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Sanctions and Consequences: Third-state Impacts and the Development of International Law in the Shadow of Unilateral Sanctions on Russia

BY: AVIDAN Y. COVER*

INTRODUCTION

In response to Russia's invasion of Ukraine, NATO member states and their allies have imposed "unprecedented," unilateral economic sanctions to hold Russia accountable, degrade its military capability, and limit its international financial access.¹ From the outset, sanctioning states such as the United States have stated that they "designed these sanctions to maximize the long-term impact on Russia and to minimize the impact on [themselves and their] allies."² These sanctions on an economic power like Russia "have global economic effects far greater than anything seen before."³ And

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1. See U.S. DEP'T OF TREASURY, *U.S. Treasury Announces Unprecedented & Expansive Sanctions Against Russia*, Imposing Swift and Severe Economic Costs (Feb. 24, 2022), <https://home.treasury.gov/news/press-releases/jy0608>. See also THE WHITE HOUSE, *FACT SHEET: United States Takes Further Actions to Counter Sanctions Evasion by Russia* (June 2, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/02/fact-sheet-united-states-takes-further-actions-to-counter-sanctions-evasion-by-russia/>.

2. Eric Garcia, INDEPENDENT, *'Putin chose this war, he will pay': Biden announces 'major' new sanctions on Russia over Ukraine invasion* (Feb. 24, 2022), <https://www.independent.co.uk/news/world/americas/us-politics/biden-today-russia-speech-ukraine-b2022727.html>.

3. Nicholas Mulder, *The Sanctions Weapon*, *International Monetary Fund, Finance and Development* INT'L MONETARY FUND 20 (June 2022), <https://www.imf.org/en/Publications/fandd/issues/2022/06/the-sanctions-weapon-mulder>. See also *id.* at 21 (comparing against past economic sanctions regimes and concluding that "[t]he impact of the sanctions on Russia belongs to an altogether different category. Russia is the world's 11th largest economy, and its role as the prime commodity exporter among emerging markets gives it a structurally significant position."). See also *World Economic Outlook: Inflation Peaking Amid Low Growth*, INT'L MONETARY FUND (January 2023) [hereinafter *World Economic Outlook*], ("The war in Ukraine and the related international sanctions aimed at pressuring Russia to end

there is concern that the unintended consequences of the sanctions will disproportionately harm developing states.

Unilateral sanctions have long been a subject of contention within foreign policy and international law. Once conceived as the panacea to war, scholars have come to appreciate sanctions' destructive impact too. Yet as the United Nations learned from the terrible humanitarian consequences of its sanctions regimes in Iraq and Haiti and wound them down, there has been a rise in unilateral sanctions, particularly imposed by the United States, raising humanitarian concerns along with issues of extraterritorial jurisdiction and imperialism.

The unilateral sanctions against Russia and the prospect of economic spillover effects felt worldwide, but most acutely in the Global South, call for a reexamination of how international law treats sanctions and their unintended consequences. Yet even in the midst of this fast-moving, massive, and complex set of unilateral sanctions there may be emerging welcome developments in the murky legal spaces.

This Article proceeds in three parts. Part One reviews the unilateral sanctions regime against Russia with particular attention expended on the unintended consequences sustained by developing states as well as exemptions that sanctioning states have crafted. The section also addresses the general literature on sanctions and humanitarian impacts. Part Two addresses the international law governing unilateral sanctions, focusing first on the principle of non-intervention and then exploring how sanctions may be classified as countermeasures. The section examines whether general-interest countermeasures are permitted and would apply to the current sanctions regimes. The section also details how countermeasures do not adequately account for and protect the rights of non-targeted third states. Part Three then proposes both substantive legal changes and procedural mechanisms to mitigate unilateral sanctions' unintended consequences. The section sketches a sanctioning state's duty to prevent human rights harms to third states and to afford assistance to these states. The following section sketches a "lawmaking" and coordinating role for the General Assembly, clarifying what sanctions measures are lawful and resuscitating the UN Charter Article 50 process to ensure that third states enjoy a right to consult over sanctions and a right to necessary assistance. The Article concludes that a clarified legal and economic framework for unilateral

hostilities are splitting the world economy into blocs and reinforcing earlier geopolitical tensions, such as those associated with the US-China trade dispute. . . . Fragmentation could intensify—with more restrictions on cross-border movements of capital, workers, and international payments—and could hamper multilateral cooperation on providing global public goods.”), <https://www.imf.org/en/Publications/WEO/Issues/2023/01/31/world-economic-outlook-update-january-2023>; Esfandyar Batmanghelidj, *Iran, Russia, and the Limits of Financial War*, BOURSE & BAZAAR (Feb. 28, 2022) (“The only other comparable financial war waged by the United States and Europe has targeted Iran.”), <https://www.bourseandbazaar.com/articles/2022/2/28/iran-russia-and-the-limits-of-financial-war>.

sanctions is vital to the development of an international system dedicated to peace, security, and fairness.

I. UNILATERAL SANCTIONS ON RUSSIA

A. *Scope and size*

The unilateral sanctions imposed on Russia are notable because of their number and that they target the world's eleventh largest economy, with inevitable consequences for the global economy.⁴ The sanctions are intended to “cripple the Kremlin’s ability to finance the war; impose clear economic and political costs on Russia’s political elite responsible for invasion; and diminish its economic base.”⁵ These sanctions are also significant in that they are not under the aegis of the United Nations Security Council; rather, these unilateral sanctions have been imposed by and coordinated between more than 30 primarily Western states.⁶ But since the dollar is the dominant reserve currency, the U.S. and its allies enjoy unparalleled power to impact trade and international markets and banks via economic and financial sanctions even without Security Council authority and coordination.⁷

4. World Bank, GDP, World Bank national accounts data, and OECD National Accounts data files, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true (accessed March 9, 2023) (listing 2021 economic figures). See also Nicholas Mulder, Sanctions Against Russia Ignore the Economic Challenges Facing Ukraine, N.Y. Times (Feb. 9, 2023) (“By any metric, the Western sanctions of the last year have been impressive in their speed and sweep.”) <https://www.nytimes.com/2023/02/09/opinion/sanctions-russia-ukraine-economy.html>; Erica Moret, Sanctions and the Cost of Russia’s War in Ukraine, IPI Global Observatory (May 12, 2022), <https://theglobalobservatory.org/2022/05/sanctions-and-the-costs-of-russias-war-in-ukraine/> (“[A]n economy of the size of that of Russia—highly integrated into world markets, a G20 member, and a leading energy supplier—has not been targeted through sanctions to this extent before.”).

5. *EU sanctions against Russia following the invasion of Ukraine*, EUROPEAN COMM’N [hereinafter *EU sanctions*], https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_en (accessed March 9, 2023).

6. *Targeting Key Sectors, Evasion Efforts, and Military Supplies, Treasury Expands and Intensifies Sanctions Against Russia*, U.S. DEP’T OF TREASURY [hereinafter *Targeting*] (Feb. 24, 2023), <https://home.treasury.gov/news/press-releases/jy1296>. See also Elena Chachko, & J. Heath, *A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield*, 116 AM. J. OF INT’L. L. UNBOUND, 135, 138 (2022) (“Despite the enthusiasm for sanctions among European and NATO countries, much of the world—including all of Central and South America, Africa, and most of Asia—remains on the sidelines.”).

7. Nicholas Mulder, *THE ECONOMIC WEAPON: THE RISE OF SANCTIONS AS A TOOL OF MODERN WAR* 295 (2022) (“Today, global banks and corporate finance are the frontline of sanctions implementation and compliance.”). The U.S. Department of Treasury explains that the “economic and financial sanctions . . . tool rests on the formidable strength of, and trust in, the U.S. financial system and currency. U.S. Dep’t of Treasury, *The Treasury 2021 Sanctions Review* 1 (Oct. 2021) [hereinafter *The Treasury 2021*], <https://home.treasury.gov/system/files/136/Treasury-2021-sanctions-review.pdf>.

One year after Russia's invasion, the U.S. Department of Treasury has imposed more than 2500 sanctions on Russian individuals and entities, as well as sanctions on more than 80 percent of Russian banking assets.⁸ The EU sanctions entail similar prohibitions on funds and asset freezes for almost 1500 individuals and over 200 entities, bans and freezes on more than 70 percent of Russian banking assets, prohibitions on more than 90 percent of oil imports from Russia, and various bans on military and aircraft-related exports.⁹ The U.S. and EU sanctions limit foreign investment in Russia and encompass restrictions on trade ranging from coal to drones to luxury items.¹⁰ In addition, the sanctioning states have effectively removed most Russian banks from the Society for Worldwide Interbank Financial Telecommunications (SWIFT) system, encumbering most Russian electronic payments and financial transactions.¹¹ Together, the U.S., EU and other allies also imposed a \$60 per barrel cap on Russia crude oil, intended to limit Russian revenues while addressing the energy needs of developing and lower income states.¹²

B. Transnational expression

Sanctions also serve a critical, geopolitical communicative function. Sarah Cleveland explains that "[s]anctions are a primary means by which various members of the international community articulate collective standards, monitor international behavior, and communicate outrage at noncompliance by rogue states."¹³ In the case of the sanctions against Russia, the sanctions may be characterized as "succeeding" insofar as they express "an emphatic message of disapproval and condemnation," increase war costs, and exhibit "a highly visible show of unity among many in the international community."¹⁴

C. Efficacy

The sheer scope of, and general adherence to, the sanctions regimes led to early valedictories over the success of economic warfare over military

8. U.S. Dep't of Treasury, *FACT SHEET: Disrupting and Degrading – One Year of U.S. Sanctions on Russia and Its Enablers* (Feb. 24, 2023) [hereinafter *Disrupting and Degrading*], <https://home.treasury.gov/news/press-releases/jy1298>; *Targeting*, *supra* note 6.

9. *EU sanctions*, *supra* note 5.

10. *See id.* *See also Disrupting and Degrading*, *supra* note 8.

11. *See Targeting*, *supra* note 6. *See also EU sanctions*, *supra* note 5.

12. *Disrupting and Degrading*, *supra* note 8; *EU sanctions*, *supra* note 5.

13. Sarah Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 *YALE J. INTL. L.*, 1, 87 (2001).

14. Compare Moret, *supra* note 4 with Jeffrey Sachs, *A negotiated peace is the only way to end Russia's war on Ukraine*, CNN (April 21, 2022) ("[M]ost of the world does not believe in the sanctions . . . Add up all of the countries and regions imposing sanctions on Russia . . . and their combined population comes to just 14% of the world population."), <https://www.cnn.com/2022/04/20/opinions/sachs-ukraine-negotiation-op-ed/index.html>.

aggression and vindication of the international legal order. Yet more than one year into the extensive unilateral economic sanctions response, the efficacy of these sanctions as a deterrent on Russia's military objectives and drag on its economy are in some dispute.¹⁵ Differing financial indicators vary on how badly the sanctions have hurt the Russian economy with some contending that future growth is likely.¹⁶ Others do not expect that the sanctions will destroy the Russian economy or end the war.¹⁷ Still, others contend that long-term effects should not be discounted.¹⁸

These disputes over whether sanctions are effective forms of statecraft are not new. In the twentieth century, economic sanctions were "partially successful in 34 percent of cases."¹⁹ And yet the international community's "sanctions use doubled in the 1990s and 2000s compared to the period from 1950 to 1985; by the 2010s it had doubled again." Moreover, despite the increase in use, the efficacy declined, from 35-40 percent between 1985-1995, to lower than 20 percent in 2016.²⁰

15. See Rebecca M. Nelson, *In Focus: The Economic Impact of Russia Sanctions 2*, CONG. RSCH. SERV., (Dec. 13, 2022) (noting conflicting data on sanctions impact of Russian economy).

