

RESEARCH ARTICLE

# The EU's 'Massive and Targeted' Sanctions in Response to Russian Aggression, a Contradiction in Terms

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## Abstract

In response to Russia's aggression against Ukraine, the EU adopted a series of unprecedented 'massive and targeted sanctions' against the Russian economy. Whereas the EU has clarified that its restrictive measures are not directed against Russian society, it has stated that it seeks to 'diminish' the Russia economy and 'cripple' its ability to finance the war. Such measures recall economic warfare, where the adversary's economy is targeted in order to weaken it and, if successful, would undoubtedly have an impact on Russian people. Moreover, the sanctions have had repercussions on third states and economic operators. Applying the proportionality principle, the article finds that the restrictive measures the EU has imposed on Russia in response to its aggressive war in Ukraine are disproportionate due to their impact on third parties.

**Keywords:** restrictive measures; proportionality; serious breaches of international law; economic warfare

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## I. Introduction: The return of the 'economic weapon'

The EU responded swiftly to Russia's aggression against Ukraine by adopting a series of sanctions. In a tweet posted on 25 February 2022, Ursula van der Leyen described the measures adopted as 'massive and targeted'.<sup>1</sup> She explained that these included financial sanctions, 'targeting 70% of the Russian banking market and key state owned companies', and sectoral sanctions, restrictions were imposed on Russia's energy sector, one of its key economic sectors, as well as a ban on selling aircraft and equipment to Russian airlines and reducing Russia's access to crucial technology.<sup>2</sup> These measures constituted the first of the (now) eleven sanctions packages that the EU has instituted against Russia.<sup>3</sup> In addition to being 'massive and targeted', the restrictions have also been

<sup>1</sup>Tweet posted by Ursula van der Leyen (@vonderleyen) on 25 February 2022, <https://twitter.com/vonderleyen/status/1497021840572796928>.

<sup>2</sup>Ibid.

<sup>3</sup>At the time of writing (August 2023) the EU has adopted eleven sanctions packages against Russia. See further European Council, 'Timeline - EU Restrictive Measures Against Russia over Ukraine', <https://www.consilium.europa.eu/en/policies/>

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characterized as ‘unprecedented’.<sup>4</sup> According to the Brookings Institute, they ‘represent the most severe and comprehensive sanctions ever imposed on a major economic power’.<sup>5</sup>

According to the European Commission website, the sanctions aim to ‘cripple the Kremlin’s ability to finance the war’ and ‘diminish its economic base’.<sup>6</sup> Another EU website is more measured, stating that their goal is to ‘weaken’, and not ‘cripple’, ‘the Kremlin’s ability to finance the war’.<sup>7</sup> Elsewhere, it is stated that: ‘The aim of the economic sanctions is to impose severe consequences on Russia for its actions and to effectively thwart Russian abilities to continue the aggression’.<sup>8</sup>

As is known, the Union coordinated its sanctions with the UK, the US, and other (mainly western) states. When the sanctions were adopted in February 2022, a British government website explained the ‘Sanctions will *devastate* Russia’s economy’. It continues:

Working with allies, we will *cripple* Russia’s economic development in both the short and long term. The UK and our allies are united and clear that nothing and no one is off the table.<sup>9</sup>

The US announced that it was taking:

significant and unprecedented action to respond to Russia’s further invasion of Ukraine by imposing *severe economic costs* that will have both immediate and long-term effects on the Russian economy and financial system.

(...)

This will *fundamentally imperil* Russia’s ability to raise capital key to its acts of aggression. These actions are specifically designed to impose immediate costs and disrupt and degrade future economic activity, isolate Russia from international finance and commerce, and degrade the Kremlin’s future ability to project power.<sup>10</sup>

As is clear from the statements above, the severe and unprecedented sanctions aim to *coerce* (or force, pressure) Russia from ending the war in Ukraine, while simultaneously seeking to *deter*, or constrain, Russia from expanding its military operation.<sup>11</sup> Sanctioners also invoke the imposition

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[sanctions/restrictive-measures-against-russia-over-ukraine/history-restrictive-measures-against-russia-over-ukraine/](https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/history-restrictive-measures-against-russia-over-ukraine/) (accessed 10 August 2023).

<sup>4</sup>European Council, ‘The EU Sanctions Against Russia Explained’, <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/#sanctions> (accessed 20 April 2023); but see I Timofeev, ‘Unprecedented Sanctions? By No Means’ (*Valdai Club*, 2 January 2023), <https://valdaiclub.com/a/highlights/unprecedented-sanctions-by-no-means/>.

<sup>5</sup>‘Sanctions on Russia over Ukraine’ (*Brookings Institute*, 29 December 2022), <https://www.brookings.edu/articles/sanctions-on-russia-over-ukraine/>.

<sup>6</sup>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](https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_en) (accessed 30 September 2022).

<sup>7</sup>European Council, ‘EU Restrictive Measures Against Russia over Ukraine (Since 2014)’, <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/#sanctions> (accessed 30 September 2022).

<sup>8</sup>European Council, note 4 above.

<sup>9</sup>UK Government Press Release, ‘UK Statement on Further Economic Sanctions Targeted at the Central Bank of the Russian Federation’ (28 February 2022), <https://www.gov.uk/government/news/uk-statement-on-further-economic-sanctions-targeted-at-the-central-bank-of-the-russian-federation>.

<sup>10</sup>US Department of Treasury Press Release, ‘US Treasury Announces Unprecedented & Expansive Sanctions Against Russia, Imposing Swift and Severe Economic Costs’ (24 February 2022), <https://home.treasury.gov/news/press-releases/jy0608>; Executive Order (EO) 14024.

