and defense sector, paramilitary groups operating in Ukraine like the infamous Wagner group, individuals responsible for atrocities committed in Ukraine and other potential war crimes, and more.<sup>34</sup>

The Russian financial sector has been a key sanctions target. The United States, the EU and others have levied a host of restrictions against Russian banks, including capital markets bans, asset freezes and removal from SWIFT, a Belgium-based global financial messaging system.<sup>35</sup> Crucially, the United States and the European Union have banned nearly all transactions with the Central Bank of the Russian Federation.<sup>36</sup> The aim was to prevent Russia from

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*see also* Chachko & Heath, *supra* note 6, at 136; Richard Martin, *Sanctions Against Russia—A Timeline*, S&P GLOB. MKT. INTEL. (July 20, 2023), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/sanctions-against-russia-8211-a-timeline-69602559> [<https://perma.cc/6NRK-2B9C>].

<sup>29</sup> *Russia Sanctions Database*, *supra* note 1.

<sup>30</sup> *See* Press Release, U.S. Dep't of the Treasury, Russian Elites, Proxies, and Oligarchs: Task Force Joint Statement (June 29, 2022), <https://home.treasury.gov/news/press-releases/jy0839> [<https://perma.cc/4P53-Y2XU>].

<sup>31</sup> *Id.*; Press Release, U.S. Dep't of the Treasury, Joint Statement from the REPO Task Force (Mar. 9, 2023), <https://home.treasury.gov/news/press-releases/jy1329> [<https://perma.cc/E3J6-S37M>].

<sup>32</sup> *EU Sanctions Against Russia Explained*, EUR. COUNCIL, <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/> [<https://perma.cc/H9E8-7G9E>].

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Mohammed Abbas Taqi, *More Than 80% of Russia's Banking Sector Subject to Sanctions Over Ukraine War*, S&P GLOB. MKT. INTEL. (Mar. 22, 2022), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/more-than-80-of-russia-s-banking-sector-subject-to-sanctions-over-ukraine-war-69434351> [<https://perma.cc/Z26F-V94E>].

<sup>36</sup> Prohibitions Related to Transactions Involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation, 88 Fed. Reg. 36648, 36649 (June 5, 2023),

accessing its sizable foreign reserves or trading in sovereign debt to negate the impact of sanctions.<sup>37</sup> The EU estimates that more than half of Russia's foreign reserves are now frozen.<sup>38</sup>

Sanctions also extensively targeted Russia's energy sector. Energy was a particularly sensitive target because of Europe's heavy dependence on Russian energy products and infrastructure, compounded by concern over the stability of global energy markets.<sup>39</sup> That concern was heightened given the fragile state of the global economy at the time of the Russian invasion right on the heels of the COVID-19 pandemic. The United States has banned the import of Russian oil, liquefied natural gas, and coal.<sup>40</sup> It heavily restricted U.S. and foreign investment in Russia's energy sector.<sup>41</sup>

The EU imposed similar but more limited bans on imports of energy products and capped oil prices.<sup>42</sup> It also introduced an extraordinary authority to mandate EU-wide emergency energy rationing to prepare for Russian supply manipulation.<sup>43</sup> Adding to these measures, the EU Commission is pursuing an ambitious energy plan, REPowerEU, to wean Europe off Russian energy by the end of the decade and diversify EU suppliers.<sup>44</sup>

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<https://www.govinfo.gov/content/pkg/FR-2023-06-05/pdf/2023-11980.pdf> [<https://perma.cc/888F-XFCV>]; *EU Sanctions Against Russia Explained*, *supra* note 32.

<sup>37</sup> Press Release, U.S. Dep't of the Treasury, Treasury Prohibits Transactions with Central Bank of Russia and Imposes Sanctions on Key Sources of Russia's Wealth (Feb. 28, 2022), <https://home.treasury.gov/news/press-releases/jy0612> [<https://perma.cc/7LFA-U4K8>].

<sup>38</sup> *EU Sanctions Against Russia Explained*, *supra* note 32.

<sup>39</sup> See, e.g., Patricia Cohen & Stanley Reed, *Why the Toughest Sanctions on Russia Are the Hardest for Europe to Wield*, N.Y. TIMES (Feb. 25, 2022), <https://www.nytimes.com/2022/02/25/business/economy/russia-europe-sanctions-gas-oil.html> [<https://perma.cc/G66T-GQ7A>]; Natasha Bertrand, Katie Bo Lillis & Phil Mattingly, *US Fears Russian Energy Manipulation Could Fracture European Resolve on Ukraine*, CNN (Sept. 12, 2022), <https://www.cnn.com/2022/09/12/politics/us-russia-europe-energy/index.html> [<https://perma.cc/8PPU-2N3V>].

<sup>40</sup> Press Release, White House, Fact Sheet: United States Bans Imports of Russian Oil, Liquefied Natural Gas, and Coal (Mar. 8, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/08/fact-sheet-united-states-bans-imports-of-russian-oil-liquefied-natural-gas-and-coal/> [<https://perma.cc/8GPP-2DWM>].

<sup>41</sup> Exec. Order No. 14066, 87 Fed. Reg. 13625 (Mar. 8, 2022) ("Prohibiting Certain Imports and New Investments with Respect to Continued Russian Federation Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine.").

<sup>42</sup> *EU Sanctions Against Russia Explained*, *supra* note 32.

<sup>43</sup> Council Regulation 2022/1369, 2022 O.J. (L 206) 1 (EU); see also Elena Chachko & Katerina Linos, *Ukraine and the Emergency Powers of International Institutions*, AM. J. INT'L L. 775, 777 (2022).

<sup>44</sup> Press Release, Eur. Comm'n, REPowerEU: A Plan to Rapidly Reduce Dependence on Russian Fossil Fuels and Fast Forward the Green Transition (May 18, 2022), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_3131](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3131) [<https://perma.cc/4H6A-YVEG>]; see also Chachko & Linos, *supra* note 43.

Other trade restrictions were primarily designed to curtail Russia's access to technology and other products and materials that could support its operations in Ukraine. Members of the G7 and other WTO members committed to deny Russia Most-Favored-Nation status concerning key products, revoking benefits Russia was entitled to as a WTO member.<sup>45</sup> The United States followed suit with additional export controls and designations.<sup>46</sup> The EU's export and import sanctions on Russia have resulted in export and import restrictions valued at over 134 billion euros.<sup>47</sup>

In sum, the international sanctions against Russia over the Ukraine invasion cast an extremely broad net. Nearly all these measures taken individually had precedents in previous sanctions regimes against other countries. But the sanctions' target—one of the world's largest economies deeply integrated into the global financial system, and the speed and frequency with which G7 members and allies levied them, render this case unique. Perhaps this is why the Ukraine case so effectively focused global attention on the practice of economic sanctions and the difficult questions that it raises.

### B. Gauging Effectiveness

The leaders of the sanctions coalition against Russia have been careful in defining their goals. Presumably, the ultimate objective of the sanctions would be to end the Russian invasion and secure Ukraine's independence. Yet the public statements have been much more nuanced. U.S. leadership has defined the objectives of the sanctions campaign as “depriv[ing] President Putin of the economic resources he uses to continue his needless war of choice,”<sup>48</sup> “supporting Ukraine while degrading Russia's ability to conduct its invasion,”<sup>49</sup> and “degrad[ing] Russia's economy and diminish[ing] its ability to wage war against Ukraine.”<sup>50</sup> The EU has asserted that “[t]he aim of the economic

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<sup>45</sup> *G7 Leaders' Statement*, G7 2 (Mar. 11, 2022), <https://www.g7germany.de/resource/blob/997532/2014234/39e142fa878dce9e420ef4d29c17969d/2022-03-11-g7-leader-eng-data.pdf?download=1s> [<https://perma.cc/J9NZ-QP36>]; Press Release, World Trade Org. General Counsel, Joint Statement on Aggression by the Russian Federation Against Ukraine with the Support of Belarus (Mar. 15, 2022) (on file with the *Ohio State Law Journal*).

<sup>46</sup> Press Release, U.S. Dep't of the Treasury, With Over 300 Sanctions, U.S. Targets Russia's Circumvention and Evasion, Military-Industrial Supply Chains, and Future Energy Revenues (May 19, 2023), <https://home.treasury.gov/news/press-releases/jy1494> [<https://perma.cc/ZLK6-VZQZ>].

<sup>47</sup> *EU Sanctions Against Russia Explained*, *supra* note 32.

<sup>48</sup> Press Release, White House, *supra* note 40.

<sup>49</sup> Press Release, U.S. Dep't of the Treasury, *supra* note 46.