16. Compare Alan Rappeport, *I.M.F. Upgrades Global Outlook as Inflation Eases*, N.Y. TIMES (Jan. 30, 2023), (observing that Russia's projected 2023 and 2024 economic growth indicates that "efforts by Western nations to cripple its economy appear to be faltering. The I.M.F. predicts Russian output to expand 0.3 percent this year and 2.1 percent next year, defying earlier forecasts of a steep contraction in 2023 amid a raft of Western sanctions."), <https://www.nytimes.com/2023/01/30/business/economy/imf-world-economic-outlook.html>; *World Economic Outlook*, *supra* note 3, at 4, with Jeffrey Sonnenfeld et. Al., *Business Retreats and Sanctions Are Crippling the Russian Economy 3* (July 19, 2022), (disputing forecasts that questioned sanctions' efficacy, contending that "business retreats and sanctions are crippling the Russian economy, in the short-term, and the long-term").

17. See Mulder, *supra* note 4. ("[S]anctions have failed to cause crippling and insurmountable problems of the kind that will cause the collapse of either the Russian economy or Mr. Putin's war effort."); *id.* (attributing "[t]he limited efficacy of the sanctions . . . to Russia's policy response, its size, its commercial position and the importance of nonaligned countries in the world economy"); Josh Holder et. Al., *The West Tried to Isolate Russia. It Didn't Work*, N.Y. TIMES (Feb. 23, 2023), <https://www.nytimes.com/interactive/2023/02/23/world/russia-ukraine-geopolitics.html> (describing how China and Turkey compensate for the export deficit to Russia caused by sanctions).

18. See Jeanne Whalen & Catherine Belton, *Sanctions haven't stopped Russia, but a new oil ban could cut deeper*, WASH. POST (Feb. 15, 2023), <https://www.washingtonpost.com/business/2023/02/15/russia-sanctions-impact-ukraine-war/> (describing initial financial sanctions as less destructive than anticipated but noting potential long-term deleterious effects and that EU restrictions on Russian oil imports likely to have greater effect); Mulder, *supra* note 4 (acknowledging that "a smaller-than-expected contraction means that the Russian economy is significantly below its long-run growth trajectory. Under current circumstances, it will be lucky if it ever regains its 2021 income level.").

19. GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* 158 (2007); MULDER, *supra* note 7 ("[T]he history of sanctions is largely a history of disappointment.").

20. Mulder, *supra* note 19, at 296.

Some scholars question, however, the accuracy of studies measuring both the effectiveness and cost of sanctions.²¹ They suggest certain conception of efficacy may be “underinclusive” in failing to account for a variety of results owing to sanctions.²²

Effective or not, sanctions against Russia produce unintended consequences for both Russia’s own citizens and those of other states. Russia’s position within the integrated world economy presents challenges to containing sanctions and avoiding their collateral effects on developing states.²³ For this article’s purposes, the question of efficacy is most relevant in assessing whether sanctions and their adverse consequences on third states may be viewed as a necessary and proportionate response to Russia’s invasion of Ukraine.²⁴

D. Unintended consequences

The inherent tension in sanctions is that whatever economic harm is intended for particular targets also invariably affects innocent civilians.²⁵

21. *Id.* (observing that it is impossible to satisfyingly attribute certain outcomes to sanctions alone). See Cleveland, *supra* note 13, at 86-87 (2001).

22. Cleveland, *supra* note 13 at 86-87. (Sarah Cleveland offers a capacious “effectiveness” standard for sanctions, proposing they “be measured in terms of the international community’s overall progress towards accepting and implementing the normative values being advanced by the sanctioning state.”). See also Moret, *supra* note 4 (noting that in assessing impact of sanctions and underlying “crisis” that “it is notoriously difficult to demonstrate causation over correlation with any confidence in isolation of other factors at play”).

23. See *S. Afr.’s Ramaphosa: Russia sanctions hurting ‘bystander’ states*, ALJAZEERA (May 24, 2022), (quoting South Africa President Cyril Ramaphosa stating that “‘bystander countries’ were suffering due to sanctions against Russia”), <https://www.aljazeera.com/economy/2022/5/24/update-2-s-africas-ramaphosa-russia-sanctions-hurt-bystander-countries>; Nicholas Mulder, *The Sanctions Weapon, Finance and Development*, INT’L MONETARY FUND,

23 (Jun. 2022), <https://www.imf.org/en/Publications/fandd/issues/2022/06/the-sanctions-weapon-mulder> (noting sanctions impact on developing states); Nelson, *supra* note 15. (“Sanctions that isolate Russia are a shock to the global economy, which is still struggling to recover from the COVID-19 pandemic. The sanctions have likely contributed to disruptions in global supply chains, higher global commodity prices, and a slowdown in global economic growth.”); see also *id.* (“The IMF forecasts that global economic growth will slow from 6.0% in 2021 to 3.2% in 2022 and 2.7% in 2023.”).

24. See *infra* Part III.B.

25. Katharina L. Meissner & Patrick A. Mello, *The Unintended Consequences of UN Sanctions: A Qualitative Comparative Analysis*, 43 CONTEMP. SEC. POL’Y 243, 244 (2022) (“Despite their omnipresence, restrictive measures, especially the comprehensive ones, frequently bring about unintended consequences for the civilian population of the targeted country.”); Dominic P. Parker et. Al., *Unintended Consequences of Sanctions for Human Rights: Conflict Minerals and Infant Mortality*, THE J. OF L. & ECON. (2016) 59:4, 731, 768 (“[T]he general problem with sanctions: it is difficult to withhold economic transactions from perpetrators of abuses without the brunt of the effects being absorbed by the victims.”); See *id.* (finding that “section 1502 of the Dodd-Frank Act, which effectively reduced international demand for Congolese 3T minerals . . . appears to have had one of its intended effects, reducing militia revenue from 3T mining, . . . [but] that it has also produced unwanted effects that were borne by the vulnerable populations the policy sought to help.”). See also Djavah Salehi-Isfahani, *Iran under sanction: Impact of Sanctions on Household Welfare and*

Studies on sanctions are almost uniform in their “assessment of the negative spillover effects of sanctions.”²⁶ And these “unintended negative consequences can be just as destructive as premeditated harms.”²⁷

One study of UN sanctions found that “94 percent of the sanctions episodes entail unintended consequences of one form or another.”²⁸ In a more precise study of “major negative externalities,” Katharina Meissner and Patrick Mello found that sanctions regimes led to “increases in corruption and criminality (58 percent) and humanitarian consequences (44 percent), followed by strengthened authoritarian rule (35 percent), increases in human rights violations (26 percent), and an erosion of local institutional capacities (8 percent).”²⁹

The Committee on Economic, Social and Cultural Rights found two decades prior that sanctions “often cause significant distribution of food, pharmaceuticals and sanitation supplies, jeopardize the quality of food and the availability of drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work.”³⁰

The unintended consequences from sanctions are most likely to follow when sanctions are (1) comprehensive; (2) lengthy (more than eight years); (3) imposed on autocratic regimes that are not economically isolated; and (4) coordinated with a permanent UN Security Council member.³¹

Overcompliance with unilateral sanctions regimes – even those entailing “smart” sanctions and humanitarian exemptions – often aggravates the human rights harms suffered by vulnerable groups in both sanctioned

Employment (2020)
<https://static1.squarespace.com/static/5f0f5b1018e89f351b8b3ef8/t/60de2563d4938b6bad5adee1/1625171299905/DJAVAD+SALEHI-ISFAHANI.pdf>. (noting that, due to sanctions against Iran, poverty rates to “nearly doubled, from the lowest point of 6.4 percent in 2012 to 12.1 in 2019”).

26. *Hearing on Considerations on Economic Sanctions Before H. Foreign Affairs Comm. Tom Lantos & Hum. Rts. Comm’n 2* (Oct. 4, 2022) (Statement of Dr. Daniel W. Drezner) [hereinafter *Hearing*]; See also Daniel W. Drezner, *How not to sanction*, 98 INT’L AFFAIRS 1533, 1549 (2022).

27. MULDER, *supra* note 7.

28. Meissner & Mello, *supra* note 25, at 253 (citing BIERSTEKER ET AL., TARGETED SANCTIONS: THE IMPACTS AND EFFECTIVENESS OF UNITED NATIONS ACTION (2016)).

29. *Id.*; See also ERICA MORET ET AL., *The New Deterrent?: International Sanctions Against Russia Over the Ukraine Crisis: Impacts, Costs and Further Action*, Programme for the Study of International Governance (PSIG) at the Graduate Institute of International and Development Studies, Geneva, 39 n.62 & accompanying text (Oct. 12, 2016)(summarizing Targeted Sanctions Consortium Database findings concerning unintended consequences of [UN Security Council] targeted sanctions as including “an increase in corruption and criminality (69%); strengthening of authoritarian leadership in the target (54%), diversion of state resources between sectors (44%); negative humanitarian consequences (39%) and reputational harm to the sender (in this case the UNSC) (39%)”).

30. U.N. ECOSOC, 17th Sess., at para. 3, U.N.Doc. E/C.12/1997/8 (Dec. 12, 1997).

31. Meissner & Mello, *supra* note 25, at 266-67.

and third, unsanctioned states.³² “Overcompliance consists of self-imposed restraints that go beyond the restrictions mandated by sanctions, either as part of a de-risking process, to minimize the potential for inadvertent violations or to avoid reputational or other business risks, or as a means to limit compliance costs.”³³ Overcompliance “has become very widespread and even pervasive in some sectors such as banking.”³⁴ The Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights has documented how overcompliance greatly expands the consequences and ambit “of effective targets to include non-sanctioned individuals, entities and sometimes entire populations....”³⁵

The Special Rapporteur identifies the primary causes of overcompliance as: “the complexity of sanctions regimes; the vagueness of their provisions; tough enforcement measures; and threats of secondary sanctions or criminal or civil penalties.”³⁶ But studies have found that even economic measures aimed at deterring human rights violations in developing countries involving only disclosure and reporting may lead to corporate avoidance and government bans on that activity, amounting to effective sanctions or boycotts and having unintended consequences on vulnerable populations.³⁷

Sanctions also may result in unintended *long-term* consequences. Sanctions, often conceived as temporary responses to illegal conduct, run the risk of establishing themselves as permanent fixtures, unmoored from their initial intended purposes, causing collateral harms.³⁸ The U.S.

32. See generally U.N. GAOR, 51st Sess., U.N. Doc. A/HRC/51/33 (July 15, 2022) [hereinafter 51st Sess.]; *Hearing, supra* note 26. (“[P]rivate sector actors engage in overcompliance and de-risking, magnifying the effects beyond what was intended.”).

33. 51st Sess., *supra* note 32. See also ELIZABETH ROSENBERG ET AL., *The New Tools of Economic Warfare Effects and Effectiveness of Contemporary U.S. Financial Sanctions* 35-37, CENT. FOR NEW AM. SEC. (2016), <https://s3.us-east-1.amazonaws.com/files.cnas.org/hero/documents/CNASReport-EconomicWarfare-160408v02.pdf?mtime=20161010171125&focal=none> (describing de-risking as negative and unintended consequence of U.S. sanctions policy).

34. 51st Sess., *supra* note 32, at para. 80.