<sup>11</sup>See also comments from Ambassador O’Brien: US Department of State Press Briefing, ‘Online Briefing with Special Envoy for Global Food Security Dr Cary Fowler and Head of the Office of Sanctions Coordination Ambassador Jim O’Brien’ (9 June 2022), <https://www.state.gov/online-briefing-with-special-envoy-for-global-food-security-dr-cary-fowler-and-head-of-the-office-of-sanctions-coordination-ambassador-jim-obrien/> (‘Our policy is to try to deter Russia from continuing its invasion and occupation of Ukraine. It’s a grotesque violation of every norm of international law. And that’s what our

of costs and of holding Russia *accountable* for breaching international norms.<sup>12</sup> The sanctions, therefore, pursue various goals.<sup>13</sup> In order to achieve these, the targets of these measures are not only Russian individuals that are considered to be members of the political and economic elite responsible (at varying degrees) for the conflict, but the Russian economic and financial system as a whole.

While the sanctions can be said to have multiple functions, overall they can be understood as ‘economic warfare’, which has been defined as the ‘weaken[ing] of the adversary’s economy in order to diminish or eliminate its capacity to wage war’.<sup>14</sup> Economic warfare is not a legal term and such practice is grossly unregulated.<sup>15</sup> Chachko and Heath note that the measures against Russia ‘[highlight] the relative lack of legal constraints governing economic warfare, even in the face of potentially grave harms to third parties and the global economy’.<sup>16</sup> They are nonetheless hopeful that the measures against Russia may give rise to ‘an ethic of responsibility’ around sanctions,<sup>17</sup> yet the question of sanctioning responsibly has been on the agenda for decades.<sup>18</sup> In spite of the various attempts that have been made at reducing the damage caused by sanctions, one may say that we suffer from ‘sanction-amnesia’ as the same problems frequently re-emerge.<sup>19</sup>

One of the questions relates to sanctions’ ‘collateral damage’ and their impact on third parties who are not targeted but nonetheless affected, such as the civilian population, third states, or private companies. Although this has been a pervasive question,<sup>20</sup> it received a lot of attention in the 1990s when the UN Security Council (‘UNSC’) sanctions against Iraq laid bare the devastating humanitarian toll that comprehensive sanctions can have on the civilian population.<sup>21</sup> Such measures were imposed on a country as a whole, without making the distinction between those who were responsible for the policy that the sanctioners wanted to change and the innocent bystanders. The severest consequences were felt by the latter. Given the ethical concerns that arose from this practice, academia and policy advisers called for a shift in approach: sanctions should be *targeted* against those directly responsible. It was suggested that they consist of asset freezes or travels bans that can be imposed on individuals, or only be aimed at a specific section of the state’s economy (known as sectoral sanctions).<sup>22</sup> Sanctions can also be financial, where restrictions are imposed on a country’s banking system or its ability to carry out financial transactions. The difference between comprehensive and targeted sanctions lies in who bears the costs. As Meissner and Graziani note, there is generally a continuum between the two:

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sanctions aim to do’). Although it seems that the sanctions have failed at achieving this, and therefore that the sanctioners have sought to ‘seriously impede [its] economic growth and military capabilities’. Brookings Institute, note 5 above.

<sup>12</sup>US Department of Treasury, note 10 above.

<sup>13</sup>F Giumelli, *The Success of Sanctions: Lessons Learned from the EU Experience* (Ashgate/Routledge, 2013); I Jones and C Portela, ‘Evaluating the Success of International Sanctions: A New Research Agenda’ (2020) 125 *Revista CIDOB d’Afers Internacionals* 39.

<sup>14</sup>V Lowe and A Tzanakopoulos, ‘Economic Warfare’ (2013) *Max Planck Encyclopedia of Public International Law*, para 3.

<sup>15</sup>*Ibid*, para 1.

<sup>16</sup>E Chachko and J Benton Heath, ‘A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield’ (2022) 116 *AJIL Unbound* 135, p 135.

<sup>17</sup>*Ibid*, p 139.

<sup>18</sup>Though one could go as far back as the inter-war period, see N Mulder, *The Economic Weapon: The Rise of Sanctions as a Tool of Modern War* (Yale University Press, 2022).

<sup>19</sup>I owe this comment to Dr E Nanopoulos.

<sup>20</sup>Mulder, note 18 above; E Moret, ‘More Civilian Pain Than Political Gain (Again?): The Demise of Targeted Sanctions and Associated Humanitarian Impacts’ in A Charron and C Portela (eds), *Multilateral Sanctions Revisited: Lessons Learned from Margaret Doxey* (McGill Queen’s University Press, 2022); J Gordon, ‘A Peaceful, Silent, Deadly Remedy: The Ethics of Economic Sanctions’ (1999) 13 *Ethics & International Affairs* 123.

<sup>21</sup>J Gordon, *Invisible War: The United States and the Iraq Sanctions* (Harvard University Press, 2010).

<sup>22</sup>D Cortright and G Lopez, *Smart Sanctions: Targeting Economic Statecraft* (Rowman & Littlefield, 2002); C Portela, ‘Are Targeted Sanctions Targeted?’ (2016) 29 *Cambridge Review of International Affairs* 912; J Gordon, ‘Smart Sanctions Revisited’ (2011) 25 *Ethics and International Affairs* 315.

Comprehensive restrictions, on one extreme of this continuum, entail costs for the target's entire population. (...) Targeted sanctions, on the other extreme of the continuum, entail costs only for specific individuals, entities or firms.<sup>23</sup>

Financial and sectoral sanctions can have a significant impact on a state's economy and society, bringing them closer to comprehensive sanctions.<sup>24</sup>

In advocating for targeted sanctions, one could say that there was the concern that sanctions be proportionate and discriminate.<sup>25</sup> This Article focuses on the former. In its broadest sense, proportionality is described as a balancing act; it can provide a rational framework for resolving tensions between conflicting rights and interests.<sup>26</sup> The present Article is concerned with whether the European Union is exercising its sanctioning powers in a proportionate manner while it seeks to achieve the goal of stopping an unlawful war.