<sup>50</sup> Press Release, White House, Fact Sheet: On One Year Anniversary of Russia's Invasion of Ukraine, Biden Administration Announces Actions to Support Ukraine and Hold Russia Accountable (Feb. 24, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/24/fact-sheet-on-one-year-anniversary-of-russias-invasion-of-ukraine-biden->

sanctions is to impose severe consequences on Russia for its actions and to effectively thwart Russian abilities to continue the aggression.”<sup>51</sup> Nevertheless, it is hard to definitively assess the effectiveness of international sanctions against Russia even compared to these narrower goals. The record is at best mixed.<sup>52</sup>

Over a year after the Russian invasion and contrary to what most anticipated when it began, Ukraine has stood its ground and proved highly resilient with U.S., EU, and NATO assistance. Instead, the war exposed widespread dysfunction in the Russian military and its leadership, culminating in a failed mutiny when a paramilitary leader threatened to march on Moscow.<sup>53</sup> As of this writing, estimates by the World Bank, the IMF and the OECD suggest that the Russian economy had shrunk in 2022 and may continue on that path in 2023.<sup>54</sup> There is evidence that Russia’s trade is declining significantly, and that revenue from fossil fuels is diminishing.<sup>55</sup> The Russian economy is under-performing on other indicators as well.<sup>56</sup> And the depletion of Russian human capital coupled with restrictions on access to technology could hinder Russia’s growth and competitiveness in the long run.<sup>57</sup>

But the fact remains that Russia is pressing forward with its Ukraine campaign even under heavy sanctions. And the economic impact of sanctions may not be as devastating as international coalition members tend to portray it.<sup>58</sup>

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administration-announces-actions-to-support-ukraine-and-hold-russia-accountable/ [https://perma.cc/T2FV-CSJZ].

<sup>51</sup> *EU Sanctions Against Russia Explained*, *supra* note 32.

<sup>52</sup> Ella Koeze, *Boycotts, Not Bombs: Sanctions Are a Go-To Tactic, with Uneven Results*, N.Y. TIMES (Mar. 11, 2022), <https://www.nytimes.com/interactive/2022/03/11/world/economic-sanctions-history.html> [https://perma.cc/J9BM-FJ5G].

<sup>53</sup> See, e.g., Anders Åslund, *Russia’s Failing Ukraine Invasion Is Exposing Putin’s Many Weaknesses*, ATL. COUNCIL (June 11, 2023), <https://www.atlanticcouncil.org/blogs/ukrainealert/russias-failing-ukraine-invasion-is-exposing-putins-many-weaknesses/> [https://perma.cc/V2EG-SMDK]; Patrice Taddonio, *What the Wagner Group Mutiny Reveals About Putin’s Grip on Power*, PBS (July 11, 2023), <https://www.pbs.org/wgbh/frontline/article/wagner-group-mutiny-vladimir-putin-prigozhin-documentary-excerpt/> [https://perma.cc/V72R-W2PD].

<sup>54</sup> *Infographic—Impact of Sanctions on the Russian Economy*, EUR. COUNCIL, <https://www.consilium.europa.eu/en/infographics/impact-sanctions-russian-economy/> (on file with the *Ohio State Law Journal*).

<sup>55</sup> *Id.*

<sup>56</sup> See *Russia Sanctions Database*, *supra* note 1 (discussing the Russian government’s struggles with budget deficits).

<sup>57</sup> Johannes Wachs, *Digital Traces of Brain Drain: Developers During the Russian Invasion of Ukraine*, 12 EPJ DATA SCI. 1, 1–3 (2023).

<sup>58</sup> See, e.g., Nicholas Mulder, *Sanctions Against Russia Ignore the Economic Challenges Facing Ukraine*, N.Y. TIMES (Feb. 9, 2023), <https://www.nytimes.com/2023/02/09/opinion/sanctions-russia-ukraine-economy.html> [https://perma.cc/5KTP-WEEA] (“One year later, the Russian economy has weathered the shock much better than expected.”); Edward Wong, Ana Swanson & Michael Crowley, *Five*

Russia's GDP fell by only 2.1 percent in 2022, and at least the IMF forecasts that it will grow in 2023—outperforming sanctions-free Western economies like the United Kingdom.<sup>59</sup> Despite early panic, the Russian financial system appears to remain stable.<sup>60</sup>

Significantly, Russia has turned to other countries in Asia, Latin America, Africa and the Middle East that did not jump on the sanctions bandwagon. It has done so to replace markets lost because of sanctions and to get access to technology and products Russia can no longer procure in the west. Russian trade with China grew by one-third in 2022,<sup>61</sup> and China and India are now the destination of 57 percent of Russian oil exports.<sup>62</sup> Sanctions have also sent Russia searching for alternatives to dollar-dominated international financial systems.<sup>63</sup> Sanctions evasion by Russia and its collaborators has proved challenging too.<sup>64</sup> Russia continues to have access to U.S.-made technology despite extensive sanctions.<sup>65</sup>

Given this mixed record, there is no clear-cut answer to the question of whether sanctions against Russia have been effective, and if so, along what dimensions.<sup>66</sup> As one scholar put it, there is no doubt that sanctions are “economically very, very painful,” but “this doesn't imply necessarily that they're going to reach their ultimate goals”.<sup>67</sup> The effectiveness question is further complicated by the indirect consequences of sanctions.<sup>68</sup> Sanctions

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*Ways Sanctions Are Hitting Russia*, N.Y. TIMES (Nov. 4, 2022), <https://www.nytimes.com/2022/11/04/us/politics/russia-sanctions-ukraine-war.html> [https://perma.cc/C522-ZTPT].

<sup>59</sup> Alan Rappeport, *Russia's Economic Growth Suggests Western Sanctions Are Having a Limited Impact*, N.Y. TIMES (Jan. 31, 2023), <https://www.nytimes.com/2023/01/31/world/europe/russias-economic-growth-suggests-western-sanctions-are-having-a-limited-impact.html> [https://perma.cc/BY8X-J5SF]; *Infographic—Impact of Sanctions on the Russian Economy*, *supra* note 55; IMF, *2023 Article IV Consultation* (July 2023).

<sup>60</sup> Prokopenko, *supra* note 26.

<sup>61</sup> *Id.*

<sup>62</sup> *Russia Sanctions Database*, *supra* note 1.

<sup>63</sup> See, e.g., Maia Nikoladze & Mrugank Bhusari, *Russia and China Have Been Teaming Up to Reduce Reliance on the Dollar. Here's How It's Going*, ATL. COUNCIL (Feb. 22, 2023), <https://www.atlanticcouncil.org/blogs/new-atlanticist/russia-and-china-have-been-teaming-up-to-reduce-reliance-on-the-dollar-heres-how-its-going/> [https://perma.cc/48UK-3KCH].

<sup>64</sup> See, e.g., Mulder, *supra* note 58 (“A global ‘dark fleet’ of uninsured and hard-to-trace tankers roams the oceans to deliver Russian oil to buyers everywhere.”).

<sup>65</sup> Ana Swanson & Niraj Chokshi, *U.S.-Made Technology Is Flowing to Russian Airlines, Despite Sanctions*, N.Y. TIMES (May 15, 2023), <https://www.nytimes.com/2023/05/15/business/economy/russia-airlines-sanctions-ukraine.html> [https://perma.cc/W6X5-YJ5T].

<sup>66</sup> See Koeze, *supra* note 52.

<sup>67</sup> *Id.*

<sup>68</sup> See *infra* Part III.C.

precipitated shifts in Russian economic policy and the creation of alternative economic partnerships that help mitigate their impact on Russia.

On this uncertain terrain, legal and theoretical reevaluations of sanctions have been gaining traction.

## II. THREE VIEWS OF THE ECONOMIC WEAPON

The argument against economic sanctions in at least the last half century has centered on their humanitarian costs and ineffectiveness.<sup>69</sup> The paradigmatic sanctions method before the mid 1990s was blanket embargos like the international sanctions against Rhodesia, South Africa and Iraq over its 1990 invasion to Kuwait.<sup>70</sup> Such blanket sanctions regimes tended to galvanize public opinion behind national leaders, they were criticized as unjust because of their devastating humanitarian impact, and they failed to meet their goals in most cases, with South Africa being the oft-cited counter example.<sup>71</sup>

The 1990 Iraq sanctions regime and the ensuing humanitarian crisis was a turning point that prompted a shift toward so-called targeted sanctions.<sup>72</sup> Targeted sanctions generally freeze the assets of the sanctioned individual or entity, limit their economic transactions, and restrict their travel.<sup>73</sup> The idea was that calibrating sanctions to only apply to those with the ability to influence decision-making concerning objectionable policies would avoid much of the downside of blanket sanctions.<sup>74</sup> U.S. resort to targeted sanctions has since exploded, and sanctions have become a go-to policy tool across different foreign policy and national security problems.<sup>75</sup> The United States increased its

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<sup>69</sup> See, e.g., LEE JONES, *SOCIETIES UNDER SIEGE: EXPLORING HOW INTERNATIONAL ECONOMIC SANCTIONS (DO NOT) WORK* 2–5 (2015).

<sup>70</sup> See S. C. Res. 328 (May 22, 1973); S.C. Res. 181 (Aug. 7, 1963); S.C. Res. 661 ¶ 3 (Aug. 6, 1990); see also Chachko, *supra* note 7, at 1076–77.

<sup>71</sup> See Johan Galtung, *On the Effects of International Economic Sanctions: With Examples from the Case of Rhodesia*, 19 *WORLD POLS.* 378, 399 (1967); Gary C. Hufbauer & Barbara Oegg, *Targeted Sanctions: A Policy Alternative?*, 32 *LAW & POL'Y INT'L BUS.* 11, 11 (2000); T. Clifton Morgan, Navin Bapat & Yoshiharu Kobayashi, *Threat and Imposition of Economic Sanctions 1945-2005: Updating the TIES Dataset*, 31 *CONFLICT MGMT. & PEACE SCI.* 541, 541–42 (2014); Joseph Hanlon, *Successes and Future Prospects of Sanctions Against South Africa*, 47 *REV. AFR. POL. ECON.* 84, 84 (1990).