35. *Id.* at para. 17. The special rapporteur also found that overcompliance occurs with targeted and sectoral sanctions as well, “making them less targeted, sometimes to the point of equalling [sic] comprehensive sanctions that impact an entire population.” *Id.* at para. 52.

36. *Id.* at para. 70

37. Parker ET AL., *supra* note 25, at 732-38 (examining how section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, which was intended to deter manufacturers from purchasing conflict-minerals due to Democratic Republic of the Congo warlord exploitation and brutality, reduced such mineral mining but also increased infant mortality rates in targeted mineral mining villages and in “unintentionally boycotted” villages). See also *id.* at 768. (“High transaction costs of following supply chains from source to product can produce unintentional boycotts. Rather than absorb costs and the associated reputational risk of not appearing socially responsible, companies may simply choose to source elsewhere.”).

38. Drezner, *supra* note 26, at 1549 (explaining that sanctions may become entrenched because they “come to be viewed as either an adjunct to kinetic action or a long-term

experience reflects this trend, from 912 existing sanctions designations in 2020 to an accretion of 9,421 sanctions by 2021.³⁹ Moreover, the literature on sanctions suggests that the longer the duration of sanctions the higher the incidence of unintended consequences.⁴⁰

E. Russia sanctions and their unintended consequences

In the case of Russia, “broad-based market integration has widened the avenues through which sanction shocks spill over into the world economy.”⁴¹ Sanctions against Russia’s “highly integrated econom[y]” means the “risks and costs of sanctions . . . affect more people around the world.”⁴²

Concerns are especially heightened over the impact of sanctions on Russian exports. Specifically, Russia’s role as a leading exporter of fertilizer, agricultural commodities, and oil renders developing states particularly vulnerable.⁴³ Small, landlocked countries have been particularly susceptible to Russian sanctions’ adverse impacts.⁴⁴

containment strategy, senders are increasingly less interested in developing an exit strategy from economic coercion”); Chachko & Heath, *supra* note 6, at 138. (“The pain that could be borne by ordinary Russians as the result of long-term sanctions is well-known and familiar from experiences in Iran, Iraq, and Cuba, among others.”).

39. *The Treasury 2021*, *supra* note 7, at 2. *See also Hearing*, *supra* note 26, at 2 (noting that “the U.S. has also created situations in which the average duration of sanctions imposition has lengthened.”).

40. Meissner & Mello, *supra* note 25, at 251.

41. Mulder, *supra* note 3, at 23. *See also* Sachs, *supra* note 14. (“Sanctions on Russia hurt not just Russia but the entire world economy, stoking supply-chain disruptions, inflation and food shortages.”); Victor Mallett & Andy Bounds, *African Union warns of ‘collateral impact’ as EU’s Russia sanctions hit food supplies*, FINANCIAL TIMES (May 31, 2022), <https://www.ft.com/content/e558de33-6064-4b10-a784-eb344cb17915> (noting concerns of Senegalese President Macky Sall that sanctions on Swift payment system hinder developing states’ ability to pay for commodities).

42. Mulder, *supra* note 3. *See id.* (“As sanctions remove Russian commodity exports from world markets, prices are driven higher, putting pressure on the import bills and constrained public finances of net-commodity-importing emerging market and developing economies.”); *id.* (observing that developing economies have not imposed sanctions on Russia).

43. Josefa Sacko & Ibrahim Mayaki, *How the Russia-Ukraine conflict impacts Afr.*, *Afr. Renewal* (April 21, 2022), <https://www.un.org/africarenewal/magazine/may-2022/how-russia-ukraine-conflict%2%A0impacts-africa> (describing worry that sanctions will “further exacerbate commercial flows between Russia and Africa due to the closure of vital port operations in the Black Sea”).

44. Tom Mitchell, *Mongolia reels from impact of Russian sanctions*, FINANCIAL TIMES (Jan. 29, 2023), <https://www.ft.com/content/21a51801-6bc6-4fda-a38d-0653605c0d88> (quoting Mongolian Prime Minister Luvsannamsrai Oyun-Erdene complaining about sanctions impacts due to Mongolian dependence on Russian fuel and that “Economic sanctions have to be imposed based on extensive research because they’re having extensive impacts and negative influences on other countries.”).

However, some experts dispute both the level of impact and the extent to which any such impact is directly attributable to sanctions.⁴⁵ They assign the humanitarian concerns to Russian disinformation.⁴⁶

But the global effects that may be felt are also an inevitable product of overcompliance. David Laborde takes a mixed view concerning global food insecurity, disputing that “the biggest problem is sanctions. The biggest problem is the war and other drivers. The sanctions can have a moderate impact. The sanctions aren’t targeting fertilizer and food products, but businesses are afraid to trade with Russia.”⁴⁷

F. Russian Sanctions Exemptions

With these unintended consequences partially in mind, sanctioning states have included broad humanitarian exemptions.⁴⁸ The European Union, United Kingdom, and United States have all crafted exceptions to the sanctions on commercial activity with Russia, permitting state and non-state actors to purchase agricultural commodities, medicine, and medical devices from Russia.⁴⁹

45. Some of the dispute centers on an analytical conundrum. It can be difficult to disassociate the impact of sanctions from the war itself and other economic trends. See, e.g., Joseph Glauber & David Laborde, *How sanctions on Russia and Belarus are impacting exports of agricultural products and fertilizer*, INT’L FOOD POL’Y RSCH. INST. BLOG (Nov. 9, 2022), <https://www.ifpri.org/blog/how-sanctions-russia-and-belarus-are-impacting-exports-agricultural-products-and-fertilizer> (noting that lack of export data from Russia and Belarus and general rise in prices complicates assessing effect of sanctions on food and fertilizer exports). See also Nelson, *supra* note 15, (noting that “it is difficult to assess the effect of sanctions separate from other contemporaneous factors, including the war, tighter monetary policy (higher interest rates) in many advanced economies, and COVID-19 related supply disruptions primarily in China”).

46. *Remarks by Jeffrey Sonnenfeld and Steven Tian, Washington Foreign Press Center Briefing on “Economic Impact of Sanctions on Russia,”* U.S. Dep’t of State (Aug. 10, 2022), <https://www.state.gov/briefings-foreign-press-centers/economic-impact-of-sanctions-on-russia>. Steven Tian adds that the message that sanctions is causing widespread famine is “propagated relentlessly by the Kremlin. And there is this myth, particularly in developing countries, that the United States has somehow created a global famine, that United States sanctions are leading to a collapse in agricultural products, soaring agricultural costs.” *Id.*

47. *In the News, Senegal’s Macky Sall appeals to West to ease sanctions on Russia* (France 24 English), INT’L FOOD POL’Y RSCH. INST. (June 4, 2022), <https://www.ifpri.org/news-release/senegals-macky-sall-appeals-west-ease-sanctions-russia-france-24-english%2%A0>.

48. Nelson, *supra* note 15.; Emily Kilcrease, Jason Bartlett, & Mason Wong, *Sanctions by the Numbers: Economic Measures against Russia Following Its 2022 Invasion of Ukraine*, CTR. FOR NEW AM. SEC. (June 16, 2022), <https://www.cnas.org/publications/reports/sanctions-by-the-numbers-economic-measures-against-russia-following-its-2021-invasion-of-ukraine>.

49. EU-US-UK: Joint Statement on global food security and Russia sanctions by the High Representative of the European Union Joseph Borrell, U.S. Secretary of State Anthony Blinken, and UK Foreign Secretary James Cleverly (Nov. 14, 2022), https://www.eeas.europa.eu/eeas/eu-us-uk-joint-statement-global-food-security-and-russia-sanctions-high-representative_en. See also Office of Financial Sanctions Implementation HM Treasury, General Licence – INT/2022/2349952 (Nov. 4, 2022),

To address overcompliance, the United States has issued General Licenses and “comfort letters”- guidance that sets forth with greater clarity the exemptions to sanctions.⁵⁰ The European Union has also issued guidance indicating that its sanctions do not target Russian agricultural items and restrict only EU-Russian trade, but not international transactions.⁵¹

Notwithstanding the well-intentioned exemptions to sanctions, they may not work as envisioned, with mixed results in the exports of fertilizer and agricultural goods.⁵² Even the targeted sanctions against Russian oligarchs may reduce exports of commodities and fertilizer exports because these individuals remain engaged in such industries and the financial constraints still present logistical transactional challenges.⁵³ Also, additional business costs, overcompliance, and reputational concerns may have further deterred nations and corporations from engaging in commerce with Russia.⁵⁴

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1115732/Publication_Notice_INT.20-2.2349952.pdf; Office of Foreign Assets Control, Russian Harmful Foreign Activities Sanctions Regulations 31 CFR part 587, GENERAL LICENSE NO. 6B, Transactions Related to Agricultural Commodities, Medicine, Medical Devices, Replacement Parts and Components, or Software Updates, the Coronavirus Disease 2019 (COVID-19) Pandemic, or Clinical Trials (July 14, 2022), https://home.treasury.gov/system/files/126/russia_gl6b.pdf.

50. See, e.g., Michelle Nichols & Kanishka Singh, *U.S. can offer ‘comfort letters’ to help Russia grain, fertilizer exports – U.S. envoy*, REUTERS (May 31, 2022, 2:08 PM EDT), <https://www.reuters.com/markets/commodities/us-can-offer-comfort-letters-help-russia-grain-fertilizer-exports-us-envoy-2022-05-31/>; Office of Foreign Assets Control, U.S. Dep’t of Treas., *OFAC Food Security Fact Sheet: Russia Sanctions and Agricultural Trade* (July 14, 2022), https://home.treasury.gov/system/files/126/russia_fact_sheet_20220714.pdf; Lewis Brisbois, *OFAC Issues Updates to Russian Harmful Foreign Activities Sanctions Regulations*, LEGAL ALERTS, (Feb. 15, 2023), <https://lewisbrisbois.com/newsroom/legal-alerts/ofac-issues-updates-to-russian-harmful-foreign-activities-sanctions-regulations>; *Disrupting and Degrading*, *supra* at 8 (“To minimize the unintended negative consequences of U.S. sanctions on Russia while ensuring a high degree of impact on Russia, and particularly to protect and preserve agricultural, humanitarian, and energy transactions, OFAC has issued 68 new and 40 amended general licenses.”).

51. *Agrifood trade and EU sanctions adopted further to the invasion of Ukraine by the Russian Federation and the support of Belarus to it*, https://www.eeas.europa.eu/sites/default/files/documents/Food%20Security_Fact-sheet.pdf (accessed Feb. 25, 2023) (“Agrifood trade and EU sanctions adopted further to the invasion of Ukraine by the Russian Federation and the support of Belarus to it.”).

52. Glauber & Laborde, *supra* at 45. (“[C]arve outs in trade sanctions appear to have helped sustain exports of some agricultural products and fertilizers from Russia and Belarus, but exports of potash from Belarus and anhydrous ammonia from Russia, which have traditionally utilized EU and Ukraine port facilities, have fallen significantly.”).

53. *Id.*

54. *Id.* See also Kilcrease, Bartlett, & Wong, *supra* note 48, (“Corporations “face significant logistical difficulties moving products into or out of Russia or Ukraine . . . and aggressive de-risking of Western financial institutions may make licit transactions for humanitarian purposes nearly impossible to execute.”); *id.* (observing that “some companies have even voluntarily withdrawn from the Russian market entirely”).