This Article does not assess the sanctions' effectiveness, be that in achieving the desired objectives or in their genuine impact on the Russian economic and financial sectors. Even if one says that the sanctions are not succeeding in crippling the Russian economy, it is the explicit intention of the sanction senders (inasmuch as we are able to decipher what the exact objectives are).<sup>27</sup> Rather, the question addressed is whether the (anticipated or desired) impact of the sanctions is a proportionate response to Russia's aggression, which can be understood as a serious breach of international law. This is further explained in the following Part, which also defends the importance of the proportionality principle in ensuring that sanctions remain targeted (Part 2). It then considers how the principle is generally applied to sanctions under international law as well as EU law (Parts 3 and 4 respectively). After laying out the general legal framework, the article applies these considerations to the EU restrictive measures against Russia that have been adopted since February 2022, focusing on the financial and sectoral sanctions (Part 5). The final Part concludes.

## II. Proportionate sanctions as a lawful means to end serious breaches of international law

The prohibition of aggression is a *jus cogens* norm as well as an *erga omnes* obligation.<sup>28</sup> Russia's actions in Ukraine are to be understood as a 'serious breach' of international law, which, under Article 40 of the Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA'), constitutes a State's 'gross or systemic failure' to respect a peremptory, or *jus cogens*, norm.<sup>29</sup> Per Article 41 ARSIWA, 'States shall cooperate to bring to an end through lawful means any serious breach'. During the drafting of ARSIWA, it was uncertain whether there actually was

<sup>23</sup>K Meissner and C Graziani, 'The Transformation and Design of EU Restrictive Measures Against Russia' (2023) 45 *Journal of European Integration* 377, p 380 (references omitted).

<sup>24</sup>Ibid, p 384.

<sup>25</sup>B R Early and M Schulzke, 'Still Unjust, Just in Different Ways: How Targeted Sanctions Fall Short of Just War Theory's Principles' (2018) 21 *International Studies Review* 57; Gordon, note 20 above.

<sup>26</sup>See generally E Gill-Pedro and U Linderfalk, 'Introduction' in E Gill-Pedro and U Linderfalk (eds), *Revisiting Proportionality in International and European Law* (Brill, 2021).

<sup>27</sup>See D Drezner, 'What Is the Plan behind Sanctioning Russia?' (*The Washington Post*, 1 March 2022), <https://www.washingtonpost.com/outlook/2022/03/01/what-is-plan-behind-sanctioning-russia/>. For a general discussion, see Jones and Portela, note 13 above.

<sup>28</sup>ILC, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), in II *Yearbook of the International Law Commission*, Conclusion 23 (2022) [hereinafter 'Conclusions on Peremptory Norms']; ILC, Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, in II *Yearbook of the International Law Commission* (2001), p 85, para 5; p 127, para 9 [hereinafter 'ARSIWA with Commentaries'].

<sup>29</sup>See also CAVV, 'Rechtsgevolgen van een ernstige schending van een regel van dwingend recht: de internationale rechten en plichten van staten bij schending van het agressieverbod' Advies 41 (2002).

such an obligation under customary international law.<sup>30</sup> Nonetheless, this ‘duty to cooperate’ was reiterated in Article 19(1) of the International Law Commission’s ‘Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)’ (hereafter ‘Conclusions on Peremptory Norms’). The International Court of Justice (‘ICJ’) has also found that states have an obligation to cooperate to bring an end to breaches of *erga omnes* obligations in its advisory opinion on *The Wall* in 2004<sup>31</sup> and in the *Chagos* advisory opinion of 2019.<sup>32</sup>

Sanctioners, such as the EU, could argue that through their sanctions they are acting consistently under international law and cooperating to bring an end to Russia’s aggression against Ukraine. Nonetheless, there is a concern regarding how far states can go when adopting sanctions, particularly as these measures are grossly unregulated under international law. The International Law Commission (‘ILC’) and the ICJ have both asserted that states must use *lawful means*, but it remains unclear what this would consist of, particularly when they act outside of the United Nations.<sup>33</sup> Commenting on the duty of non-recognition, which requires States to not ‘recognize as lawful a situation created by a serious breach’ and is codified in Article 19(2) Conclusions on Peremptory Norms, the ILC noted it ‘is not to be implemented to the detriment of the affected population and deprive it of any advantages derived from international cooperation’.<sup>34</sup> It is difficult to conceive why this caveat would not be applicable to the duty to cooperate. Yet, the detrimental effect on the civilian population is precisely the concern that arises from broad, far-reaching sanctions.

Finding that ‘the 2010s have been characterized by a return to *de facto* comprehensive sanctions’, Moret has noted the ‘re-comprehensization’ of sanctions.<sup>35</sup> The 2022 and 2023 sanctions against Russia are a continuation of this trend. Commenting on the US and EU sanctions against Russia, Gordon finds ‘their scope is similarly vast and indiscriminate’ to comprehensive sanctions. In her opinion, the sanctioners have demonstrated their ‘willingness to abandon the expectation that [they] will not impose the kind of broad, devastating damage to the civilian population that we saw in the 1990s’.<sup>36</sup> This conclusion is confirmed by Meissner and Graziani, who find that the EU’s response to Russia’s unlawful conduct in Ukraine in 2022 is by far the most comprehensive sanctions the regional organization has adopted autonomously. The comprehensiveness of these measures entails major costs for the Russian economy and, consequently, the Russian population.<sup>37</sup> It is here that the proportionality principle could provide guidance.

As stated above, a broad definition of the proportionality principle is to say that it aims to strike a balance between the interests of different actors. Notwithstanding its centrality in international law, the proportionality principle is characterized by its indeterminate nature as its application varies across fields of international law. As Michaelsen suggests, it is perhaps best seen as a guiding principle that informs decision making and functions as an ‘analytical structure that leads to the

<sup>30</sup> ARSIWA with Commentaries, note 28 above, Commentary to Article 41(1), p 114, para 3 (‘It may be open to question whether general international law at present prescribes a positive duty of cooperation, and [Article 41(1)] in that respect may reflect the progressive development of international law’).

<sup>31</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (2004) ICJ Reports 136 (July 9), para 159.

<sup>32</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion (2019) ICJ Reports 95 (Feb. 25), para 182.

<sup>33</sup> ILC, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*) with Commentaries, in *Yearbook of the International Law Commission*, note 28 above, pp 72–73.