<sup>72</sup> Matthew Happold, *Targeted Sanctions and Human Rights*, in *ECONOMIC SANCTIONS AND INTERNATIONAL LAW* 87, 88–90 (Matthew Happold & Paul Eden eds., 2016); Mary Ellen O'Connell, *Debating the Law of Sanctions*, 13 *EUR. J. INT'L L.* 63, 64 (2002). In a 1997 report, then-UN Secretary General Kofi Annan implored States to “render sanctions a less blunt and more effective instrument, and reduce the humanitarian costs to civilian populations.” Hufbauer & Oegg, *supra* note 71, at 11.

<sup>73</sup> See Chachko, *supra* note 7, at 1077. I define “targeted sanctions” as sanctions directed at individual persons or entities. *But see* Hufbauer & Oegg, *supra* note 72, at 12; Morgan, Bapat & Kobayashi, *supra* note 71, at 551–52.

<sup>74</sup> See Chachko, *supra* note 5, at 1077.

<sup>75</sup> See Chachko, *supra* note 7, at 1077–78.

sanctions designations by a whopping 933 percent between 2001-2021.<sup>76</sup> A similar process has occurred in the EU.<sup>77</sup>

The next major reevaluation of sanctions after Iraq began as targeted sanctions became a major part of the U.S.-led global war on terror.<sup>78</sup> Groups and individuals worldwide became subject to international United Nations Security Council as well as unilateral asset freezes and movement restrictions with limited to non-existent recourse to legal process.<sup>79</sup> Prompted by the *Kadi* cases in the EU and the establishment of the Security Council ombudsperson mechanism for reviewing individual sanctions, this generation of critical sanctions work focused on the due process shortcoming of the practice and offered solutions oriented around procedural justice.<sup>80</sup>

Ukraine has motivated a new generation of critical sanctions scholarship. New work following the Russian invasion centers around three main critiques of the practice. I call them the rule of law critique, the unintended consequences critique, and the political economy critique. The next sections consider and evaluate each line of argument. My schematic categorization oversimplifies; the categories frequently overlap in the discourse around Ukraine sanctions and in individual pieces of scholarship. But it is useful for analytical purposes.

### A. Rule of Law

The forceful economic response to Russia's Ukraine invasion reaffirmed "the central role of sanctions as a tool of the post-1945 legal order and a 'laissez faire' approach to their application."<sup>81</sup> Economic sanctions are today very lightly regulated. Very few legal constraints apply to a state's decision to deploy sanctions unilaterally.

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<sup>76</sup> See U.S. DEP'T OF THE TREASURY, THE TREASURY 2021 SANCTIONS REVIEW 2 (Oct. 2021), <https://home.treasury.gov/system/files/136/Treasury-2021-sanctions-review.pdf> [<https://perma.cc/XKQ5-AM4M>].

<sup>77</sup> See, e.g., Elena Chachko, *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, 44 YALE J. INT'L L. 1, 8 (2019).

<sup>78</sup> See Chachko, *supra* note 7, at 1095. At the international level, see S. C. Res. 1267 ¶ 4(b) (Oct. 15, 1999); S.C. Res. 1988 ¶ 1 (June 17, 2011); S.C. Res. 1989 ¶ 1(a) (June 17, 2011); S. C. Res. 2253 (Dec. 17, 2015); S. C. Res. 2368 (July 20, 2017). On EU counterterrorism sanctions, see, for example, Douglas Cantwell, Note, *A Tale of Two Kadis: Kadi II, Kadi v. Geithner & U.S. Counter-terrorism Finance Efforts*, 53 COLUM. J. TRANSNAT'L L. 652, 655 (2015).

<sup>79</sup> See, e.g., S.C. Res. 661 (Aug. 6, 1990) (Iraq).

<sup>80</sup> See Elena Chachko, *Due Process is in the Details: U.S. Targeted Sanctions and International Human Rights Law*, 113 AM. J. INT'L L. UNBOUND 157, 158–59 (2019).

<sup>81</sup> See Chachko & Heath, *supra* note 5, at 137.

The origins of this sanctions legal grey hole<sup>82</sup> trace back to the early post-World War II years.<sup>83</sup> International law and the United Nations Charter distinguish between unilateral use of military force (generally prohibited) and economic coercion (generally allowed).<sup>84</sup> In the landmark *Nicaragua* case, the International Court of Justice (ICJ) found that even a comprehensive economic embargo is consistent with customary international law.<sup>85</sup> Early arguments like the ones Nicaragua had raised before the ICJ that economic coercion violates state sovereignty failed to gain traction.<sup>86</sup> And although plenty of other international law doctrines like the law of countermeasures, non-intervention, jurisdictional constraints, and proportionality could be interpreted to impose meaningful constraints on the resort to sanctions, their potential has to date remained untapped.<sup>87</sup>

Trade and investment treaties such as the WTO agreements similarly failed to provide a source of meaningful constraint. Security exceptions in these treaties often accommodate economic sanctions, even though sanctions conflict

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<sup>82</sup>David Dyzenhaus coined the term legal “grey hole” to describe situations in which “there are some legal constraints on executive action—it is not a lawless void—but the constraints are so insubstantial that they pretty well permit government to do as it pleases.” DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 3, 42 (2006).

<sup>83</sup>See Heath, *supra* note 7, at 6–7.

<sup>84</sup>See U.N. Charter art. 2, ¶ 4 (the prohibition on international use of force); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶¶ 244–45, 279 (June 27); James A. Delanis, “Force” Under Article 2(4) of the United Nations Charter: The Question of Economic and Political Coercion, 12 VAND. J. TRANSNAT’L L. 101, 101, 130 (1979).

<sup>85</sup>*Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 85, ¶¶ 244–45, 279.

<sup>86</sup>Ntina Tzouvala, *Successful Failures: Economic Sanctions, Humanitarianism, and the Undoing of Post-Colonial Sovereignty*, YALE J. INT’L L. ONLINE (2023).

<sup>87</sup>See *id.* (“Concerns about the impact of sanctions on civilians have generally failed to bring about concrete legal limits on the use of sanctions as a tool of foreign policy.”); Chachko & Heath, *supra* note 5, at 137; Armin Steinbach, Jerg Gutmann, Matthias Neuenkirch & Florian Neumeier, *Economic Sanctions and Human Rights: Quantifying the Legal Proportionality Principle*, 36 HARV. HUM. RTS. J. 1, 3 (2023); Alexandra Hofer, *The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?*, 16 CHINESE J. INT’L L. 175, 179 (2017) (“[I]dentifying unlawful economic coercion remains a legal grey area.”); Tom Ruys & Cedric Ryngaert, *Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, 0 BRIT. Y.B. INT’L L. 2, 10 (2020); Tom Ruys, *Sanctions, Retorsions, and Countermeasures: Concepts and International Legal Framework*, in RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW 10 (Larissa van den Herik ed. 2016); Alena F. Douhan, *Unilateral Coercive Measures: Effects and Legality Issues*, YALE J. INT’L L. ONLINE (June 20, 2023), <https://www.yjil.yale.edu/unilateral-coercive-measures-effects-and-legality-issues/> [https://perma.cc/XYC5-6F8K] (listing ten different groups of international law norms that sanctions may violate, from state and official immunity to the Bern Convention of Postal Relations).

with core requirements of an international trade and investment regime built around non-discrimination and trade liberalization.<sup>88</sup> Security exceptions typically allow a state to take “any action which it considers necessary for the protection of its essential security interests” in time of war or emergency.<sup>89</sup>

Domestic legal constraints on geopolitical sanctions practices in the key sanction-imposing jurisdictions are rudimentary as well. U.S. law in particular is rife with authority to impose national security economic restrictions and barriers.<sup>90</sup> The Biden Administration has used these powers extensively against Russia.<sup>91</sup>

One form of national security trade restrictions is the Commerce Department’s Entity List, which subjects persons and entities to special export licensing requirements for national security reasons.<sup>92</sup> The U.S. has used this authority to impose export controls on Russian and related entities.<sup>93</sup> But the cornerstone of the U.S. sanctions regime is the 1977 International Emergency Economic Powers Act (IEEPA).<sup>94</sup> Statutes like the Antiterrorism and Effective

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<sup>88</sup> See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

<sup>89</sup> General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

<sup>90</sup> Kathleen Claussen, *Trade’s Security Exceptionalism*, 72 STAN. L. REV. 1097, 1100 (2020); see also J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1029 (2020).

<sup>91</sup> See Press Release, White House, *supra* note 50.

<sup>92</sup> The Department’s Bureau of Industry and Security (BIS) has published the Entity List since 1997. *Entity List FAQs*, BUREAU OF INDUS. & SEC., [https://www.bis.doc.gov/index.php/component/fsj\\_faqs/cat/33-entity-list-faqs#faq\\_105](https://www.bis.doc.gov/index.php/component/fsj_faqs/cat/33-entity-list-faqs#faq_105) [<https://perma.cc/WSM8-XL87>]. The grounds for inclusion in the Entity List are activities designated by the State Department and ones that are contrary to U.S. national security and foreign policy interests. *Entity List*, BUREAU OF INDUS. & SEC., <https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list> [<https://perma.cc/56Y6-74MS>]. The Export Administration Regulations (EAR) govern the Entity List. See 15 C.F.R. §§ 744.11, 744.16 (2023).