Attempts to rein in unintended consequences for third states have proven difficult. Extensive sanctions have “caused commercial effects far beyond the legal scope of the sanctions measures.”⁵⁵ And there is worry that the global economic impact of so many unilateral sanctions will only deteriorate “as tight energy markets become more strained, shocks to the supply of food commodities aggravate food insecurity in the developing world, globalized trade shrinks, and inflation rises.”⁵⁶ The ratcheting of unilateral sanctions against Russia, with its vital role in the integrated world economy, and the resulting unintended consequences for developing states in particular, raise important foreign and fiscal policy concerns. But the legal ambiguity surrounding unilateral sanctions also requires clarification, with particular attention to the rights of third states impacted by sanctions and the correlative duties of the sanctioning states.

II. LEGAL ARCHITECTURE OF SANCTIONS

The UN Charter does not address unilateral sanctions, but instead assigns the Security Council the sole authority to “decide what measures not involving the use of armed force are to be employed to give effect to its decisions, . . . [which] may include partial interruption of economic relations. . . .”⁵⁷ Yet even prior to the sanctions established in response to the Russian invasion, the U.S. and EU operated at least 25 sanctions regimes independent of any Security Council resolution.⁵⁸ Japan, Russia, Canada, and Ukraine also have maintained unilateral sanctions.⁵⁹

Notwithstanding the increased use of unilateral sanctions, “[t]he legality of sanctions not authorized by the Security Council is a grey area of international law.”⁶⁰ Elena Chachko and J. Benton Heath describe the lack of “strong legal constraints on a state’s decision on *whether* to deploy sanctions,” but see an emerging international and domestic law “governing *how*

55. *Id.*

56. *Id.* See also Nelson, *supra* note 15. (“The new sanctions responding to Russia’s aggression could have lasting effects on the structure of the global economy. The sanctions could create (or deepen) fractures in the global economy, resulting in disparate economic blocs and schisms that could undermine the international rules-based economic order”); Chachko & Heath, *supra* note 6, at 138 (noting that Global South “populations . . . are likely to suffer greatly from a prolonged, sanctions-induced recession.”).

57. U.N. Charter, art. 41. The Security Council may rely on member states to implement these sanctions. See also Rebecca Brubaker & Sophie Huve, *Conflict-related UN sanctions regimes and humanitarian action: A policy research overview*, U.N. UNIV. CTR. FOR POL’Y RSCH INT’L. REV. OF THE RED CROSS (2021), 103 (916), 385, 397. Counterterrorism, sanctions and war doi:10.1017/S1816383121000412 (“UN sanctions are the only type of sanctions universally endorsed through the delegated authority that UN member States have given to the Security Council under Article 25 of the UN Charter.”).

58. Rebecca Barber, *An Exploration of the General Assembly’s Troubled Relationship with Unilateral Sanctions*, 70 INT’L & COMP. L. Q. 343, 353 (2021).

59. *Id.*

60. *Id.*

sanctions are imposed.”⁶¹ Sarah Cleveland concludes that “nothing in the U.N. Charter bars the use of nonforcible economic measures to promote human rights compliance.”⁶² Indeed, Cleveland contends that “such measures complement, rather than contradict, the multilateral remedies available under” the Charter.⁶³ In contrast, the Special Rapporteur on unilateral sanctions Alena Douhan pronounces that unilateral sanctions enjoy only “dubious legality under international law.”⁶⁴ In addition, the lack of explicit textual grant of authority may call into question unilateral sanctions’ international legitimacy and accountability.⁶⁵ Nor, by their very nature, may unilateral sanctions reflect an “international consensus.”⁶⁶

This section focuses principally on how customary international law may constrain unilateral sanctions and their unintended consequences on third states. The part will begin with an examination of the principle of non-intervention. It will then turn to an extensive review of countermeasures and their application to unilateral sanctions and their impact on non-targeted third states.⁶⁷

61. Chachko & Heath, *supra* note 56, at 137 (emphases in original).

62. Cleveland, *supra* note 13.

63. *Id.*

64. Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena F. Douhan, Secondary sanctions, civil and criminal penalties for circumvention of sanctions regimes and overcompliance with sanctions, para. 2, Human Rights Council, A/HRC/51/33 (15 July 2022). *See also id.* at para. 13.

65. Brubaker & Huve, *supra* note 57, at 397-98.

66. *Id.* at 398. *See also* Sachs, *supra* note 56 (observing that only 14% of world population support sanctions on Russia); Chachko & Heath, *supra* note 56, at 138 (noting support for sanctions limited to largely Western and NATO countries).

67. Scholars have considered whether to characterize unilateral sanctions as a form of retorsion, an essentially unfriendly act that does not entail a violation of an international obligation. *See* Julia Schmidt, *Legality of Unilateral Extra-territorial Sanctions under International Law*, J. OF CONFLICT & SEC. L. (2022), Vol. 27, No. 1, 53, 71-74. Some have suggested that “low coercion” economic sanctions should be regarded as acts of retorsion, but more coercive sanctions must fall within countermeasures. *See* W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, EUR. J. OF INT’L. L. 9 (1998), 128. But the unintended consequences implicating third, developing states’ rights to food and health remove the unilateral sanctions on Russia from any safe harbor of retorsion. Moreover, retorsion may prove only so useful a category as so many states’ unilateral sanctions are likely to run afoul of the free- and fair-trade obligations in the General Agreement on Tariffs and Trade (GATT). Schmidt, *supra* at 71-73. Yet GATT may prove a fairly permeable restraint as well. The EU and G-7 countries have asserted that sanctions which would potentially violate GATT might qualify as exceptions under Article XXI(b) (“any action which it considers necessary for the protection of its essential security interests to protect “essential security interests”). European Commission, EU sanctions against Russia following the invasion of Ukraine, https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_en (accessed March 9, 2023); Council of the European Union, *Press release: Russia’s military aggression against Ukraine: fourth EU package of sectoral and individual measures* (March 15, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/03/15/russia-s-military-aggression-against-ukraine-fourth-eu-package-of-sectoral-and-individual-measures/>. Sarah

A. *Non-intervention*

In 1965, the General Assembly issued the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty. The Declaration provides: “No State may use or encourage the use of economic, political or other types or measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind.”⁶⁸ Relying in part on the declaration as an expression of *opinio juris* and reviewing state practice, the International Court of Justice determined that the principle of non-intervention “is part and parcel of customary international law.”⁶⁹ The Court further explained that an intervention is wrongful when a state “uses methods of coercion” concerning another state’s “choice of a political, economic, social and cultural system, and the formulation of foreign policy.”⁷⁰

The Court was not, however, convinced by Nicaragua’s claims that the United States’ “act[ion] of an economic nature” – stopping economic assistance; reducing sugar imports from Nicaragua by 90 percent; and a later trade embargo – violated the principle of non-intervention.⁷¹ As the Court later noted, “[a] State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation.”⁷²

The Court’s ruling amounts to a “minimal constraint” on unilateral sanctions.⁷³ Scholars may theorize that the judgment permits instances

Cleveland has also earlier argued that GATT should be read to permit comprehensive sanctions aimed at protecting fundamental human rights. Sarah Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT’L L., 1, 68 (2001). But even were the sanctions to amount to GATT violations, sanctioning states might seek to justify the trade restraints as lawful countermeasures. See *infra* Part II.B.

68. U.N. Doc. NRES/2131 (XX) (1965), at annex, para. 2. (Reflecting the ongoing tension between foreign policy and international law, the United States declared at the time of the resolution’s adoption that it was “only a statement of political intention and not a formulation of law.”); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, Judgment)* [1986] ICJ Reports, para. 203 (quoting Official Records of the General Assembly, Twentieth Session, First Committee, A/C. 1/SR.1423, p. 436). However, as the ICJ noted, the U.S. did not issue a similar statement when the Assembly adopted the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (U.N. Doc. NRES/2625 (XXV) (1970), at annex.), which sets out the same basic principles.

69. *Id.* at para. 202.

70. *Id.* at para 205. The Court did not explain the “element of coercion” in a clear fashion, stating only that “force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State” is a “particularly obvious” realization of coercion. *Id.*

71. *Id.* at paras. 244-45.

72. *Id.* at para 276. The Court did find that the trade embargo was “such an abrupt act of termination of commercial intercourse” as to violate “the obligation not to defeat the object and purpose of the [parties’ Treaty of Friendship, Commerce and Navigation].” *Id.*

73. Chachko & Benton, *supra* note 56 at 137.

where the dependence on aid and trade from another state might render the deployment of sanctions coercive and wrongful.⁷⁴ But as a practical matter, the U.S. measures against Nicaragua “are the most common, and potentially most severe, economic actions that can be employed against a state.”⁷⁵

While the ICJ appeared to have blessed many unilateral sanctions measures, including those by powerful Western countries against the Global South, the General Assembly has consistently condemned the use of unilateral sanctions. Canvassing 40 resolutions voted on by the General Assembly that condemn unilateral coercive economic measures, Alexandra Hofer has found that “that there is indeed a clear divide between ‘developed’ and ‘developing’ States” on whether both UN and unilateral economic sanctions violate international law.⁷⁶ Hofer does not believe, however, that the repeated denunciations of unilateral sanctions amount to a prohibitory norm.⁷⁷ Rather, “the repeated adoption of these resolutions can be understood as an attempt to ‘establish international standards of behaviour’ by the large majority of States that vote in their favor.”⁷⁸ This division both causes and reflects ambiguity within the law.

Rebecca Barber has sought to reconcile the increasing state practice of unilateral sanctions and the ICJ’s *Paramilitary Activities* judgment with the seemingly divergent General Assembly declarations condemning the same sanctions.⁷⁹ Barber concludes General Assembly resolutions should be understood as condemning only unilateral coercive sanctions “aimed at subordinating State sovereignty.”⁸⁰

Barber explains that the General Assembly persists in condemning unilateral sanctions for three reasons, most notably that some sanctions regimes “are not at all targeted and have devastating impacts on the human rights of the population of the targeted state.” Barber notes also that other sanctions are subject to General Assembly condemnation because they

74. Maziar Jamnejad & Michael Wood, *The Principle of Non-intervention*, 22 LEIDEN J. OF INT’L L. 345, 371(2009).

75. *Id.*

76. Alexandra Hofer, *The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?* (2017) 16 CHINESE J. OF INT’L L., 175, 186-90, 190 (reviewing 21 resolutions on “Human rights and unilateral coercive measures” adopted between 1996 and 2017 and 19 resolutions on “Unilateral economic measures as a means of political and economic coercion against developing countries” adopted between 1993 and 2017).

77. *Id.* at 212 (explaining lack of custom owes in part to inability “to determine that the resolutions and the statements made by UN Member States possess normative value” and that “[i]n spite of frequent calls for the cessation of such practice, a prohibition of UCM has not crystallized”).

78. *Id.*

79. Rebecca Barber, *An Exploration of the General Assembly’s Troubled Relationship with Unilateral Sanctions*, 70 INT’L & COMP. L. Q. 343, 359 (2021).