<sup>34</sup> *Ibid*, p 78, para 15. This is based on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion (1971) ICJ Reports 16 (June 21), para 125.

<sup>35</sup> Moret, note 20 above, p 180.

<sup>36</sup> J. Gordon, ‘Russia, Ukraine, and the Demise of Smart Sanctions’ (*Ethics and International Affairs Online*, 21 March 2022), <https://www.ethicsandinternationalaffairs.org/2022/russia-ukraine-and-the-demise-of-smart-sanctions/>.

<sup>37</sup> Meissner and Graziani, note 23 above.

formulation of an opinion concerning policy implementation'.<sup>38</sup> According to Crawford, the principle requires that 'a State's acts must be a rational and reasonable exercise of means towards achieving a permissible goal, without unduly encroaching on protected rights of either the individual or the State'.<sup>39</sup> Based on this definition, she finds that it encompasses three elements: (1) suitability, the measures adopted are appropriate to the objective sought; (2) necessity, the objective can only be achieved by the method in question; and (3) proportionality *strictu sensu*, balancing the effect of the measures chosen against the objective sought.<sup>40</sup>

In the context of sanctions, proportionality should ensure that the costs or restrictions being imposed on the target are not excessive when assessed against the goals being pursued by the sender and the interests they seek to protect.<sup>41</sup> Sanctions' proportionality assessment rarely includes whether the measures were necessary.<sup>42</sup> This would entail verifying whether the objectives could be achieved via a less onerous means, which in essence requires a discussion on the sanctions' effectiveness. With regard to comprehensive sanctions, despite the high costs being imposed on Iraq in the 1990s the UNSC was not achieving its policy objectives. Furthermore, the brunt of the sanctions was felt by the Iraqi people, at a devastatingly high cost. The pain being imposed on Iraqis was superfluous. It was therefore suggested that targeted sanctions would be a less severe alternative and would be more effective at achieving policy goals. They would be 'smart', in that they would apply pain in a precise manner, and not 'massive'. Ultimately, they should be limited to those who are deemed responsible for the objectionable behaviour without harming innocent civilians.<sup>43</sup>

In essence, respecting the proportionality principle is a means to ensure that sanctions remain targeted, these measures should be directed at those who are responsible for the wrongful behaviour in question, which the sanctioner aspires to change, without causing collateral damage.<sup>44</sup> This would apply regardless of the goal pursued by the sanctions. Consequently, inasmuch as the EU declares its sanctions are targeted, they should be proportionate. This is reflected in the EU's language:<sup>45</sup>

EU sanctions are targeted at those responsible for policies the EU wants to influence. (...) The EU's principled position is that *sanctions should always be targeted in such a way as to minimise any adverse humanitarian effects or unintended consequences for non-targeted persons.*

Proportionality is also ensured through regular reviews of sanctions regimes and a system of exceptions (whereby the sanctions do not apply e.g. to meet the basic needs of, or provide medical treatment to the designated persons and to deliver humanitarian aid and related goods). (Emphasis added.)

The question that arises is how the proportionality principle applies to EU restrictive measures, particularly when considering that the measures under consideration were adopted in response to an act of aggression, which as previously mentioned is a serious breach under international law as

<sup>38</sup>C Michaelsen, 'Human Rights as Limits for the Security Council: A Matter of Substantive Law or Defining the Application of Proportionality?' (2014) 19(3) *Journal Conflict and Security Law* 451, p 465.

<sup>39</sup>E Crawford, 'Proportionality' (2012) *Max Planck Encyclopedia of Public International Law*, para 1.

<sup>40</sup>*Ibid*, para 2.

<sup>41</sup>Consider, for instance, E Cannizzaro, 'The Role of Proportionality in the Law of Countermeasures' (2001) 12(5) *European Journal of International Law* 889 (arguing that the proportionality standard should be different depending on the function of countermeasures (which is one of the legal categories for unilateral sanctions, as discussed below)).

<sup>42</sup>M E O'Connell, 'Debating the Law of Sanctions' (2002) 13(1) *European Journal of International Law* 74, p 78.

<sup>43</sup>Moret, note 20 above.

<sup>44</sup>Argued in A Hofer, 'The Proportionality of Unilateral "Targeted" Sanctions: Whose Interests Should Count?' (2020) 89 *Nordic JIL* 399.

<sup>45</sup>European Commission, 'Frequently Asked Questions: Restrictive Measures (Sanctions)' (26 February 2022), [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_22\\_1401](https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_1401).

defined by Article 40 ARSIWA. Unilateral sanctions are viewed by Western states and the EU as an appropriate response to breaches of international law,<sup>46</sup> thereby suggesting that they are acting in accordance with Article 41(1) ARSIWA. The question here is how far these actors can go when they adopt these measures and whether the proportionality principle imposes any limits, especially when, according to the EU, all its ‘sanctions are *fully compliant with obligations under international law*, whilst respecting human rights and fundamental freedoms’ (emphasis in original).<sup>47</sup>

Under international law, sanctions’ proportionality can only be assessed on a case-by-case basis. This is because they fall under different legal categories, each with their own requirements. Sanctions are either considered: (1) lawful yet unfriendly acts, commonly known as retorsions; (2) internationally wrongful acts, which is when the sanction causes the sender to breach an obligation owed to the target; or as (3) countermeasures. The latter are a circumstance precluding wrongfulness; they constitute an unlawful sanction adopted in response to a prior wrongful act and aim at inducing the wrongful state to comply with its international obligations and/or to offer reparations. As noted, the EU sanctions could be considered as a form of economic warfare, yet this is (at present) not a legal term.<sup>48</sup>