<sup>93</sup> See, e.g., Press Release, Bureau of Indus. & Sec., U.S. Dep’t of Com., Commerce Expands and Aligns Restrictions with Allies and Partners and Adds 71 Entities to Entity List in Latest Response to Russia’s Invasion of Ukraine (May 19, 2023), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3273-2023-05-19-bis-press-release-russia-rules-and-joint-bis-fincen-alert/file> [<https://perma.cc/TU42-G8UR>].

<sup>94</sup> See International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1707; National Emergencies Act, 50 U.S.C. §§ 1601–1651; CHRISTOPHER A. CASEY, IAN F. FERGUSSON, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 2 (2020); Chachko, *supra* note 7, at 1093–99.

Death Penalty Act of 1996 (AEDPA)<sup>95</sup> and other specific sanctions statutes supplement it in specific contexts.<sup>96</sup>

Under IEEPA, all it takes for the President to trigger a plethora of economic restrictions against virtually any actor is declaring a national emergency.<sup>97</sup> President Biden has relied on this authority extensively to impose individual sanctions and financial restrictions against Russia.<sup>98</sup> Exercises of broad executive power under IEEPA and other sanctions statutes have been subject to minimal judicial scrutiny except when they targeted individuals and entities with strong U.S. ties, such as social networking platform TikTok.<sup>99</sup> And far from checking U.S. sanctions policies, Congress often encourages the creation and expansion of sanctions regimes.<sup>100</sup> The Russia-Ukraine case is no different.<sup>101</sup>

Long before Ukraine, the rule of law critique of economic sanctions seized on these gaping deficits in both domestic and international sanctions governance.<sup>102</sup> However, calls for reform have so far resulted in modest progress. Some courts and international bodies like the United Nations, the

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<sup>95</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

<sup>96</sup> See, e.g., Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017) (codified at 22 U.S.C. § 9401) (concerning Russia, Iran, and North Korea). The implications of sanctions vary according to the designation authority. Generally, IEEPA designations involve the freezing of the assets of the designated person within U.S. jurisdiction and restrictions on doing business with them. 50 U.S.C. § 1702. Similarly, after the State Department designates a Foreign Terrorist Organization (FTO) under AEDPA, the Treasury Department may—but is not required to—block its assets, those providing it material support may face criminal sanctions under the material support, and financial institutions must report FTO assets. See 18 U.S.C. § 2339B.

<sup>97</sup> 50 U.S.C. § 1701.

<sup>98</sup> The numerous relevant executive orders and actions are collected at, *Ukraine-/Russia-Related Sanctions*, OFF. OF FOREIGN ASSETS CONTROL, <https://ofac.treasury.gov/sanctions-programs-and-country-information/ukraine-russia-related-sanctions> [<https://perma.cc/N7TL-Z9T7>].

<sup>99</sup> See Chachko, *supra* note 7, at 1136; PETER JEYDEL & BRIAN EGAN, AM. SOC'Y OF INT'L L., AN "IEEPA-FREE ZONE" FOR TIKTOK AND OTHER CHINESE MOBILE APPLICATIONS? 1 (Feb. 8, 2021), <https://www.asil.org/insights/volume/25/issue/2/ieepa-free-zone-tiktok-and-other-chinese-mobile-applications> [<https://perma.cc/8A6D-KB5E>].

<sup>100</sup> See, e.g., Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017); 18 U.S.C. § 2339B.

<sup>101</sup> See, e.g., Stephen Losey, *Congress Urges 'Crushing' Sanctions, Bolstered NATO Defenses After Ukraine Assault*, DEF. NEWS (Feb. 24, 2022), <https://www.defensenews.com/congress/2022/02/24/congress-urges-crushing-sanctions-bolstered-nato-defenses-after-ukraine-assault/> [<https://perma.cc/3HZH-9YTB>]; see also Edoardo Saravalle, *Why Congress Should Stay Out of U.S. Sanctions Policy on Russia*, JUST SEC. (Mar. 21, 2022), <https://www.justsecurity.org/80731/why-congress-should-stay-out-of-u-s-sanctions-policy-on-russia/> [<https://perma.cc/4UH3-8KGB>].

<sup>102</sup> Chachko & Heath, *supra* note 5, at 139; see also Rep. of the Hum. Rts. Council, at 13, U.N. Doc. A/HRC/48/59 (2021).

European Court of Justice, and the World Trade Organization have engaged in increasingly searching review of unilateral and multilateral sanctions and economic security measures.<sup>103</sup> By and large, however, these reviewing bodies have emphasized compliance with due process requirements such as reasoning, evidence, and good faith in the sanctions implementation process.<sup>104</sup> But no similar progress occurred with respect to constraints on the *resort* to sanctions.

Ukraine added urgency and gave new dimensions to this conversation. The salience of the war and the scope of international sanctions against Russia sparked renewed interest not only in the specifics of the Russia sanctions regime, but in sanctions governance more broadly.<sup>105</sup> Expanding on the more traditional due process-centered version of the rule of law critique, scholars and other stakeholders began to advocate for substantive constraints on economic sanctions.<sup>106</sup> Proposals in the Ukraine case that would extend the reach of sanctions even further have fueled concerns that sanctions policies are beginning to encroach on even the minimal international and domestic substantive legal constraints that do exist.

One example is the debate over the Biden administration potentially using seized Russian assets to help fund Ukraine's recovery. Although some prominent legal scholars have ruled such diversion lawful,<sup>107</sup> others warned that it would run afoul of both domestic and international law.<sup>108</sup>

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<sup>103</sup> See, e.g., Chachko & Heath, *supra* note 5, at 137. Panel Report, *Russia—Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019); Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, *Comm'n v. Kadi*, ECLI:EU:C:2013:518 3 (July 18, 2023); *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 111–12 (D.D.C. 2020); Devika Hovell, *Due Process in the United Nations*, 110 AM. J. INT'L L. 1, 1, 22–29 (2016).

<sup>104</sup> See Chachko & Heath, *supra* note 5, at 138.

<sup>105</sup> *Id.*; see also sources cited *supra* note 2.

<sup>106</sup> See CASEY, FERGUSSON, RENNACK & ELSEA, *supra* note 94, at 9; Chachko & Heath, *supra* note 5, at 135.

<sup>107</sup> See Laurence H. Tribe & Jeremy Levin, *\$100 Billion. Russia's Treasure in the U.S. Should be Turned Against Putin*, N.Y. TIMES (Apr. 15, 2022), <https://www.nytimes.com/2022/04/15/opinion/russia-war-currency-reserves.html> [<https://perma.cc/DV4L-RKK6>]; Laurence H. Tribe, *Does American Law Currently Authorize the President to Seize Sovereign Russian Assets?*, LAWFARE (May 23, 2022), <https://www.lawfaremedia.org/article/does-american-law-currently-authorize-president-seize-sovereign-russian-assets> [<https://perma.cc/HAQ7-DFSS>]; see also Philip Zelikow, *A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine*, LAWFARE (May 12, 2022), <https://www.lawfaremedia.org/article/legal-approach-transfer-russian-assets-rebuild-ukraine> [<https://perma.cc/QL56-XJZ7>]; Evan Criddle, *Rebuilding Ukraine Will Be Costly. Here's How to Make Putin Pay*, POLITICO (Mar. 30, 2022), <https://www.politico.com/news/magazine/2022/03/30/rebuilding-ukraine-make-putin-pay-00021649> [<https://perma.cc/FA98-TF82>].

<sup>108</sup> Paul B. Stephan, *Seizing Russian Assets*, 17 CAP. MKTS. L.J. 276, 276–77 (2022); Scott R. Anderson & Chimène Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, LAWFARE (May 26, 2022), <https://www.lawfaremedia.org/article/legal-challenges-presented-seizing-frozen-russian-assets> [<https://perma.cc/MAF7-N3EV>]; Paul

Domestically, IEEPA only contemplates the blocking of property, not its permanent seizure and transfer, with the exception of cases in which the United States is directly involved in hostilities.<sup>109</sup> Seizure of state property such as the blocked property of Russia's central bank raises additional questions under the Foreign Sovereign Immunities Act (FSIA),<sup>110</sup> and alternatives like civil forfeiture authority only cover a fraction of seized Russian assets because they hinge on the existence of a crime under U.S. law.<sup>111</sup> Much of the sanctioned conduct under the Russia sanctions regime does not have a corresponding criminal offense in the United States.<sup>112</sup> Seizure of Russian assets would also raise unsettled constitutional due process questions under the Fifth Amendment's Due Process and Takings clauses.<sup>113</sup> These arguments appear to have been persuasive. U.S. Treasury Secretary Yellen publicly stated that she did not believe the United States had legal authority to move forward with Russian asset seizure.<sup>114</sup>

From an international law viewpoint, seizure and reallocation of Russian assets is at odds with the international law of sovereign immunity, which grants broad protection to sovereign assets and particularly central bank assets.<sup>115</sup> Iran has challenged similar U.S. actions against the Central Bank of Iran at the ICJ citing violations of the international law of sovereign immunity, among other claims.<sup>116</sup> The Court did not ultimately decide those claims on the merits.<sup>117</sup>

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Stephan, *Response to Philip Zelikow: Confiscating Russian Assets and the Law*, LAWFARE (May 13, 2022), <https://www.lawfaremedia.org/article/response-philip-zelikow-confiscating-russian-assets-and-law> [<https://perma.cc/MP7Z-M9JP>].