80. *Id.* at 365.

address matters falling within the targeted state's *domaine reserve*.⁸¹ In these instances, a state's measures against another state intended to protect or secure core human rights – “obligations *erga omnes*” – do not violate the non-intervention principle because they implicate matters of international, not domestic, concern.⁸² Finally, sanctions that are applied extraterritorially receive the ire of the General Assembly.⁸³ Barber argues that the reconciling reading of the General Assembly resolutions along with UN special rapporteur reports “delineat[e] the specific legal bases upon which [unilateral coercive] measure may be illegal.”⁸⁴

Barber's narrowed reading of which unilateral sanctions amount to unlawful intervention or Hofer's characterization of legal uncertainty hovering over sanctions demand additional legal categorization and clarity. Indeed, some sanctions that do not violate the principle of non-intervention might still be unlawful.⁸⁵ In addition, neither reading sufficiently addresses the unintended consequences sustained by third states owing to unilateral sanctions. We will therefore turn to examine whether some unilateral sanctions and their negative impacts on third states might constitute countermeasures for internationally wrongful acts.

B. Countermeasures

Countermeasures reflect the decentralized component of international law where a state must be able to individually respond to an unlawful act against it without that response devolving into a breakdown of international peace and security. A countermeasure is essentially an act of self-help taken in response to a prior illegal act, rendering that response effectively lawful.⁸⁶ Many scholars have turned to countermeasures as a legal category that encompasses unilateral sanctions. The Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) provide

81. *Id.* at 369-70.

82. *Id.* at 351-53 (2021). *See also id.* at 354 (“The vast majority of unilateral sanctions relate not to matters falling with the targeted State's *domaine reserve*, but to matters regulated by international law—principally human rights but also other matters such as counterterrorism and weapons of mass destruction.”). Cleveland similarly argues that “because human rights protections enjoy the status of international, rather than domestic concerns, at a minimum, economic measures to promote international human rights do not constitute coercive intervention under customary international law.” Sarah Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L., 1, 55 (2001).

83. Barber, *supra* note 79, at 370.

84. *Id.* at 371.

85. *See, e.g.*, Military and Paramilitary Activities in and against Nicaragua, *supra* note 68, paras. 244-45, 276 (finding US embargo on Nicaragua did not violate principle on nonintervention but did violate FCN treaty).

86. *Articles on the Responsibility of States for Internationally Wrongful Acts* (ARSIWA), Art. 22, INT'L L. COMM'N, G.A. Res. 56/83 (Dec. 12, 2001) (“The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.”).

important guidance on the limitations of countermeasures. Unilateral sanctions may only be classified as lawful countermeasures if they are (1) non-forcible; (2) temporary and reversible; (3) proportionate; (4) comply with peremptory norms of international law; and (5) target the responsible state, not third states.⁸⁷ Yet there are critical gaps in the ARSIWA and in other literature and state practice, including those that do not adequately address the unintended consequences sustained by third states caused by unilateral sanctions.

1. *General-interest countermeasures*

A key issue in the application of countermeasures to unilateral sanctions regimes is whether non-injured states may undertake countermeasures in support of another injured state, i.e., “general-interest countermeasures.” The commentary to ARSIWA characterizes as “open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State.”⁸⁸ The commentary reviews state practice (up to 2001 at the time) and finds that “the current state of international law on countermeasures taken in the general interest or collective interest is uncertain.”⁸⁹ The commentary therefore concludes there is “no clearly recognized entitlement of States . . . to take countermeasures in the collective interest. . . and leaves the resolution of the matter to the further development of international law.”⁹⁰

In the intervening two decades, scholars argue, there has emerged a consistent and widespread state practice of general-interest countermeasures.⁹¹ Less apparent is whether there is *opinio juris* supporting the use of

87. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, INT'L L. COMM'N 129 ¶ 6 (2001).

88. *Id.* at Art. 22, p. 76 ¶ 6. Article 49 ARSIWA provides that “[a]n injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations.” By its terms, Article 49 indicates that a countermeasure is the prerogative of only an injured state and that the countermeasure may be exercised against only the responsible state. However, Article 48 sets forth that “[a]ny State other than an injured State is entitled to invoke the responsibility of another State . . . if . . . (b) the obligation breached is owed to the international community as a whole.” Finally, the chapter on countermeasures concludes that it “does not prejudice the right of any State, . . . to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.” ARSIWA, Art. 54.

89. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *supra* note 87, at Art. 54, p. 139 ¶ 6.

90. *Id.*

91. Alina Miron & Antonios Tzanakopoulos, *Unilateral Coercive Measures and International Law* (June 1, 2021) at 19, <https://ssrn.com/abstract=4235572> (“[I]t is probably now established in the practice of states that resort to countermeasures ‘in the general interest’ is available under international law. ARSIWA’s silence on this point seems to be compensated by considerable practice, which as such met with little opposition.”).

general-interest countermeasures. Some scholars infer from a state's "adoption of third-party countermeasures . . . recognition of the legal power to do so."⁹² But the lack of articulated legal rationale from sanctioning states supporting collective countermeasures, whether animating out of *erga omnes* obligation or not, raises doubt whether there is *opinio juris* supporting a customary norm.⁹³ That states have not proffered legal opinions concerning general-interest sanctions may evince their predilection that they "remain an instrument of foreign policy and thus unregulated by international law."⁹⁴

2. Countermeasures' unintended consequences for third states

The ARSIWA make clear that a state may take a countermeasure against only the responsible state, not a third state. But the ARSIWA do not adequately protect third states from the indirect effects of such countermeasures, either minimizing or ignoring third-state interests or affording too much leeway and discretion to the state taking the countermeasure.

The commentary to ARSIWA explains that "indirect or consequential effects of countermeasures on third parties, which do not involve an independent breach of any obligation to those third parties, will not take a countermeasure outside the scope of article 22."⁹⁵ The commentary thus presumes that unintended consequences will not render a countermeasure

92. Martin Dawidowicz, *Third-party countermeasures: A progressive development of international law?*, *QUESTIONS OF INT'L L.* 29 (2016), 3, 14, <http://www.qil-qdi.org/third-party-countermeasures-progressive-development-international-law/>. See *id.* at 13 ("Even if States have not explicitly invoked the concept of third-party countermeasures, State practice nevertheless demonstrates that they have relied on it in substance.").

93. Compare Alexandra Hofer, *The 'Curiouser and Curiouser' Legal Nature of Non-UN Sanctions: The Case of the US Sanctions against Russia*, *J. OF CONFLICT & SEC. LAW* (2018), Vol. 23 No. 1, 75, 97 ("[B]ecause the subjective element is lacking, it has not been sufficiently established that third-party countermeasures have been integrated within the international legal framework.") with Dawidowicz, *supra* note 92, at 14-15 (suggesting that European Council and Commission statements that "third-party countermeasures" are "a frequent tool of communitarian law enforcement used in full conformity with international law" reflect *opinio juris* (i.e., "accepted as law.")).

94. Hofer, *supra* note 93, at 98.

95. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *supra* note 87, at Art. 22, p. 75 ¶ 4, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. Additional commentary concerning indirect effects evinces a general presumption in favor of the state taking the countermeasure. "Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavor to avoid or to limit as far as possible." *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Art. 22, Sec. 5 (p. 76) (quotations omitted) (quoting *Cysne* (Responsibility of Germany for acts committed subsequent to 31 July 1914 and before Portugal entered the war) (Portugal/Germany) (1930), *RIAA*, vol. II, 1052, 1056-57)). The approach ascribes significant goodwill and humanitarian impulses to the state taking the countermeasure that may not always be justified.

unlawful barring a separate violation of an obligation owed to the third state. Should a state take a countermeasure against the wrongful state that causes food shortages and a health crisis in a third state, it is unclear whether those “consequential effects” amount to “an independent breach of any obligation” to the third state. Considering the law’s lack of protection for even the directly targeted state, third states may not fare any better where the effects are only indirect and unintended. On the other hand, the third state has not committed an underlying internationally wrongful act precipitating the countermeasure.

The commentary to Article 49 explains that indirectly affected states are without a claim “[i]f they have no individual rights in the matter . . . The same is true if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.”⁹⁶ The example suggests that the fact that third states suffer adverse unintended consequences because of sanctions on Russia will not impact the legality of the countermeasure.

The concerns of third states remain a blind spot elsewhere in countermeasures too. ARSIWA Article 50, which states that countermeasures shall not affect obligations to protect fundamental human rights and other peremptory norms, concerns only the relationship between the injured state and responsible state.⁹⁷ Third states are not included with the proscription.

ARSIWA Article 51 addresses proportionality, stating: “Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.” The commentary, however, seems to give extra weight to the injury suffered not just by the state that undertakes countermeasures, which looks at the “gravity” of that injury, but the “rights in question” “has a broad meaning” considering rights of both states and that “the position of other states which may be affected may also be taken into consideration.”⁹⁸ The language seems to afford greater weight to how other states are injured by the initial wrong than to how other states are injured by the countermeasures. In assessing proportionality, the rights of third states as victims of countermeasures do not appear part of any legal calculation. Ultimately this legal lacuna, compounded by unilateral sanctions against powerful economic states with unintended consequences affecting developing states,

96. *Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *supra* note 87, at Art. 49, p. 130 ¶ 5.

97. *Id.* at Art. 50, p. 131 ¶ 1.

98. *Id.* at Art. 51, p. 135 ¶ 6. *See also id.* At p.134 ¶ 3 (quoting the *Case Concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), at 415, “In the Tribunal’s view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach.”).

requires both substantive and procedural changes in the international system.

III. ADDRESSING UNILATERAL SANCTIONS' UNINTENDED CONSEQUENCES

The unilateral sanctions against Russia may offer state practice and articulations of law that enhance human rights protections for those subjected to sanctions and third states suffering unintended, but foreseeable, consequences.

A. Humanitarian exemptions

Notwithstanding the limitations attendant to humanitarian exemptions to unilateral sanctions regimes – including those against Russia – the efforts by various states to include them reflect a welcome emerging state practice.⁹⁹ There is, however, additional need to clarify that sanctioning states are required by international law to include such exemptions and undertake steps to realize their objectives. Recent developments evince a move toward such a norm.

1. UN Security Council Resolution 2664

In December 2022, the UN Security Council issued Resolution 2664, which includes a “humanitarian carve-out” that exempts activities “necessary to ensure the timely delivery of humanitarian assistance or to support other activities that support basic human needs . . . [from] the asset freezes imposed by this Council or its Sanctions Committees.”¹⁰⁰ The resolution also directs that sanctions committees provide implementation guidance for the exemption specific to their sanctions regimes and to monitor the implementation.¹⁰¹ Finally, the resolution requires a “report on unintended adverse humanitarian consequences of Security Council sanctions measures, including travel ban and arms embargo measures, . . . [and] recommendations on ways to minimize and mitigate such unintended adverse consequences . . .”¹⁰²

Scholars have described the resolution as “a watershed decision—one with potentially far-reaching implications for efforts to safeguard impartial humanitarian assistance in numerous crises around the world.”¹⁰³ The resolution should provide greater clarity to humanitarian exemptions and address concerns relating to overcompliance and de-risking that have

99. See *supra* Part II.F.

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

101. *Id.* at para. 6.

102. *Id.* at para. 7.

103. Dustin Lewis & Naz Modirzadeh, *The U.N. Security Council Adopts a Standing Humanitarian “Carve-Out,”* LAWFAREBLOG (Dec. 13, 2022), <https://www.lawfareblog.com/un-security-council-adopts-standing-humanitarian-carve-out>.

aggravated UN sanctions' adverse impacts.¹⁰⁴ Though addressing only UN sanctions regimes, the concerns and measures contemplated by Resolution 2664 should serve as the baseline minimum for individual states in their adoption of unilateral sanctions.¹⁰⁵

Indeed, the United States, which co-sponsored the resolution, has stated it would adopt such exemptions throughout its sanctions regimes.¹⁰⁶ The exemptions reflect measures the U.S. Department of Treasury recommended in 2021 to modernize its sanctions program and prevent and reduce unintended humanitarian consequences.¹⁰⁷

Neither Resolution 2664 nor US sanctions-exemption policies explicitly refer to addressing the unintended consequences affecting non-sanctioned states. But the broad language in both regimes suggests the humanitarian-carve out should address third states.