In certain cases, for a sanction to constitute a retorsion it must respect the proportionality condition. This is notably the case when sanctions limit the exercise of human rights; any such restriction must be provided by law and constitute a proportionate means to pursue a legitimate aim. Beyond these explicit requirements, the general view is that the proportionality principle does not apply to retorsions because these are considered a freedom as opposed to a right that should be regulated.<sup>49</sup> However, there are differing opinions. White and Abbas, for instance, consider that retorsions ‘are still governed by the limitations of necessity and proportionality’.<sup>50</sup> According to Daillier et al, a ‘legality threshold’ would be applicable to these measures albeit the problem remains in defining its limits.<sup>51</sup> In reference to the proportionality principle, Daillier et al write that an act of retorsion should not be excessive (in French ‘*démesurée*’) with regard to the objective pursued, but, again, practice and jurisprudence provide little guidance.<sup>52</sup> Relying on these authors as well as the abuse of rights doctrine, Hofer argues that, regardless of their legal classification, sanctions should respect the proportionality principle.<sup>53</sup> In other words, a disproportionate sanction would be an international wrongful act—even if it does not breach an obligation the sender owes the target. Furthermore, as demonstrated by the debate on comprehensive sanctions, it is generally argued that sanctions should not have an impact on the well-being of a State’s general population. This is frequently reiterated by the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights,<sup>54</sup> yet concrete measures to protect human rights and living standards are lacking, or those put in place are falling short.<sup>55</sup>

<sup>46</sup>A perspective that is not universally shared, see A Hofer, ‘The Developed/developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?’ (2017) 16(2) *Chinese Journal of International Law* 175; C L Lim and R M Mitchell, ‘Neutral Rights and Collective Countermeasures for *Erga Omnes* Violations’ (2023) *International and Comparative Law Quarterly*.

<sup>47</sup>European Council, note 4 above.

<sup>48</sup>Chachko and Heath, note 16 above; Lowe and Tzanakopoulos, note 14 above.

<sup>49</sup>T Giegerich, ‘Retorsion’ (2011) *Max Planck Encyclopedia of Public International Law*, para 14.

<sup>50</sup>N D White and M Abbas, ‘Countermeasures and Sanctions’ in M D Evans (ed), *International Law* (Oxford University Press, 2014), p 538.

<sup>51</sup>P Daillier, M Forteau, and A Pellet, *Droit International Public*, 8<sup>th</sup> ed (LGD), 2009), pp 1056–57, para 573 (term in original text: ‘seuil de licéité’).

<sup>52</sup>*Ibid.*

<sup>53</sup>Hofer, note 44 above.

<sup>54</sup>See the Special Rapporteur on unilateral coercive measures and human rights’ remarks following her country visit to Syria: OHCHR Press Release, ‘UN Expert Calls for Lifting of Long-Lasting Unilateral Sanctions “Suffocating” Syrian People’ (10 November 2022), <https://www.ohchr.org/en/node/104160>.

<sup>55</sup>See the adoption of guiding principles: OHCHR Press Release, ‘Special Rapporteur on the Negative Impact of Unilateral Coercive Measures Says Guiding Principles Need to Be Drafted to Protect the Rights and Lives of People’ (14 September

If a sanction falls short of an obligation the sender owes the target it would be an internationally wrongful act. In this case, the measure's wrongfulness could be precluded if it can be justified as a countermeasure, provided it meets the conditions outlined in Articles 49 to 53 ARSIWA. A countermeasure must be a proportionate response to a wrongful act committed by the target (the responsible State) with the purpose of inducing the target to comply with its secondary obligations of cessation, reparation, and satisfaction (where applicable). The necessity of the measure is defined by its limited purpose; it is the State that adopts the measure that determines at its own risk whether the countermeasure is necessary (ie, whether an initial wrongful act had been committed). Under Article 51 ARSIWA, proportionality is not measured in relation to the goal pursued by the countermeasure nor by taking into account whether the measure is able to achieve its objective.<sup>56</sup> Rather, the sanction has to be 'commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'. The test is quantitative, 'the scope and effect' of the countermeasure must not surpass the initial wrong.<sup>57</sup> The proportionality principle was expected to limit countermeasures' potentially negative effects.<sup>58</sup>

As far as the sanctions against Russia are concerned, to the extent that the sending states are not directly injured they would potentially be adopting third-party countermeasures. These are adopted in response to breaches of obligations owed to the international community, also referred to as obligations *erga omnes* (*partes*). Whether third states and international organizations can adopt countermeasures is controversial and remains unsettled. One of the bones of contention is how such measures should be regulated, including how proportionality should be assessed when states act collectively in response to breaches of community norms.<sup>59</sup> When it comes to third-party countermeasures, the commentaries to ARSIWA provide that the proportionality of the sanctions should be considered as a whole, not individually.<sup>60</sup> This provides a rather crude measuring stick when considering measures that are adopted in response to an act of aggression. After all, given the gravity of the act and the fact that the victim state's population and infrastructure will suffer severe, long-lasting damage, it would seem odd to argue that sanctions could be disproportionate. That said, states are not given an unlimited right to respond to unlawful uses of force. Action taken in self-defence in

2022), <https://www.ohchr.org/en/press-releases/2022/09/special-rapporteur-negative-impact-unilateral-coercive-measures-says-guiding>.

<sup>56</sup>ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, in II(2) *Yearbook of the ILC*, Commentary to Art 51, para 7 (2001) (proportionality 'has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance'. Although 'a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures'. Ibid. Fourth Report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, in II(1) *Yearbook of the International Law Commission*, para 56 (1992) ('[proportionality] is not to be measured [...] on the basis of the likelihood of the reaction achieving a particular aim').

<sup>57</sup>R Kolb, *The International Law of State Responsibility: An Introduction* (Edward Elgar Publishing, 2017), p 180.

<sup>58</sup>ARSIWA with Commentaries, note 28 above, Commentary to Article 51, 135, para 7; Draft Articles Adopted on First Reading, Commentary to Article 49 (1996), p 317, para 2, [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_1996.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_1996.pdf) ('Proportionality is a crucial element in determining the lawfulness of a countermeasure in the light of the inherent risk of abuse as a result of the factual inequality of States'). See further Cannizzaro, note 41 above; T Franck, 'On Proportionality of Countermeasures in International Law' (2008) 102(4) *American Journal of International Law* 715; R O'Keefe, 'Proportionality' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press, 2010).

<sup>59</sup>As debated during the drafting of ARSIWA, see M Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press, 2017), pp 353–60.