<sup>109</sup> Anderson & Keitner, *supra* note 108.

<sup>110</sup> 28 U.S.C. §§ 1602–1611.

<sup>111</sup> Anderson & Keitner, *supra* note 108.

<sup>112</sup> *See id.*

<sup>113</sup> *See id.*

<sup>114</sup> David Lawder, *Yellen: Not Legal for U.S. to Seize Russian Official Assets*, U.S. NEWS & WORLD REP. (May 18, 2022), <https://www.usnews.com/news/world/articles/2022-05-18/yellen-not-legal-for-u-s-government-to-seize-russian-central-bank-assets> [<https://perma.cc/HT9D-V3EQ>].

<sup>115</sup> Anderson & Keitner, *supra* note 108.

<sup>116</sup> *See* Elena Chachko, *Certain Iranian Assets: The International Court of Justice Splits the Difference Between the United States and Iran*, LAWFARE (Feb. 14, 2019), <https://www.lawfaremedia.org/article/certain-iranian-assets-international-court-justice-splits-difference-between-united-states-and-iran> [<https://perma.cc/S6L4-ZL4C>].

<sup>117</sup> *See id.*; Keian Razipour, *After ICJ's "Certain Iranian Assets" Judgment, Iran and United States Both Claim Victory*, JUST SEC. (Apr. 17, 2023), <https://www.justsecurity.org/85982/after-icjs-certain-iranian-assets-judgment-iran-and-united-states-both-claim-victory/> [<https://perma.cc/RD36-XCRE>] (evaluating the ICJ's merits judgment in the case, which was limited to claims under the applicable U.S.-Iran bilateral treaty); Chimène Keitner, *World Court Rules on Iran Challenge to US Suits for Acts of Terrorism*, JUST SEC. (Feb. 19, 2019), <https://www.justsecurity.org/62604/unpacking-icj-judgment-certain-iranian-assets/> [<https://perma.cc/376H-Y7L7>].

Notably, asset *freezes* of sovereign property may be lawful as a form of countermeasures.<sup>118</sup> An asset freeze means that the assets cannot be mobilized by their owner, but the owner retains title, and the assets can be made available to the owner once the freeze is lifted.<sup>119</sup> Countermeasures are actions a state may take unilaterally in response to a violation of international obligation by another party.<sup>120</sup> Not so when it comes to permanent seizure. Countermeasures must be temporary, reversible, and proportional.<sup>121</sup> They are not meant to be a form of punishment.<sup>122</sup> The permanent seizure and confiscation of Russian assets would violate these requirements.<sup>123</sup> Given these international law concerns, Chimène Keitner and Scott Anderson implored the United States to form a robust international law justification for any potential seizure of Russian property “because future stability of the sovereign immunities that the United States relies on around the world depends on preserving common understandings of the applicable legal framework.”<sup>124</sup>

Ukraine also made salient a debate about the legality of secondary sanctions, as U.S. policymakers contemplated this option to increase pressure on Russia further.<sup>125</sup> Secondary sanctions target non-U.S. third parties that transact with a U.S. designated individual or entity by restricting their access to the U.S. market. For example, if a European company provides goods to a sanctioned Russian company, that company could itself be placed under U.S. sanctions for that conduct.<sup>126</sup> Secondary sanctions are about using U.S. market power to deter any dealings with U.S. sanctioned entities globally.<sup>127</sup> The United States has so far used secondary sanctions mostly against Iran and North Korea.<sup>128</sup> And while the Treasury Department indicated that it may use secondary sanctions against

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<sup>118</sup> See G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts, arts. 49–54 (Jan. 28, 2002).

<sup>119</sup> See Lawder, *supra* note 114.

<sup>120</sup> See G.A. Res. 56/83, *supra* note 118, art. 49.

<sup>121</sup> *Id.* arts. 49, 51.

<sup>122</sup> *Id.* art. 49.

<sup>123</sup> See, e.g., *Proposals to Seize Russian Assets to Rebuild Ukraine: Session 22 of the Congressional Study Group*, BROOKINGS (Dec. 29, 2022), <https://www.brookings.edu/articles/proposals-to-seize-russian-assets-to-rebuild-ukraine/> [https://perma.cc/G4PU-NQQM].

<sup>124</sup> Anderson & Keitner, *supra* note 108.

<sup>125</sup> See, e.g., Kate Abnett, Max Hunder & Timothy Gardner, *Ukraine Lawmakers Urge U.S., EU to Hit Russian LNG with Secondary Sanctions*, REUTERS (Apr. 13, 2023), <https://www.reuters.com/world/europe/ukraine-lawmakers-urge-us-eu-hit-russian-lng-with-secondary-sanctions-2023-04-13/> [https://perma.cc/WE4J-C7YC].

<sup>126</sup> See Ruys, *supra* note 87, at 8.

<sup>127</sup> See Ruys & Ryngaert, *supra* note 87, at 16.

<sup>128</sup> *Id.* at 8–9; Jason Bartlett & Megan Ophel, *Sanctions by the Numbers: U.S. Secondary Sanctions*, CTR. FOR A NEW AM. SEC. (Aug. 26, 2021), <https://www.cnas.org/publications/reports/sanctions-by-the-numbers-u-s-secondary-sanctions> [https://perma.cc/2XWR-EZHK].

those dealing with sanctioned Russian individuals and entities, the United States appears to have used that authority sparingly so far.<sup>129</sup>

Critics of U.S. application of secondary sanctions—including, at least in the past, the EU—argue that they are extraterritorial measures that exceed U.S. jurisdiction, punish lawful economic activity in foreign jurisdictions, and therefore violate international law.<sup>130</sup> Secondary sanctions may capture conduct that has no U.S. nexus.<sup>131</sup> In 2018, the EU went as far as revising its rarely used Blocking Statute,<sup>132</sup> a 1996 measure that prohibits EU operators from complying with certain U.S. secondary sanctions, to counter U.S. secondary sanctions against Iran.<sup>133</sup> However, even the EU has now moved to impose secondary sanctions in relation to Russia.<sup>134</sup>

Like seizure of blocked assets, secondary sanctions are an example of novel sanctions practices that push the boundaries of even the extremely permissive global sanctions governance regime. The prospect brought rule of law objections to sanctions to the fore of the sanctions debate.

## B. *Unintended Consequences*

Many U.S. and other sanctions regimes target relatively isolated and small economies. The impact of sanctions on Cuba, Syria, Iran, Venezuela, North Korea, and others has been relatively localized and contained.<sup>135</sup> The sanctions

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<sup>129</sup> See, e.g., Agathe Demarais, *Russia Sanctions: 10 Lessons and Questions for What Comes Next*, FOREIGN POL’Y (Feb. 24, 2023), <https://foreignpolicy.com/2023/02/24/russia-sanctions-war-ukraine-lessons-putin-energy-gas-oil/> [https://perma.cc/MLY9-VUFG]; see also Daniel Flatley, *What Secondary Sanctions Mean, For Russia and the World*, BLOOMBERG L. (Apr. 5, 2022), [https://www.bloomberg.com/news/articles/2022-04-05/what-secondary-sanctions-mean-for-russia-and-world-quicktake?in\\_source=embedded-checkout-banner&leadSource=verify%20wall](https://www.bloomberg.com/news/articles/2022-04-05/what-secondary-sanctions-mean-for-russia-and-world-quicktake?in_source=embedded-checkout-banner&leadSource=verify%20wall) [https://perma.cc/MP2R-SP7B].

<sup>130</sup> Julia Schmidt, *The Legality of Unilateral Extra-Territorial Sanctions Under International Law*, 27 J. CONFLICT & SEC. L. 53, 55 (2022) (“The EU consistently views the extra-territorial application of unilateral sanctions against European[s] . . . to be in violation of international law.”).

<sup>131</sup> See *id.*; see also, e.g., Ruys, *supra* note 87, at 9; Klaus E. Meyer, Tony Fang, Andrei Y. Panibratov, Mike W. Peng & Ajai Gaur, *International Business Under Sanctions*, 58 J. WORLD BUS. 101426, at 1, 1 (2023).

<sup>132</sup> Council Regulation 2271/96, 1996 O.J. (L 309) 1 (EC).

<sup>133</sup> *Id.*; Commission Delegated Regulation 2018/1100, 2018 O.J. (L 199) 1 (EC).

<sup>134</sup> See Rikard Jozwiak, *Wider Europe Briefing: Unpacking the Latest EU Sanctions on Russia. Plus, Two Damning Reports on Moscow and Minsk*, RADIO FREE EUR. (May 15, 2023), <https://www.rferl.org/a/wider-europe-jozwiak-european-union-russia-sanctions-belarus/32411935.html> [https://perma.cc/VJA4-RPZJ].