Finally, despite the apparent positive developments in institutionalizing humanitarian exemptions, past practice recalls the need for tempered optimism. The Committee on Economic, Social and Cultural Rights criticized early humanitarian exemptions as "very limited in scope" and "ambiguous," resulting in "[d]elays, confusion and the denial" of vital resources.¹⁰⁸ And more recently, the UN special rapporteur on unilateral sanctions found that

104. See *id.*; Emanuela-Chiara Gillard, *Humanitarian exceptions: A turning point in UN sanctions* <https://www.chathamhouse.org/2022/12/humanitarian-exceptions-turning-point-un-sanctions>.

105. Lewis & Modirzadeh, *supra* note 103 ("It may be worth monitoring whether the rationale embedded in Resolution 2664's core obligation is carried over to [unilateral] sanctions regimes."); Brubaker & Huve, *supra* note 57, at 398 (stating that UN sanctions measures "set the tone and standards or pave the way for the application of additional regional and unilateral measures. . .").

106. Edward Wong & Ana Swanson, *How Russia's War on Ukraine Is Worsening Global Starvation*, Jan. 2, 2023, N.Y. TIMES, <https://www.nytimes.com/2023/01/02/us/politics/russia-ukraine-food-crisis.html> (describing the exemptions as "the most significant change to U.S. sanctions policy in years."). The United States indicated that, in connection with Security Council Resolution 2664, it would "incorporate humanitarian authorizations across [U.S.] domestic sanctions programs." The U.S. further indicated it would cooperate "with other Member States and humanitarian actors to ensure aid continues to reach those in need, while maintaining the integrity of sanctions that help promote global peace and security." Press Statement by Sec'y of State Antony J. Blinken, UN Security Council Adopts Resolution Establishing Humanitarian Carveout across UN Sanctions Regimes, U.S. DEP'T OF STATE (Dec. 9, 2022), <https://www.state.gov/un-security-council-adopts-resolution-establishing-humanitarian-carveout-across-un-sanctions-regimes/>.

107. U.S. DEP'T OF TREASURY, *supra* note 7 (recommending that the Treasury Department "expand sanctions exceptions to support the flow of legitimate humanitarian goods and assistance and provide clear guidance at the outset when sanctions authorities are created and implemented, particularly related to vulnerable populations," as well as monitor for unintended consequences and adjust accordingly).

108. Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997), The relationship between economic sanctions and respect for economic, social and cultural rights, para. 5 (E/C.12/1997/8) (quoting "Impact of armed conflict on children" (A/51/306, annex) (1996), para. 128).

overcompliance with sanctions prevented NGOs and humanitarian providers from effectively serving those most in need.¹⁰⁹ Additional steps are therefore necessary to fully realize the objectives of humanitarian exemptions.

2. *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.)*

Designing humanitarian exceptions alone may not meet a sanctioning state's human rights obligations.¹¹⁰ Though not explicitly addressing sanctions as a countermeasure, the International Court of Justice determined in 2018 that U.S. sanctions would violate its treaty with Iran if it did not *ensure* that certain items required for humanitarian needs were exempted.¹¹¹ The Court was not moved by the United States's "specific steps to mitigate the impact of its measures on the Iranian people [and] humanitarian-related authorizations and exceptions."¹¹² Rather, the Court ordered that the United States "must remove . . . any impediments . . . to the free exportation to the territory of Iran of goods required for humanitarian needs . . ."¹¹³ Accordingly, the Court held, "the United States must ensure that licences and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction in so far as they relate to [medicines and medical devices; foodstuffs and agricultural commodities; and civil aviation-related goods and services]."¹¹⁴

The Court's reasoning and insistence on humanitarian exemptions might apply with equal force should the United States claim that its sanctions are a countermeasure in response to Iran's own internationally wrongful acts.¹¹⁵ The Court's approach may indicate that a sanctioning state must go beyond the drafting of humanitarian exemptions and reflects a

109. See Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena F. Douhan, Secondary sanctions, civil and criminal penalties for circumvention of sanctions regimes and overcompliance with sanctions, para. 56-59, Human Rights Council, A/HRC/51/33 (15 July 2022).

110. See Seyed M.H. Razavi & Fateme Zeynodini, *Economic Sanctions and Protection of Fundamental Human Rights: A Review of the ICJ's Ruling on Alleged Violations of the Iran-U.S. Treaty of Amity*, 29 WASH. INT'L L.J. 303, 314 (2020).

111. *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.)*, Provisional Measures, 2018 I.C.J. (Oct. 3), para. 98 (addressing claims that U.S. sanctions reimposed after alleged Iranian violation of the Joint Comprehensive Plan of Action violated the 1955 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States).

112. *Id.* at para. 86.

113. *Id.* at para. 98.

114. *Id.*

115. See Lori Damrosch, *The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts*, 37 BERKELEY J. INT'L L. 249, 263 (2019). See also Razavi & Zeynodini, *supra* note 110, at 332 (characterizing the Court's order as "a new development with regard to the duty of the sanctioning state vis-à-vis the fundamental human rights of the sanctioned state's civilian population."); *id.* at 339.

move toward “defining sanctioning obligations as results-oriented rather than means-oriented.”¹¹⁶

Relying in part on the Court’s ruling, Sayed Razavi and Fateme Zeynodini argue that a sanctioning state has “a higher level of care and duty . . . to limit negative effects and to ensure that fundamental rights, such as access to food and medicine, are protected.”¹¹⁷ Two decades earlier, the Committee on Economic, Social and Cultural Rights stressed the need for “an appropriate sanctions regime” that considers how economic, social and cultural rights are affected, including systems “for anticipating and tracking sanctions impacts,”¹¹⁸ “effective monitoring,”¹¹⁹ and “respon[se] to any disproportionate suffering experienced by vulnerable groups. . . .”¹²⁰ To meet the duty of care, Razavi and Zeynodini similarly propose that a state first must undertake a human rights impact assessment aimed at preventing violations prior to imposing sanctions.¹²¹ Second, the state must monitor and respond to suffering caused by the sanctions, including “mitigating measures . . . to reduce negative effects.”¹²² Their proposal appears limited in scope, however, by (1) limning the duty of care to the sanctioned state population; and (2) forswearing compensation as part of the sanctioning state’s duty.¹²³

Several of these recommendations – impact assessment, monitoring – appear within UNSCR 2664 and U.S. sanctions policy. Missing from both the UN and U.S. unilateral sanctions exemptions, however, is a clear requirement that the state reduce unintended humanitarian consequences. Yet adopting the mitigate-negative-effects element of the duty of care is vital considering the well-documented unintended humanitarian consequences.

B. The sanctioning state’s duty of care and assistance to third

116. *Id.* at 338 (2020); *See also Alleged Violations of the 1955 Treaty of Amity, supra* note 112, at para. 89 (“[W]hile the importation of foodstuffs, medical supplies and equipment is in principle exempted from the United States’ measures, it appears to have become more difficult in practice, since the announcement of the measures by the United States, for Iran, Iranian companies and nationals to obtain such imported foodstuffs, supplies and equipment.”); *id.* at para. 92 (finding that U.S. commitment to “ensure that ‘humanitarian or safety of flight-related concerns which arise following the reimposition of the United States sanctions’ receive ‘full and expedited consideration’ . . . are not adequate to address fully the humanitarian and safety concerns”).

117. Razavi & Zeynodini, *supra* note 110, at 328.

118. Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997), The relationship between economic sanctions and respect for economic, social and cultural rights, para. 12 (E/C.12/1997/8).

119. *Id.* at para. 13.

120. *Id.* at para. 14.

121. *See* Razavi & Zeynodini, *supra* note 110, at 328-29.

122. *Id.* at 329.

123. *See id.* at 338 (stating that the sanctioning state is “not required to provide direct humanitarian assistance to the sanctioned country”).

states

Building on these international organizational developments, legal theory, and studies on sanctions, I argue, first, that a state, in imposing unilateral sanctions, has a duty of care under international law to prevent human rights harms to both the sanctioned state population *and* third states. And this duty is even more pronounced insofar as it concerns developing third states, which are poorly positioned to withstand unintended humanitarian consequences.¹²⁴ A failure to meet this component of the duty of care should remove a unilateral sanction from the protective countermeasures framework.

The documented harms that third states suffer from unilateral sanctions often violate international law, which cannot be justified as a countermeasure. The consequences are not merely “incidental,”¹²⁵ but implicate third states’ economies, violating their peoples’ rights to food and health, exceeding the bounds of countermeasures as contemplated under ARSIWA.¹²⁶

Despite the effects on third states receiving little attention in the legal development of countermeasures, ARSIWA Article 50(1)(b) (“the obligation for the protection of fundamental human rights”) must apply to third states’ human rights too in considering the limits on countermeasures. Similarly, the unintended consequences suffered by third-state populations call into question the proportionality of most unilateral sanctions, given that they are not even citizens of the sanctioned state. And regardless of the potential validity of general-interest unilateral sanctions and the underlying gravity of a peremptory norm violation, the documented unintended consequences on third states should not be regarded as “commensurate” with that harm. Moreover, these unintended consequences illustrate how unilateral sanctions may not accord with the principle of distinction.¹²⁷ Finally,

124. See Committee on Economic, Social and Cultural Rights, *supra* note 30, at para. 14 (stating the sanctioning state “has an obligation ‘to take steps, individually and through international assistance and cooperation, especially economic and technical’ in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.”). In light of the documented unintended consequences on third states resulting from sanctions, the Committee’s same reasoning should apply to the sanctioning state’s obligation to third states.

125. ARSIWA *supra* note 86, at Art. 49, Sec. 5.

126. *Id.*; *id.* at Art. 22, Sec. 4.

127. See, e.g., Nema Milaninia, *Jus ad bellum economicum and jus in bello economico: The Limits of Economic Sanctions Under the Paradigm of International Humanitarian Law*, in *ECON. SANCTIONS UNDER INT’L. L.: UNILATERALISM, MULTILATERALISM, LEGITIMACY, AND CONSEQUENCES* 119 (Ali Z. Marossi & Marissa R. Bassett eds., 2015) (“To be lawful under IHL, economic sanctions must be capable of discrimination.”); See also Reisman & Stevick, *supra* note 67, at 132 (“[I]t would seem that genuinely effective general embargoes, which, by definition, cannot discriminate between combatant and non-combatant, should be impermissible and that there is now a need for a much more refined use of the economic sanction.”) (characterizing 1990 UNSC Resolution 661 sanctions as “exorbitant” for restricting food into Iraq).

disputes over the efficacy of sanctions may further undermine the argument that unilateral sanctions satisfy the principle of necessity.¹²⁸

Second, the duty to mitigate such negative effects should include direct assistance to third states, which may include funding to forestall foreseeable unintended consequences and compensation to remedy these negative effects. Again, the obligation to provide direct assistance to developing third states is stronger because such states are more vulnerable to economic disruption.¹²⁹ Moreover, in contrast to the sanctioning state, the third state is blameless, having not committed the precipitating internationally wrongful act that could theoretically have supported a countermeasure. The predictable severity of sanctions' effects on third states calls into question satisfaction of ARSIWA's Article 49's objects and limits of countermeasures.¹³⁰

Ensuring individual state compliance with a heightened duty of care will invariably require international multilateral coordination. The UN, and particularly the General Assembly, has a pivotal role to play here.