<sup>60</sup>ILC, State Responsibility, Third Report on State Responsibility, by Mr. James Crawford, Special Rapporteur, UN Doc A/CN.4/507 and Add. 1–4\*, p 106, para 406 ('[Collective] countermeasures should comply with the other conditions for countermeasures laid down in the draft articles, and in particular they should not, taken together, infringe the requirement of proportionality'); ILC, State Responsibility, Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading, UN Doc A/CN.4/L.600\* (1996), Art 54(3) ('Where more than one State takes countermeasures, the States concerned shall cooperate in order to ensure that the conditions laid down by this Chapter for the taking of countermeasures are fulfilled').



response to an armed attack must be proportionate and necessary. *Jus in bello* also requires that actors respect proportionality and necessity when targeting military objectives. Likewise, sanctioners do not have free rein. To the extent that such responses can have repercussions beyond the responsible State and can negatively impact third parties, such as the target's civilian population and third countries, it seems reasonable to consider the broader consequences of countermeasures when assessing their proportionality. This is reflected in the rules that govern the adoption of countermeasures.

For instance, countermeasures should be directed against those responsible and not at third parties (Article 49 ARSIWA). Crawford considered that if countermeasures had an indirect effect on third countries this was a separate issue, which did not fall under the proportionality requirement.<sup>61</sup> For some, the impact of sanctions on the civilian population would fall within the proportionality assessment.<sup>62</sup> Additionally, under Article 50 ARSIWA, a countermeasure cannot undermine fundamental human rights, the prohibition on the threat or use of force, the prohibition on retaliation and peremptory norms of international law. It remains unclear which fundamental rights cannot be affected by countermeasures.<sup>63</sup> According to the ILC's commentaries to ARSIWA, fundamental human rights are those from which no derogation is permitted, even in times of war or other emergencies.<sup>64</sup> The commentaries also refer, *inter alia*, to the writings of the Committee on Economic, Social and Cultural Rights, which argues that sanctions must distinguish between the responsible political elite and civil society, while taking into account the International Covenant on Economic, Social and Cultural Rights.<sup>65</sup> For example, a people cannot be deprived of their means of subsistence,<sup>66</sup> as such sanctions should not lead to starvation or deterioration of living conditions.

It follows that, from a legal perspective, there is no general, all-encompassing, rule on sanctions' proportionality. Instead, this needs to be assessed on a case-by-case basis as the conditions that apply vary depending on whether the sanction is a retorsion or a countermeasure. Having briefly considered how the proportionality principles applies, or should apply, to retorsions and (third-party) countermeasures under international law, the next section considers how the EU and its judicial bodies put this requirement in practice.

### III. The EU's approach to proportionality and its application to restrictive measures

The principle of proportionality has been described as one of the fundamental principles within the EU's legal system,<sup>67</sup> notably because it is enshrined in EU law, for example under Article 5(4) of the Treaty on European Union ("TEU"). This may be why there is the assumption that EU restrictive measures are proportionate,<sup>68</sup> in addition to the fact that the EU frequently states that its restrictive measures respect this condition. For example, an EU Commission website states that:

<sup>61</sup>Third Report on State Responsibility, note 60 above, p 91, para 347; ARSIWA with Commentaries, note 28, Commentary to Art 49(1), p 130, para 5.

<sup>62</sup>Dawidowicz, note 59 above, p 358 ; W M Reisman and D L Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanctions Programmes' (1998) 9 *European Journal of International Law* 86; D Joyner, 'United Nations Counter-Proliferation Sanctions and International Law' in L van den Herik (ed), *Research Handbook on United Nations Sanctions and International Law* (Edward Elgar Publishing, 2016); N Jayakody, 'Refining United Nations Security Council Targeted Sanctions: "Proportionality" as a Way Forward for Human Rights Protections' (2018) 29 *Security and Human Rights* 90; H Smith, 'The Ethics of United Nations Sanctions on North Korea: Effectiveness, Necessity and Proportionality' (2020) 52 *Critical Asian Studies* 182.

<sup>63</sup>Third Report on State Responsibility, note 60 above, p 92, para 351.

<sup>64</sup>ARSIWA with Commentaries, note 28 above, Commentary to Article 50, p 132, para 6.

<sup>65</sup>*Ibid.*, p 132, para 7.

<sup>66</sup>*Ibid.*

<sup>67</sup>J Dlugosz, 'The Principle of Proportionality in European Union Law as a Prerequisite for Penalization' (2017) *Adam Mickiewicz University Law Review* 283.

<sup>68</sup>K Meissner, 'How to Sanction International Wrongdoing? The Design of EU Restrictive Measures' (2022) *The Review of International Organizations*.

EU sanctions are carefully targeted, and *designed to be proportionate to the objectives they seek to achieve*. As such, they are aimed at those responsible for policies or actions the EU wants to influence, while reducing as much as possible any unintended consequences. (Emphasis added).<sup>69</sup>

There is, however, little indication of the factors the EU takes into account when it designs its proportionate restrictive measures and decides who or which sector to target. As noted in the quote above, while the objective of the sanction factors into the proportionality assessment it is unclear how this is achieved.

To reiterate, proportionality ensures that there is a balance between the interests of the individuals or rights affected and the goal pursued by (in this case) the EU. Because sanctions necessarily entail the imposition of costs, these should not be too excessive when assessed against the desired outcome. One would assume that there would be a causal link between the individual, entity or sector being sanctioned and the goal being pursued. Imposing a restriction on an individual, for example, would enable the EU to achieve their policy goal. For instance, the idea behind an asset freeze could be to impose costs so as to manipulate the person's cost-benefit analysis, leading them to decide not to engage in the behaviour that the sender wants to change. It could also aim to prevent them from having funds that would permit them to engage in unwanted behaviour, thereby seeking to constrain their activities.