<sup>135</sup> See, e.g., Emre Hatipoglu, Jennifer Considine & Abdullah AlDayel, *Unintended Transnational Effects of Sanctions: A Global Vector Autoregression Simulation*, 34 DEF. & PEACE ECON. 863, 863 (2023), <https://www.tandfonline.com/doi/epdf/10.1080/10242694.2022.2073429?needAccess=true&role=button> [https://perma.cc/5J76-ZJAL]; see also U.N. Secretary-General, *Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of*

against Russia are unique in that they target one of the world's largest economies, with deep ties to the global economy and a critical role in the international energy and commodity markets. The barrage of sanctions against Russia is widely believed to have had profound global economic impact, although there is disagreement about the extent of that impact.<sup>136</sup> Accordingly, Russia sanctions brought renewed attention to the systemic effects of sanctions and their unforeseen consequences.<sup>137</sup>

One set of arguments along these lines focuses on the risk that the United States may be overplaying its hand as the world's only "sanctions superpower."<sup>138</sup> Abraham Newman and Henry Farrell presciently argued before the Ukraine invasion that one of the reasons the United States has been able to exert so much economic pressure on global actors through sanctions is its dominance in global networks in our modern, interconnected world.<sup>139</sup> The United States has been able to harness its control over chokepoints in international financial and technology networks to squeeze adversaries out. In other words, the United States has weaponized global interdependence to advance its national interests.<sup>140</sup>

Yet the scope of sanctions against Russia has led observers to warn that the United States may be overreaching. The sanctions could undermine financial and other networks currently dominated by western actors and the U.S. dollar.<sup>141</sup> Chocking off Russia's access to the global financial system could precipitate the creation of separate rival networks, complicating matters for U.S. businesses that operate globally and opening them up for retaliation. With Russia finding

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*America Against Cuba*, U.N. Doc. A/68/116 (May 21, 2013), [https://unctad.org/system/files/official-document/a68d116\\_UNCTADcontribution\\_en.pdf](https://unctad.org/system/files/official-document/a68d116_UNCTADcontribution_en.pdf) [<https://perma.cc/3VJA-6R8M>]; Press Release, Wash. Off. on Lat. Am., New Report Documents How U.S. Sanctions Have Directly Aggravated Venezuela's Economic Crisis (Oct. 29, 2020), <https://www.wola.org/2020/10/new-report-us-sanctions-aggravated-venezuelas-economic-crisis/> [<https://perma.cc/EW8X-W3ZC>].

<sup>136</sup> See, e.g., REBECCA M. NELSON, CONG. RSCH. SERV., IF12092, *THE ECONOMIC IMPACT OF RUSSIA SANCTIONS 1* (2022).

<sup>137</sup> See *supra* note 2 and accompanying text. On the unintended effects of sanctions, see generally Mulder, *supra* note 7. Published shortly before the Russian invasion, this study shows that the impact of economic sanctions is unpredictable, and that the harsher the sanctions, the greater the risk of unintended consequences.

<sup>138</sup> See Henry J. Farrell & Abraham L. Newman, *The U.S. Is the Only Sanctions Superpower. It Must Use That Power Wisely*, N.Y. TIMES (Mar. 16, 2022), <https://www.nytimes.com/2022/03/16/opinion/us-russia-sanctions-power-economy.html> [<https://perma.cc/Z88W-HWUB>].

<sup>139</sup> *Id.*

<sup>140</sup> See Henry Farrell & Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44 INT'L SEC. 42, 42 (2019).

<sup>141</sup> See *id.* at 78; see also Carla Norrlöf, *Will Economic Statecraft Threaten Western Currency Dominance? Sanctions, Geopolitics, and the Global Monetary Order*, ATL. COUNCIL (Sept. 27, 2022), <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/will-economic-statecraft-threaten-western-currency-dominance-sanctions-geopolitics-and-the-global-monetary-order/> [<https://perma.cc/LDL6-82VH>].

alternative markets in China, India, and elsewhere and seeking replacements for western financial networks and goods, there is evidence that this is already beginning to take place.<sup>142</sup>

A further concern relates to sanctions spillover. The larger and more integrated an economy under sanctions is in the global economy, the more avenues there are for “sanctions shocks to spill over into the world economy.”<sup>143</sup> The sanctions on Russia have had substantial spillover effects on the global economy. They raised energy and commodity prices, straining both emerging markets and strong economies like the EU that depended on Russian energy products.<sup>144</sup> They have disrupted global supply chains.<sup>145</sup> There is insufficient attention in existing sanctions governance mechanisms to the global economic costs of sanctions with systemic economic effects and ways to contain and mitigate them.<sup>146</sup>

Adding to these systemic economic effects, the cost of sanctions also includes soaring compliance costs, especially for banks and other private providers of financial and other services that form an essential part of the sanctions enforcement mechanism.<sup>147</sup> They are the ones that hold frozen assets, are required to report them, and must exercise perpetual vigilance lest they accidentally clear a sanctioned transaction.<sup>148</sup> A constantly evolving system of designations, licenses, regulations, and export controls has made it extremely difficult for private actors and their legal advisers to manage risk.<sup>149</sup> Complicating things further is the fact that each jurisdiction—the United States, the European Union, Canada, the United Kingdom, and the list goes on—has its own system of restrictions.<sup>150</sup> This requires private actors to adhere to the most

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<sup>142</sup> See *infra* Part II.B.

<sup>143</sup> See Nicholas Mulder, *The Sanctions Weapon*, FIN. & DEV., June 2022, at 22–23, <https://www.imf.org/en/Publications/fandd/issues/2022/06/the-sanctions-weapon-mulder> (on file with the *Ohio State Law Journal*).

<sup>144</sup> See, e.g., Channing Arndt, Xinshen Diao, Paul Dorosh, Karl Pauw & James Thurlow, *The Ukraine War and Rising Commodity Prices: Implications for Developing Countries*, 36 GLOB. FOOD SEC. 100680, at 1, 1 (2023); Chachko & Linos, *supra* note 44, at 783–85.

<sup>145</sup> See, e.g., ORG. FOR ECON. COOP. & DEV., THE SUPPLY OF CRITICAL RAW MATERIALS ENDANGERED BY RUSSIA’S WAR ON UKRAINE 1 (Aug. 2022), <https://www.oecd.org/ukraine-hub/policy-responses/the-supply-of-critical-raw-materials-endangered-by-russia-s-war-on-ukraine-e01ac7be/> (on file with the *Ohio State Law Journal*).

<sup>146</sup> See generally Mulder, *supra* note 143, at 22–23.

<sup>147</sup> See, e.g., RACHEL WOLCOTT, BRETT WOLF & TODD EHRET, THOMSON REUTERS, THE FOG OF SANCTIONS: GLOBAL BANKS AND BUSINESSES FACE UNPRECEDENTED CHALLENGES IN APPLYING MEASURES AGAINST RUSSIA 3 (Randall A. Mikkelsen & Alexander Robson eds., 2022), <https://www.thomsonreuters.com/en-us/posts/wp-content/uploads/sites/20/2022/07/Russia-Sanctions-White-Paper-2022.pdf> [<https://perma.cc/H9PA-PN7U>].

<sup>148</sup> See *id.* at 9–10.

<sup>149</sup> See *id.* at 3.

<sup>150</sup> See *id.*

restrictive sanctions regime or to invest substantially in tailoring their operations to comply with the specific requirements of each jurisdiction.<sup>151</sup>

A related consequence is sanctions overcompliance. Overcompliance means “situations in which market participants apply sanctions beyond what is legally mandated.”<sup>152</sup> Sanctions may have a chilling effect even on permissible transactions in a saturated sanctions environment like the Russia sanctions regime. This may include not only for-profit entities but also non-governmental organizations (NGO) seeking to provide anything from humanitarian assistance to legal advising to sanctioned countries and entities.<sup>153</sup> Overcompliance may therefore constrict lawful and desirable business activity. It may exacerbate the direct cost of sanctions as well as their humanitarian impact.

As a result, sanctions regimes as extensive as the Russia sanctions may end up creating an effect similar to old-school blanket sanctions, negating the advantages policymakers may attribute to more targeted sanctions.<sup>154</sup> Overcompliance, then, may exacerbate the unintended consequences of sanctions by restricting much more economic activity than policymakers may have originally intended with substantial added humanitarian harms.

### C. Political Economy

The rule of law critique and the unintended consequences critique take issue with how sanctions are governed and highlight their risks. Nevertheless, they accept that properly calibrated, economic sanctions can be a legitimate—indeed, necessary—mode of statecraft. What sets the political economy critique apart is that it views the practice as fundamentally unjust and illegitimate.<sup>155</sup> The political economy critique maintains that sanctions build on engrained global power asymmetries perpetuated by colonial legacies and the neoliberal post-World War II global order.

One indication of the growing salience of the political economy critique of sanctions in mainstream sanctions work is the 2023 publication of an edited volume on *Sanctions as War: Anti-Imperialist Perspectives on American Geo-Economic Strategy*.<sup>156</sup> Another was a symposium the Yale Journal of International Law and the Law and Political Economy (LPE) blog convened recently on third world approaches to international law and economic

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<sup>151</sup> *Id.*

<sup>152</sup> See, e.g., Pierre-Hugues Verdier, *Sanctions Overcompliance: What, Why, and Does It Matter?*, 48 N.C. J. INT’L L. 471, 472 (2023).