C. General Assembly involvement and oversight

The General Assembly should play a critical coordinating, "lawmaking," gatekeeping, and oversight role concerning unilateral sanctions. Because the Security Council is often stymied – as is the case with Russia certain to veto any sanctions relating to its invasion – the General Assembly's importance is heightened when addressing unilateral sanctions. The General Assembly may invoke certain authorities in lieu of the Security Council through a Uniting for Peace Resolution.¹³¹ Immediately after Russia's invasion, the General Assembly did just that, convening an emergency special

128. See *infra* Part I.C; see also Reisman & Stevick, *supra* note 67, at 128-31 (discussing application of law of armed conflict principles of necessity and proportionality to economic sanctions).

129. See Committee on Economic, Social and Cultural Rights, *supra* note 30, at para. 14.

130. ARSIWA, *supra* note 86, at Art. 49 ("An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations . . ."). Here, the third state being penalized has not committed an internationally wrongful act.

131. The Resolution, first utilized over the 1950 Korean conflict, provides: "[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security . . . the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures[.]" GA Res. 377 A (V). Uniting for Peace A, para. 1, A (Nov. 3, 1950), <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/059/75/PDF/NR005975.pdf?OpenElement>. See also Michael P. Scharf, *Power Shift: The Return of the Uniting for Peace Resolution*, Faculty Publications 1, 8 (2023), https://scholarlycommons.law.case.edu/faculty_publications/2153 (describing Uniting for Peace Resolution mechanism); Rebecca Barber, *What can the UN General Assembly do about Russian Aggression in Ukraine?*, EJIL:TALK! (Feb. 26, 2022), <https://www.ejiltalk.org/what-can-the-un-general-assembly-do-about-russian-aggression-in-ukraine/>.

session and called on Russia to cease its aggression against Ukraine.¹³² Pursuant to the same mechanism, the General Assembly may recommend economic sanctions.¹³³

By taking the leading role in recommending sanctions the General Assembly may coordinate the different states' regimes to limit unintended consequences, including by ensuring the sanctions requirements are similar and clear to avoid overcompliance problems.¹³⁴ The coordinating role addresses concerns that surfaced in early drafts of ARSIWA relating to general-interest countermeasures, which would have "required several states taking such countermeasures to act in concert to ensure proportionality."¹³⁵ The General Assembly may also oversee and coordinate the humanitarian exemptions to ensure that vital goods and services reach disadvantaged populations.¹³⁶ Such multilateral engagement is critical to ensuring that disparate, individual state sanctions regime not wreak unnecessary havoc to the global financial and trade system.¹³⁷

The General Assembly might also play a critical role in clarifying the law on sanctions and countermeasures. Moreover, the Assembly's central role, in addition to its multilateral and representative legitimacy, may also "alleviate concerns regarding abuse that might arise in a single state, or a small group of states, determining the legality of sanctions unilaterally."¹³⁸

132. General Assembly, *Eleventh emergency special session: Aggression against Ukraine*, A/ES-11/L.1 (March 1, 2022), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N22/272/27/PDF/N2227227.pdf?OpenElement>.

133. Barber, *supra* note 131 ("[T]he General Assembly could recommend . . . whatever sanctions it could get majority agreement on – asset freezes and travel bans targeting senior government officials, sanctions targeting Russian financial institutions, or any of the various other measures already imposed or being considered by many western states."); *id.* (noting past instances of such recommendations); Scharf, *supra* note 131, at 31 ("The General Assembly has used the Uniting for Peace Resolution in the past to call upon members to impose diplomatic sanctions and trade embargoes as a countermeasure to induce compliance with international law by a law-breaking State.").

134. Michael Ramsden, *Uniting for Peace: The Emergency Special Session on Ukraine*, HARV. INT'L L. J., <https://harvardilj.org/2022/04/uniting-for-peace-the-emergency-special-session-on-ukraine/>. See also Douhan, *supra* note 32, at para. 51 ("The Special Rapporteur observes that differences between unilateral sanctions regimes targeting the same country, entity or individual also produce overcompliance when adherence to the strictest sanctions exceeds what is necessary to comply with milder ones."). See also *id.* (noting that European Union, United Kingdom, United States differs as to what conduct violates sanctions imposed on Russian in 2022).

135. Margo Kaplan, *Using Collective Interests to Ensure Human Rights: An Analysis of the Articles on State Responsibility*, 79 N.Y.U. L. REV. 1902, 1923 (2004) (discussing ARSIWA Article 51 and 2000 draft Article 54).

136. See *cf.* Razavi & Zeynodini, *supra* note 110, at 336–37, n. 205 (describing challenges to Swiss government's efforts to afford "humanitarian channel" in line with U.S. sanctions against Iran).

137. See U.S. DEP'T OF TREASURY, *supra* note 7, at 5 (recommending that U.S. Treasury work more with multilateral institutions to improve its sanctions program).

138. Ramsden, *supra* note 134. Though not addressing the role of the General Assembly, Sarah Cleveland long ago stressed the need for institutionalizing norms across unilateral

The Assembly's coordination at a legal plane would better ensure that developing states – and third states impacted by sanctions – are heard from concerning the law's progression.

Rebecca Barber has argued that the Assembly could resolve the legal ambiguity over sanctions, addressing, for example, whether a state may invoke general-interest countermeasures to enforce *erga omnes* obligations.¹³⁹ Further resolving the legal mire, the Assembly could offer comprehensive legal guidance that includes developing-world perspectives and would better inform the extent to which unintended consequences on third parties might violate limitations on countermeasures and related sanctioning-state obligations.¹⁴⁰ These General Assembly endorsements and characterization of certain sanctions as countermeasures would have the effect of nonbinding “quasi-judicial determinations.”¹⁴¹

1. *The third state's Article 50 right to consult and assistance*

In connection with articulating the legal duties that sanctioning states owe to third states, the rights of third states must be clarified and provided a mechanism by which to vindicate their rights. The documented history and already emerging unintended consequences for developing economies require sanctioning states and organizations to “take seriously the task of providing them with economic support.”¹⁴²

Article 50 of the UN Charter provides such a vehicle as both a substantive and procedural matter. The little-used provision affords states injured by Security Council-imposed economic sanctions targeting another state “the right to consult the Security Council with regard to a solution of those

sanctions regimes. Cleveland, *supra* note 13, at 85 (Even those who consider unilateral sanctions matters of foreign policy and national interest recognize that their legitimacy – and compliance – requires “international norms that [states] perceive to be fair, and reliable *interpretation* and *application* of international norms by transnational actors”) (emphasis in original). See also Kaplan, *supra* note 135, at 1930 (observing that leaving development of countermeasures concerning general-interest sanctions to individual states means that “[p]owerful states therefore have more incentive to take collective countermeasures, but they have little guidance to protect against their potentially disastrous effects.”).

139. Barber, *supra* note 58, at 374.

140. See Ramsden, *supra* note 134 (observing that, although states have sanctioned Russia with General Assembly direction or recommendation, “there is a role, moving forward, for the Assembly to evaluate the legality of sanctions against Russia by, for example, certifying that the conditions for the valid invocation of the law of countermeasures have been met[.]”); Scharf, *supra* note 131, at 31.

141. Barber, *supra* note 58, at 375–76 (noting that the General Assembly's characterization of particular sanctions as countermeasures would (1) distinguish such sanctions from those it condemns; (2) provide greater clarity for the legality of “human rights-related sanctions” as countermeasures; (3) afford states leeway to evade certain treaty obligations as countermeasures; and (4) create General Assembly precedent.).

142. Mulder, *supra* note 3.

problems.”¹⁴³ Though explicitly tethered to Security Council sanctions, the purpose and function of Article 50 supports its utilization in connection with unilateral sanctions and where the General Assembly acts pursuant to the Uniting for Peace Resolution.¹⁴⁴

Although third states have not frequently invoked Article 50, there are notable exceptions.¹⁴⁵ The lack of Article 50 requests may also be attributed to the Security Council’s parsimonious responses and lack of textually explicit remedy.¹⁴⁶ Whether or not states have explicitly referred to Article 50, Security Council members have continually raised concerns over the impacts of sanctions on third states, which “are of relevance for the interpretation and application of Article 50.”¹⁴⁷

Some states and scholars, however, have argued that Article 50 should be interpreted to include not merely a right to consult but also a right to a remedy, i.e., direct assistance or compensation for the unintended

143. UN Charter art. 50 (“If preventive or enforcement measures against any state are taken by the Security Council, any other state, . . . which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.”); Reisman & Stevick, *supra* note 67, at 140; Jeremy Carver & Jenine Hulsmann, *The Role of Article 50 of the UN Charter in the Search for International Peace and Security*, 49 INT’L AND COMPAR. L. Q. 528, 529 (2000) (“[T]hose who drafted the UN Charter anticipated the possibility of unintended collateral effects arising from the imposition of economic sanctions and included Article 50 . . . [T]hey provided that the Security Council would at least listen, if not actually resolve, the problems which States other than the target State would suffer.”). The various sanctions committees associated with UN sanctions appear derivative of Article 50 and may fulfill some of the Article’s intended and proposed functions. See UN Security Council: Sanctions and Other Committees, <https://www.un.org/securitycouncil/content/repertoire/sanctions-and-other-committees> (listing committees).

144. Carver & Hulsmann, *supra* note 144, at 528, 530, n. 15 (observing that, despite article 50 functioning almost entirely in Article 41 Security Council context, the Collective Measure Committee requested that article 50 apply where the General Assembly acted under the Uniting for Peace Resolution).

145. Guy Martin & Charles Enderby Smith, *UN Sanctions*, GLOB. INVESTIGATIONS REV. (July 13, 2021), <https://globalinvestigationsreview.com/guide/the-guide-sanctions/second-edition/article/un-sanctions> (describing Security Council-created committee consideration of 13 states’ requests for assistance owing to impact from 1990 UN sanctions against Iraq and eventual financial awards).

146. See *id.* (describing Article 50 as providing only “a right of consultation, not a right of compensation,” and that “the international community has been reluctant in the past to take much meaningful action and, therefore, Article 50 is generally considered an ineffective remedy”). See also JEREMY MATAM FARRALL, U. N. SANCTIONS AND THE RULE OF LAW 229 (2007) (describing invocation of Article 50 as “a largely symbolic action” with little economic impact).

147. Repertoire of the Practice of the Security Council, 2016–2017, IX. *Special economic problems of the nature described in Article 50 of the Charter*, 409, 410, https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/part_vii_2016-2017.pdf#page=61. See, e.g., *id.* (describing “Case 17, General Issues relating to sanctions,” and noting that “[t]he representative of the Islamic Republic of Iran said that sanctions committees must be ‘vigilant’ of the economic effects of sanctions on third parties[]”; “the representatives of Kazakhstan and China stressed the need to avert negative socioeconomic consequences for innocent populations and third States.”).

consequences of sanctions. The argument is ventured that “recognition of a right to consult implies a corresponding obligation on the part of the Council to ensure that effective assistance is provided.”¹⁴⁸

Several states, principally developing ones, have consistently sought to implement Article 50 insofar as it would aid third states impacted by sanctions.¹⁴⁹ However, there remain differing views on any such obligation to assist, with Western states, particularly permanent Security Council members and most prominent purveyors of unilateral sanctions such as the United States and United Kingdom, often opposing any duty to compensate or affording such a mechanism.¹⁵⁰

The long track record of unintended consequences befalling third states argues for an expansive reading of Article 50 that entail both a third state’s right to consultation and right to assistance along with a correlative sanctioning state obligation to mitigate and remedy. One challenge to fully realizing the potential efficacy of Article 50 is that it affords a state adversely affected by sanctions a right to consult only *after* imposition, not before.¹⁵¹ However, to forestall negative consequences that befall third

148. FARRALL, *supra* note 146, at 229.

149. See, e.g., Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (A/C.6/71/L.15), Annex, para. 2 (2016), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N16/365/90/PDF/N1636590.pdf?OpenElement>.