If the purpose is to change a state's behaviour, such as ending a war, then there should be a connection between the person targeted and the state's decision-making apparatus. Yet, there is not always a clear link between the individual targeted and the policy decision the EU wishes to change. This is particularly the case when the EU targets the wealthier segments of a state's population. Although these individuals may be prominent business(wo)men, or may have ties to such people, this does not mean that they have any weight in the state's decision making. They may be far removed from such processes. As such, imposing a sanction would make little practical difference and would essentially be a symbolic act, whereby the EU engages in signalling.<sup>70</sup> In such circumstances, it is unclear why the restriction imposed on them would be justified. Particularly when the utility of a sanction boils down to signalling, one would think there are less onerous measures that are available to actors of the international community wishing to communicate their commitment to fundamental norms. If the purpose is to constrain Russia by reducing its ability to finance the war, then sanctioning wealthier individuals may make sense—but again it all depends on what their link is to Russian decisionmakers, whether they are able to exercise pressure and increase the costs of pursuing the war effort, or to what extent their funds contribute to sustaining this policy.

Those targeted by the EU's restrictive measures can challenge their listing before the EU Court of Justice ('CJEU') and in certain cases European judges have determined that an individual or entity should be delisted. While listed individuals and entities frequently challenge their listing as a disproportionate measure, at present the Court has refrained from annulling a sanction for being disproportionate.<sup>71</sup> Courts have frequently recognized that the Council enjoys broad discretion when adopting and implementing restrictive measures.<sup>72</sup> As Chachko writes:

<sup>69</sup>European Commission, note 45 above.

<sup>70</sup>Giumelli, note 13 above; see also F Giumelli, 'From Effective to Useful Sanctions: Lessons Learned from the Experience of the European Union' in N Ronzitti, *Coercive Diplomacy, Sanctions and International Law* (Brill Nijhoff, 2016).

<sup>71</sup>E Chachko, 'Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence' (2019) 44(1) *The Yale Journal of International Law* 1, p 14; A Moiseienko 'Due Process and Unilateral Targeted Sanctions' in C Beaucillon (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar Publishing, 2021), p 415.

<sup>72</sup>*Organisation des Modjahedines du peuple d'Iran v Council of the European Union*, T-228/02, ECLI:EU:T:2006:384, para 159 ('The Council enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting economic and financial sanctions'); Chachko, note 71, p 14.

The courts have invalidated dozens of sanctions on these grounds [rights of defense and effective judicial protection], while largely rejecting challenges to the proportionality of sanctions or the legality of designation criteria. The courts have consistently held that the EU Council enjoys broad discretion in the foreign and security realm.<sup>73</sup>

When reviewing the proportionality of a restrictive measure, courts presumably assess both the measure's necessity and its reasonable relationship with the aim pursued.<sup>74</sup> In accordance with Article 215 of the Treaty on the Functioning of the European Union, the EU's restrictive measures reflect the principles it seeks to promote in the 'wider world', essentially democracy, the rule of law, human rights and fundamental freedoms, and respect for the principles of the United Nations Charter and international law (see Article 21(1) TEU). In light of these goals, the scales will commonly tip in favour of the Council's public policy objective.<sup>75</sup> As long as the limitations imposed through restrictive measures are 'not manifestly disproportionate' severe restrictions are permitted,<sup>76</sup> even on parties who may not be responsible for the wrongful policy, provided, however, they are properly justified by the information available.

In the *Bank Mellî Iran v Council of the European Union* judgment—where at issue was an asset freeze imposed upon an Iranian bank to prevent funds from being used for Iranian nuclear proliferation—the Court of First Instance stated:

the case-law [...] makes it clear that fundamental rights are not absolute, and that their exercise may be subject to restrictions justified by objectives of public interest pursued by the Community. Any economic or financial restrictive measure has, *ex hypothesi*, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm, in particular to the entities carrying on the activities that the restrictive measures in question are designed to stop. The importance of the aims pursued by the legislation at issue is such as to justify negative consequences, even of a substantial nature, for some operators.<sup>77</sup>

The Grand Chamber's *Rosneft* judgment provides another example. Rosneft, a Russian oil company, charged that the asset freeze the EU had imposed upon it in 2014 was disproportionate in comparison to the declared objective and amounted to a disproportionate interference in the freedoms enshrined in Articles 16 and 17 of the Charter of Fundamental Rights of the EU, respectively the freedom to conduct a business and the right to property.<sup>78</sup> The judges disagreed. They first recalled that:

with regard to judicial review of compliance with the principle of proportionality [...] the legality of a measure [...] can be affected only if the measure is *manifestly inappropriate* having regard to the objective which the competent institution is seeking to pursue.<sup>79</sup>

<sup>73</sup>E Chachko, 'Due Process is in the Details: US Targeted Economic Sanctions and International Human Rights Law' (2019) *AJIL Unbound* 157, 159.

<sup>74</sup>I Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (2003) 72 *Nordic JIL* 159, p 190. The same test is applied by the European Court of Human Rights, see A Mitchell, *Legal Principle in WTO Disputes* (Cambridge University Press, 2008), pp 188–89.

<sup>75</sup>Cameron, note 74 above, p 190; M Happold, 'Targeted Sanctions and Human Rights' in M Happold and P Eden (eds), *Economic Sanctions and International Law* (Hart Publishing, 2016).

<sup>76</sup>The double negative is considered to give more leeway to the actor adopting the measure. Kolb, note 57 above, p 181; Arangio-Ruiz, note 56 above, p 23, para 54.

<sup>77</sup>*Bank Mellî Iran v Council*, T-390/08, para 70; see also *ibid*, para 71 (where the Court found that the restrictions were not 'inordinate in relation to the ends sought').

<sup>78</sup>PJSC *Rosneft Oil Company v Her Majesty's Treasury and Others*, C-75/12, ECLI:EU:C:2017:236, para 143.

<sup>79</sup>*Ibid*, para 147.