<sup>153</sup> See, e.g., Holder v. Humanitarian L. Project, 561 U.S. 1, 7–8, 40 (2010).

<sup>154</sup> Verdier, *supra* note 152, at 487.

<sup>155</sup> See, e.g., Aziz Rana & Asli U. Bâli, *Sanctions Are Inhumane—Now, and Always*, BOS. REV. (Mar. 26, 2020), <https://www.bostonreview.net/articles/aziz-rana-asli-u-bali-sanctions-are-inhumane-now-and-always/> [<https://perma.cc/ER5L-9VFV>].

<sup>156</sup> See generally SANCTIONS AS WAR: ANTI-IMPERIALIST PERSPECTIVES ON AMERICAN GEO-ECONOMIC STRATEGY (Stuart Davis & Immanuel Ness eds., 2023).

sanctions.<sup>157</sup> Motivated by the Russia sanctions, the symposium provides a snapshot of different strands of the political economy critique in current scholarship.

Much of the LPE sanctions scholarship recasts economic sanctions as “financial imperialism,” which manifests not in territorial control but in the control Western powers exert through the dollar-dominated international financial system.<sup>158</sup> In this telling, today’s sanctions “imperialists”—the United States and its Western allies—“dominate state and non-state actors by manipulating and controlling international financial markets, investments, and trade.”<sup>159</sup> The dominated are, for the most part, nations in the global south.<sup>160</sup>

Among other things, the argument goes, sanctions imperialists use sanctions to appropriate the sovereign functions of other nations by “undoing and re-assembling the sovereignty of a postcolonial state.”<sup>161</sup> The United States and other western powers have assumed sovereign functions of weaker nations by, for instance, blocking the assets of central banks in Russia, Afghanistan, and Iran,<sup>162</sup> and picking winners in internal political contests. An example of the latter is the United States giving Venezuela’s Juan Guaido access to Venezuelan frozen assets in the United States while denying that access to the de-facto Venezuelan government, the Maduro government.<sup>163</sup>

An important element of the political economy critique of sanctions challenges the international law distinction between physical and economic force. It posits that economic sanctions can be just as destructive as war.<sup>164</sup> Therefore, there is no reason for international law to treat economic coercion as a benign and permissible alternative to force.<sup>165</sup> One implication is the need for accountability for sanctions harms under international law. Today, use of military force is subject to certain mechanisms of international accountability

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<sup>157</sup> *Symposia—Economic Sanctions & TWAIL*, L. & POL. ECON. PROJECT: BLOG (Sept. 10, 2023), <https://lpeproject.org/symposia/economic-sanctions-twail/> [https://perma.cc/P7DL-JGLA].

<sup>158</sup> Maryam Jamshidi, *Sanctions’ New Colonizers*, YALE J. INT’L L. ONLINE (June 22, 2023), <https://www.yjil.yale.edu/sanctions-new-colonizers/> [https://perma.cc/M9PX-6RCA].

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See Tzouvala, *supra* note 86.

<sup>162</sup> See Jamshidi, *supra* note 158.

<sup>163</sup> See Tzouvala, *supra* note 86.

<sup>164</sup> *Symposium: Third World Approaches to International Law (TWAIL) & Economic Sanctions*, YALE J. INT’L L. ONLINE (June 20, 2023), <https://www.yjil.yale.edu/symposium-third-world-approaches-to-international-law-economic-sanctions/> [https://perma.cc/FES8-LSV7] (“This Symposium provides a clarion call for international law scholars, practitioners, and members of civil society . . . to interrogate the dominant discourse presenting sanctions as nonviolent tools for international law enforcement.”).

<sup>165</sup> See Vasuki Nesiiah, *The Fog of Peace: Who Profits from Economic Sanctions?*, YALE J. INT’L L. ONLINE (June 27, 2023), <https://www.yjil.yale.edu/the-fog-of-peace-who-profits-from-economic-sanctions/> [https://perma.cc/R7VP-PU8N].

like potential criminal liability under international criminal law.<sup>166</sup> No equivalent exists for the economic harms. When people in sanctioned countries die of preventable medical conditions, plane crashes because of aging fleets or food shortages, it is hard to establish a direct causal link between these outcomes and sanctions although sanctions are often (at least) a contributing factor.<sup>167</sup>

Aslı Bâli contends that the “international legal order that legitimates economic coercion,” which sanctions epitomize, may be shifting as the U.S.-dominated unipolar global order may be coming to an end.<sup>168</sup> U.S. dominance has allowed the United States to apply economic coercion without fear of retaliation and without the targets being able to raise effective defenses. As the world transitions toward multipolarity, however, sanctions become a much less effective device for enforcing American preferences. Sanctions targets might turn to U.S. rivals—far more capable to resist U.S. economic pressure and able to retaliate in kind—for assistance. Russia is a case in point.<sup>169</sup>

### III. A QUALIFIED DEFENSE OF VIRTUE SANCTIONING

The rule of law critique of sanctions brings to the fore the puzzling lack of sustained development of international and domestic legal regulation of economic sanctions. The unintended consequences critique highlights the difficult implementation problems that sanctions policies must address to avoid disintegration of global networks, address overcompliance and contain sanctions-related global shocks. The political economy critique surfaces the political realities that make sanctions in their current form possible, as well as the injustices and selectivity that permeate this practice. If sanctions truly are lawless (if nominally lawful in some formal sense), unjust, and ineffective, what if anything explains their continued use? What justifies it?

The philosophical concept of virtue signaling may be illuminating here. Virtue signaling is opportunistic, status-seeking engagement in moral discourse to augment one’s own reputation.<sup>170</sup> One way to understand sanctions is to view them as self-interested expressions of a moral and legal stance. Thus understood, economic sanctions are not imposed because they are an effective way to realize their concrete policy objectives with respect to a particular target. Policymakers know this, or at least they ought to know this given mounting evidence and

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<sup>166</sup> *See id.*

<sup>167</sup> Jessica Whyte, *The Opacity of Economic Coercion*, YALE J. INT’L L. ONLINE (June 21, 2023), <https://www.yjil.yale.edu/the-opacity-of-economic-coercion/> [https://perma.cc/F2JK-QU29]; Michael Fakhri, *Situating Unilateral Coercive Measures Within a Broader Understanding of Systemic Violence*, YALE J. INT’L L. ONLINE (June 23, 2023), <https://www.yjil.yale.edu/situating-unilateral-coercive-measures-within-a-broader-understanding-of-systemic-violence/> [https://perma.cc/L4XE-RYM2].

<sup>168</sup> Aslı Ü. Bâli, *Weapons Against the Weak*, YALE J. INT’L L. ONLINE (June 29, 2023) <https://www.yjil.yale.edu/weapons-against-the-weak/> [https://perma.cc/S8LZ-ZDFE].

<sup>169</sup> *See supra* notes 62–66 and accompanying text.

<sup>170</sup> *See supra* notes 17–16 and accompanying text.

research on sanctions ineffectiveness.<sup>171</sup> Instead, sanctions are a means for powerful states to perform international “virtue” and back it up with concrete consequences. They engage in such performance because it serves their interests, and not necessarily out of genuine moral (or legal) conviction.

International “virtue” in the sanctions context means respect for key international norms. Western powers and their allies impose sanctions because sanctions communicate and reiterate a certain view of international law and the international order—the post-World War II liberal view, grounded in the prohibition on international use of force and individual human rights. As those who have benefited most from this global order, the dominant sanctions-imposing states and organizations like the United States and the EU gain from the act of “virtue sanctioning” independently of sanctions’ effectiveness in each case.

“Virtue sanctioning” may be worth defending despite the less-than-pure motivations of sanctions imposers, their selectivity in choosing sanctions targets, and their own flawed records.<sup>172</sup> The continued existence and relevance of international norms hinges on global actors’ willingness and capacity to call out violations and impose consequences.<sup>173</sup> Sanctions are often the only means available for this purpose. Military force is generally off the table for legal, political, and operational reasons. The collapse of the international collective security mechanism and the paralysis of the UN Security Council mean that unilateral economic and diplomatic action often remains the only recourse for those seeking to enforce an international obligation or protest the violation of an international norm.<sup>174</sup>

The absence of alternative non-military tools for imposing consequences for international law violations also means that sanctions retain an important role in the global order besides their expressive function. The availability of sanctions makes more aggressive policy options such as use of force to settle geopolitical conflict less appealing. They redirect pressure on powerful actors to respond to actual and perceived violations of international norms (or, indeed, threats to their own interests) toward non-military means.

For these reasons, treating sanctions as they are practiced today as wholly illegitimate—the view of the proponents of the political economy critique—may prove self-defeating. One possibility is that no sanctions would mean greater

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<sup>171</sup> See JONES, *supra* note 69.

<sup>172</sup> After all, the United States and the EU have been accused of engaging in similar violations of international law to those of their sanctions targets. See McGreal, *supra* note 15.