150. See, e.g., Sixth Committee (Legal) — 62nd session, Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (agenda item 85), Summary of Work, <https://www.un.org/en/ga/sixth/62/CharterCtee.shtml> (“Delegations expressed divergent views on the implementation of Article 50 of the Charter, especially regarding the obligation of the Security Council to assist third States affected by sanctions. Some delegations sought the establishment of a mechanism to assist third States at the time of the imposition of sanctions by the Security Council.”); Sixth Committee (Legal) — 64th session, Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (agenda item 82), Summary of Work, <https://www.un.org/en/ga/sixth/64/CharterCtee.shtml> (“Some representatives also emphasized the importance of adherence to Article 50 of the Charter, while some others rejected any assimilation of the right of States to consult with the Security Council under Article 50 with the responsibility of the Organization to assist third States adversely affected by sanctions.”). The U.S. has contended that Article 50 does not oblige the Security Council to take “action to assist ‘third States’ affected by the imposition of sanctions. U.S. statement to Sixth Committee concerning role of the UN Charter committee (Oct. 16, 2007), <https://2001-2009.state.gov/s/l/2007/112684.htm>. (The U.S. also noted the dearth of state requests for relief, maintaining that “targeted sanctions have substantially minimized unintended economic consequences for States,” and concluding, “we see no reason for Member States to consider actively the establishment of a fund financed from assessed contributions or other UN-based financial arrangements to address an abstract concern.”). See also *Repertoire of the Practice of the Security Council, 2016–2017, IX. Special economic problems of the nature described in Article 50 of the Charter, 409, 410*, https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/part_vii_2016-2017.pdf#page=61 (The United Kingdom asserted that targeted sanctions obviate the need to address unintended consequences for third states.).

151. See UN Charter art. 50; Carver & Hulsmann, *supra* note 143, at 536.

parties, states imposing sanctions should be expected to notify other third states of intended sanctions and afford third states the “right to consult” and advise on concerns as well as seek offsetting mitigation measures and positive investments and allocations of funds and services.¹⁵²

Further development of Article 50 rights and duties might adopt the UN Working Group’s recommended steps, including the creation of an Article 50 trust fund, a process for investigating third-state claims and recommending assistance, and assessing third-state impact prior to imposing sanctions.¹⁵³ In addition, locating within Article 50 a third-state right to direct assistance from other sanctioning states is also sound from a proportionality perspective, where the states most dependent on trade with a sanctioned state are likely to suffer disproportionately.¹⁵⁴ Moreover, the assistance is also likely to buttress third-state compliance with the sanctions regime.¹⁵⁵

Finally, there must be some limit to which countries are entitled to the right to consult and ameliorative economic measures. The currently integrated global economy renders it near certain that all states may well be impacted by sanctions on a large economy such as Russia’s. To be workable, the right to consult and assistance should thus be limited to those states disproportionately impacted by the sanctions and disentangled from those states affected by the underlying wrongful act.¹⁵⁶

2. International engagement with unilateral sanctions and consequences

The Assembly should also work via Article 50 with other international organizations like the International Monetary Fund to address myriad other challenges facing developing-state economies, which may be compounded by sanctions, including “high debt, the high cost of a transition to renewable energy, rising interest rates, and global stagflation.”¹⁵⁷ Through the Article 50 process and other UN mechanisms, the Assembly and Secretariat may help ensure that humanitarian aid reaches these states and coordinate developed states’ “demand for food and energy to reduce price pressures

152. Carver and Hulsmann dismissed the notion of an advance right to consult in the Security Council context due to concerns of timing, flexibility and utility. Carver & Hulsmann, *supra* note 143, at 536.

153. FARRALL, *supra* note 146, at 229 (citing A/53/312 (27 August 1998): *Implementation of provisions of the Charter related to assistance to third states affected by the application of sanctions*, para. 46, 54, 50).

154. *Id.*

155. *Id.*

156. Carver & Hulsmann, *supra* note 143, at 537–47.

157. Mulder, *supra* note 3. See also Kilcrease, Bartlett & Wong, *supra* note 48, (“At the same time as allies are continuing to escalate sanctions, they will need to address the impacts that the sanctions and the armed conflict have on food security and other humanitarian concerns, both in Russia and globally.”).

caused by hoarding and competitive overbidding.”¹⁵⁸ These may include novel undertakings and agreements with even the sanctioned state to minimize the unintended consequences affecting third states.

One such example that may be replicable is the July 2022 agreement between the Russian Federation and the Secretariat of the United Nations to “prevent hunger and aggravating food security issues - primarily in developing and the least developed countries – by bringing stability to global food markets by facilitating access to agricultural products including fertilizers and raw materials required to produce fertilizers (including ammonia), originating from the Russian Federation.”¹⁵⁹ The UN-Russia agreement, which has been linked with the Black Sea Grain Initiative—an agreement between Russia, Turkey and Ukraine that facilitates Ukrainian exports of food and fertilizer¹⁶⁰—is vital because Russia and Ukraine account for 30% of global wheat and barley exports, 20% of corn exports, more than 50% of sunflower oil exports, and Russia alone exports 15% of the world’s fertilizer.¹⁶¹

The agreement reflects the heightened importance of the UN as a respected and central international broker in overcoming the decentralized and hostile relations associated with armed conflict and unilateral sanctions. Notwithstanding the EU, UK and U.S. exemptions for certain commodities such as food and fertilizer, Russia has claimed that it was challenged in “facilitating payments, shipping, insurance for shipments of its grain and fertilizer and getting access to European Union ports”¹⁶²

158. Mulder, *supra* note 3.

159. *Memorandum of Understanding between the Russian Federation and the Secretariat of the United Nations on promoting Russian food products and fertilizers to the world markets* (July 22, 2022), https://news.un.org/pages/wp-content/uploads/2022/09/MOU_21_July_UN-Secretariat86.pdf.

160. *Initiative on the Safe Transportation of Grain and Foodstuffs from Ukrainian Ports* (July 22, 2022), https://www.un.org/sites/un2.un.org/files/black_sea_grain_initiative_full_text.pdf; UN News, *The Black Sea Grain Initiative: What it is, and why it's important for the world*, UNITED NATIONS (Sept. 16, 2022), <https://news.un.org/en/story/2022/09/1126811>.

161. Associated Press, *UN Reports Progress on Russia's Grain and Fertilizer Exports*, (Nov. 11, 2022), <https://www.usnews.com/news/business/articles/2022-11-11/un-russia-hold-talks-on-extending-wartime-grain-deal>; United Nations Secretary General, *Statement attributable to the Spokesperson for the Secretary-General - on the agreements to facilitate the export of food and fertilizer from Ukraine and Russia* (Oct. 28, 2022), <https://www.un.org/sg/en/content/sg/statement/2022-10-28/statement-attributable-the-spokesperson-for-the-secretary-general-the-agreements-facilitate-the-export-of-food-and-fertilizer-ukraine-and-russia> (calling for “renewal and full implementation of the Black Sea Grain Initiative, as well as for the full implementation of the agreement signed with the Russian Federation[]” and noting that “[b]oth agreements aim to ensure that grain and fertilizers from Ukraine and the Russian Federation reach global markets at the speed and price needed to avert a global food crisis and ensure food security.”).

162. Associated Press, *supra* note 161.

Under the Memorandum of Understanding with Russia, the UN committed to “engage relevant authorities and the private sector to effectively exempt food and fertilizers, including the raw materials required to produce fertilizers (including ammonia), originating in the Russian Federation from measures imposed on the Russian Federation”¹⁶³ Owing in part to both the UN-Russia agreement and Black Sea Grain Initiative , it appears that both Russian and Ukrainian grain exports have risen since the start of the war.¹⁶⁴ Yet there remain points of dispute concerning both agreements which have called into question their periodic four-month renewal.¹⁶⁵ Ultimately, however, these sorts of creative, multilateral agreements, including the coordination by and with the UN, have proven vital to limiting the adverse consequences of war and unilateral sanctions on third states in the developing world.

CONCLUSION

The widespread condemnation of Russia’s invasion reflects a general support for international law, peace, and security. In imposing unilateral sanctions against Russia, however, Western allies should be similarly mindful that these economic weapons comport with international law and that they do not harm other states. As the Committee on Economic, Social and Cultural Rights warned, “lawlessness of one kind should not be met by lawlessness of another kind which pays no heed to the fundamental rights that underlie and give legitimacy to any such collective action.”¹⁶⁶

163. Memorandum of Understanding between the Russian Federation and the Secretariat of the United Nations on promoting Russian food products and fertilizers to the world market (July 22, 2022), https://news.un.org/pages/wp-content/uploads/2022/09/MOU_21_July_UN-Secretariat86.pdf. The agreement contemplates “impediments that may arise in the sectors of finance, insurance and logistics.” *Id.*

164. Bloomberg, *Russia Wheat Exports Nearly Double What They Were Before War*, GCAPTAIN (Mar. 4, 2023), <https://gcaptain.com/russia-wheat-exports-nearly-double-what-they-were-before-war/>. See also Pamela Falk & Tucker Reals, *Russia says renewing grain export deal with Ukraine “complicated” after U.N. chief calls the pact “critical”*, CBS NEWS (Mar. 9, 2023), <https://www.cbsnews.com/news/ukraine-news-russia-war-grain-deal-food-shipments-black-sea-un-guterres/> (Russia and Ukraine “have reestablished their grain exports under the agreement, easing global food prices.”).

165. Damilola Banjo, *Malawi to Receive Russian-Donated Fertilizer Near the End of Planting Season. Does Russia Really Care?*, PASSBLUE (Jan. 31, 2023), <https://www.passblue.com/2023/01/31/malawi-to-receive-russian-donated-fertilizer-near-the-end-of-planting-season/> (noting that in spite of UN-Russia agreement, there have been significant delays in transport of Russian fertilizer to countries highly dependent on the resource); Susannah Savage, *Ukraine to Russia: Stop using food as a weapon*, POLITICO (Feb. 15, 2023), <https://www.politico.eu/article/ukraine-russia-garin-export-black-sea-delay/> (Ukraine and other states have complained that Russia has impeded the Black Sea Grain Initiative’s export objectives and made pretextual complaints over its agreement with the UN.); Falk, *supra* note 164 (quoting U.S. secretary General Antonio Guterres describing UN, Ukraine, Turkey and Russia as “working hard to remove all the remaining obstacles . . . to facilitate exports of Russian food and fertilizers to global markets.”).

166. Committee on Economic, Social and Cultural Rights, *supra* note 30, at para. 16.

In a more integrated world economy, the effects of economic restraints are more rapidly felt, particularly by developing states. Continued efforts by powerful states and the Security Council to ensure humanitarian exemptions are important legal and procedural steps. These entities should further articulate their legal duties to third states to prevent sanctions-related human rights violations and to provide assistance to these states.