<sup>173</sup> See, e.g., STRATEGIC FUTURES GRP., NAT’L INTEL. COUNCIL, US-BACKED INTERNATIONAL NORMS INCREASINGLY CONTESTED 6 (Oct. 2021), [https://www.dni.gov/files/images/globalTrends/GT2040/NIC-2021-02491\\_GT\\_Future\\_of\\_Int\\_Norms\\_22Mar22\\_UNSOURCED.pdf](https://www.dni.gov/files/images/globalTrends/GT2040/NIC-2021-02491_GT_Future_of_Int_Norms_22Mar22_UNSOURCED.pdf) [<https://perma.cc/X832-WMFR>].

<sup>174</sup> See, e.g., Monica Hakimi, *Unfriendly Unilateralism*, 55 HARV. INT’L L.J. 105, 139 (2014); Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 275 (2011).

odds that powerful states would resort to military force to redress international slights. Another, more likely possibility is that even more grave violations of international norms will go unanswered than the current baseline. This is surely an outcome proponent of the political economy critique who reject sanctions should oppose.

Consider the nature of the violations that provoked some of the major sanctions efforts in recent years: Russia's invasion of a sovereign nation and annexation of foreign territory, Bashar al-Assad's crackdown on civilian population in Syria, including use of chemical weapons, evidence of development of nuclear weapons technology and human rights violations by Iran, multiple violations of international law by North Korea, opposition suppression by Belarus's authoritarian Lukashenka, and more.<sup>175</sup> The political economy critique does not offer any concrete alternatives to war and economic coercion for addressing these situations, barring an unlikely fundamental overhaul of the way the international system works and its internal distribution of power.

The political economy critique of sanctions also appears to scoff at the claim that sanctions are better than military force. It posits that sanctions are no less violent than war, erasing the distinction between military and economic coercion and direct and indirect harms.<sup>176</sup> This argument may be persuasive on some very abstract level. Yes, sanctions may breed severe humanitarian crises and have myriad adverse effects on impacted civilians. But, papering over the economic-military distinction overlooks important differences between military action and economic sanctions in the nature and degree of harm to civilians in target states.

Military action presupposes casualties, including civilian casualties among those not directly participating in hostilities, physical destruction, and displacement.<sup>177</sup> All these harms may be entirely lawful under the current international law regime concerning use of force if they meet certain requirements like necessity and proportionality.<sup>178</sup> The direct consequence of

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<sup>175</sup> See *Sanctions Programs and Country Information*, OFF. OF FOREIGN ASSETS CONTROL, <https://ofac.treasury.gov/sanctions-programs-and-country-information> [https://perma.cc/7TD3-FKY4]; Jonas Elmerraji, *Countries Sanctioned by the US and Why*, INVESTOPEDIA, <https://www.investopedia.com/financial-edge/0410/countries-sanctioned-by-the-u.s.-and-why.aspx> [https://perma.cc/ZF4E-TDAT]; Press Release, U.S. Dep't of the Treasury, U.S. Expands Sanctions on the Belarusian Regime, Marking the Three-Year Anniversary of the Fraudulent August 2020 Presidential Election (Aug. 9, 2023), <https://home.treasury.gov/news/press-releases/jy1682> [https://perma.cc/U4XL-9LR3].

<sup>176</sup> See *supra* Part III.C.

<sup>177</sup> See, e.g., Press Release, Security Council, Ninety Per Cent of War-Time Casualties Are Civilians, Speakers Stress, Pressing Security Council to Fulfil Responsibility, Protect Innocent People in Conflicts, U.N. Press Release SC/14904 (May 25, 2022).

<sup>178</sup> See *Fundamental Principles of IHL*, INT'L COMM. OF THE RED CROSS, [https://casebook.icrc.org/a\\_to\\_z/glossary/fundamental-principles-ihl](https://casebook.icrc.org/a_to_z/glossary/fundamental-principles-ihl) [https://perma.cc/DR6A-HXLF].

economic sanctions is economic restrictions—not bodily and physical harm. In modern practice, sanctions contain humanitarian exceptions, and they are often targeted and reversible. It is easier to control escalation with economic measures compared to military action, where unforeseen events and developments on the ground central policy planners have little control over may provoke further undesired military entanglements. There is much more centralized control over the trajectory of sanctions policies even taking unintended consequences and overcompliance into account.

It follows that sanctions fulfill important expressive and practical functions in the global order. They are one of the few remaining instruments for upholding and enforcing international norms, and they reduce pressure to resort to military force by offering an alternative to war. Those functions make sanctions worth defending.

To this we should add that sanctions can be effective at a “tactical” level. They may not prevent Iran from pursuing nuclear weapons, but they can make it much harder for its nuclear scientists to procure nuclear weapons technology.<sup>179</sup> They may not stop Russia’s war effort, but they can make it much harder for Russia to sustain its military by drying off its access to ammunition, parts, advanced technology, and skilled personnel.<sup>180</sup>

Nonetheless, there is little doubt that modern sanctions practices are deeply flawed. Policymakers and scholars ought to heed the political economy critiques’ call to better account for the power imbalances that foster today’s sanctions mechanisms and skew the distribution of sanctions targets toward the global south. Yet real progress toward remedying these imbalances would require a deeper realignment of the distribution of power in the international system. As Aslı Bâli observes, such re-distribution may already be under way.<sup>181</sup> But this is a broader issue than sanctions.

In the meantime, the pressing challenge for lawyers and policymakers is to develop better mechanisms for sanctions governance. The new wave of post-Ukraine sanctions scholarship offers a roadmap for potential reform.

The rule of law critique underscores the need to reduce the likelihood of indefinite extension of sanctions regimes untethered to their effectiveness. The expressive, norm upholding value of sanctions presumptively diminishes the longer a sanctions regime remains in force while the violation of the norm continues.<sup>182</sup> Mechanisms such as sunsets on sanctions measures, mandatory periodic high-level reviews of the impact of sanctions, reporting to external oversight organs such as legislatures and inspectors-general, and more are just

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<sup>179</sup> See, e.g., *Guidance on Actions Exporters Can Take to Prevent Illicit Diversion of Items to Support Iran’s Nuclear Weapons or Ballistic Missile Programs*, BUREAU OF INDUS. & SCI., <https://www.bis.doc.gov/index.php/licensing/23-compliance-a-training/53-iran-web-guidance> [<https://perma.cc/K4EU-DFZX>].

<sup>180</sup> See Press Release, U.S. Dep’t of the Treasury, *supra* note 46.

<sup>181</sup> Bâli, *supra* note 168.

<sup>182</sup> See STRATEGIC FUTURES GRP., *supra* note 3, at 6.

a few of the available legal tools whose constraining potential has not been exhausted.

Likewise, it is important to create robust mechanisms for individuals and entities subject to sanctions to challenge them. The European Court of Justice has exercised relatively searching judicial review of targeted sanctions.<sup>183</sup> That model should be replicated in other key sanctions-imposing jurisdictions, especially the United States, where courts have largely remained on the sidelines of policing economic sanctions.<sup>184</sup> Procedures for administrative review of designations are also sorely lacking. Treasury's Office of Foreign Assets Control has procedures in place for appealing sanctions and requesting licenses and exemptions.<sup>185</sup> But the procedures are opaque, complex, and inaccessible to those who lack sophisticated legal representation.<sup>186</sup> Better public communication about applicable sanctions and relevant procedures would also help reduce overcompliance due to uncertainty about the scope of prohibited activity.

Those are all procedural fixes. The harder task is to build consensus around substantive constraints on the resort to sanctions under both domestic and international law. Ukraine jumpstarted a conversation about constraining novel extensions of sanctions practices such as secondary sanctions and seizure of frozen assets.<sup>187</sup> This could create momentum for modest constriction of allowable sanctions methods focusing on these two areas.

Moreover, as the unintended consequences critique makes clear, the time is ripe for a serious international effort to regulate sanctions with global systemic effects. Examples from the Ukraine case include the removal of large economies from financial mechanisms like the SWIFT international transaction clearinghouse or imposing energy sanctions on a key global supplier like Russia. To date, such systemic measures have been imposed ad hoc. But this category of measures requires a higher threshold for imposition, careful calibration of scope, humanitarian exceptions, and mitigating measures to reduce the likelihood of sanctions-related global economic shocks. No functioning platform with buy-in from a diverse group of states exists for coordinating these elements. Given the state of relationships between the major sanctions imposing actors and Russia and China, informal coalitions of sanctions imposing states around standards to mitigate the global systemic impact of sanctions may be the only viable path for progress.

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<sup>183</sup> See *supra* note 103 and accompanying text.

<sup>184</sup> See Chachko, *supra* note 110, at 160–61.

<sup>185</sup> See *Sanctions Programs and Country Information*, *supra* note 175; 31 C.F.R. § 501.801 (2023).

<sup>186</sup> See 31 C.F.R. § 501.801 (2023).

<sup>187</sup> See *supra* note 2 and accompanying text.

#### IV. CONCLUSION

The foregoing is, of course, but a thumbnail sketch of potential sanctions governance reforms. The task of overhauling domestic and international sanctions governance is nothing short of monumental. Global powers have used sanctions reflexively and freely for too long. Strong political forces and incentives have perpetuated this status quo. It will doubtless be extraordinarily difficult to shift from a universe of minimal constraint on the resort to sanctions to a system of governance that would counteract their worst implications. But Ukraine has given this project a fighting chance.