Second, they reiterated that the rights invoked by Rosneft are not absolute and their exercise may be constrained in pursuance of objectives of public interest as long as such constraints ‘correspond to objectives of general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very essence of the rights guaranteed’.<sup>80</sup> Seeing as the measures against Russia seek to protect Ukraine’s territorial and sovereign integrity, and are therefore related to the wider objective of maintaining international peace and security, ‘interference with Rosneft’s freedom to conduct a business and its right to property cannot be considered to be disproportionate’.<sup>81</sup> This finding was subsequently upheld by the General Court, which found: ‘the importance of the objectives pursued by the contested acts (...) is such as to justify the possibility that, for certain operators, which are in no way responsible for the situation which led to the adoption of the sanctions, the consequences may be negative, even significantly so’.<sup>82</sup>

In *RT France v Council*, the French branch of *Russia Today* challenged the EU regulation suspending its broadcasting before the Grand Chamber. According to the Council, the objectives of this measure are to stop the spreading of propaganda and misinformation in support of Russia’s unlawful war in Ukraine and to pressure Russia into ceasing these unlawful activities.<sup>83</sup> It explained the suspension is part of the global, swift, unified and coordinated effort to respond to Russia’s aggression.<sup>84</sup> RT France argued that the suspension constituted an unlawful limitation on the freedom of expression and information (Article 11 of the European Convention on Human Rights) and was thus a form of censorship. Notably, they argued that the suspension was disproportionate in that censorship was not an effective means for the EU to achieve its stated objectives.<sup>85</sup> In addressing this claim, the Chamber recalled that:

As regards the proportionate nature of the limitations in question, it should be borne in mind that the principle of proportionality requires that the limitations which may be imposed by acts of EU law on rights and freedoms enshrined in the Charter do not exceed the limits of what is appropriate and necessary in order to meet the legitimate objectives pursued or the need to protect the rights and freedoms of others; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. (...) Thus, in order to examine the proportionate nature of the restrictive measures at issue, it is necessary to ascertain, first of all, whether the evidence adduced by the Council is capable of justifying the conclusion which it has drawn concerning, in essence, control over the applicant and the tenor of the content broadcast by it and, next, whether the restrictive measures at issue are appropriate and necessary in order to achieve the objectives of general interest pursued by the European Union.<sup>86</sup>

The judgment concluded that the suspension was an appropriate measure, in particular due to its temporary nature, and that it was necessary in view of the urgency and the issue at stake.<sup>87</sup> Concerning its proportionality, it was determined that the cost imposed on the applicant was

<sup>80</sup>Ibid, para 148.

<sup>81</sup>Ibid, para 150.

<sup>82</sup>*Rosneft and Others v Council*, T-715/14, ECLI:EU:T:2018:544, para 209.

<sup>83</sup>*RT France v Council*, T-125/22, paras 160–63.

<sup>84</sup>Ibid, para 163 (‘The overall strategy of responding in a rapid, united, graduated and coordinated manner’).

<sup>85</sup>Ibid, para 119.

<sup>86</sup>Ibid, paras 168–69.

<sup>87</sup>On this last point see *ibid*, para 198 (‘In the context of the overall strategy of responding in a rapid, united, graduated and coordinated manner, implemented by the Union, the adoption of such measures, in that they effectively satisfy objectives of general interest recognised by the Union (...), may be regarded as necessary’).

not excessive in view of the goal pursued by the Union of maintaining international peace and security.<sup>88</sup> It is noteworthy that Switzerland decided not to suspend Russian media outlets because it found that there are more effective means to combat propaganda.<sup>89</sup> Norway also refrained from aligning with the EU's suspension, arguing that it would constitute an unjustified interference in freedom of expression.<sup>90</sup>

Based on the above, the present author finds that European courts have proven to be quite deferential to the Council when assessing sanctions' proportionality. It often limits its assessment to whether the sanction is pursuing a legitimate aim and, if this is the case, concludes that the restrictive measures are an appropriate tool to adopt in pursuance of that goal. Whether or not a particular person, or entity, should be listed is assessed based on the evidence provided. Because sanctions are, at their core, a policy issue they do not evaluate whether a sanction is appropriate. European courts most likely do not seem to think they are in the best position to delve into such issues. One should also note that, in the examples discussed, the Courts' assessment is limited to individual cases. The EU's sanctions regime as a whole has not been evaluated. Yet, as is well-known, the impact of sanctions can be quite drastic and the manner in which sanctions are designed can have severe, even if unintended, impacts.

#### IV. The Impact of EU sanctions on Russian society, third countries, and economic operators

When they were first adopted in 2022, the financial and sectoral sanctions against Russia triggered a slew of commentaries on their potential negative impact. Juan Zarate defined the impact of the sanctions against Russia as a 'shock-and-awe approach', triggering immediate impact on the Russian economy.<sup>91</sup> George Lopez referred to them as 'a coordinated shutdown of a country's economy with the strongest arrow being in the heart of the banking sector'.<sup>92</sup> According to Friedlander, if in 2014 the 'focus [was] on the Kremlin's behavior and not [to] hurt the broader Russian economy', in 2022 the sanctions' strategy 'shifted to driving the country into the ground'.<sup>93</sup> In an article entitled 'Weaponisation of Finance: How the West Unleashed "Shock and Awe" on Russia', the *Financial Times* used the term 'financial warfare'.<sup>94</sup> In sanctioning Russia's Central Bank's foreign currency reserves, the EU and US were

effectively declaring financial war on Russia. The stated intention of the sanctions is to significantly damage the Russian economy. Or as one senior US official put it later that Saturday night after the measures were announced, the sanctions would push the Russian currency 'into freefall'.<sup>95</sup>

<sup>88</sup>Ibid, paras 201–15.

<sup>89</sup>Confédération Suisse, 'Secrétariat d'Etat à l'économie, FAQ – Sanctions contre le Russie', [https://www.seco.admin.ch/seco/fr/home/Aussenwirtschaftspolitik\\_Wirtschaftliche\\_Zusammenarbeit/Wirtschaftsbeziehungen/exportkontrollen-und-sanktionen/sanktionen-embargos/sanktionsmassnahmen/faq\\_russland\\_ukraine.html](https://www.seco.admin.ch/seco/fr/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/exportkontrollen-und-sanktionen/sanktionen-embargos/sanktionsmassnahmen/faq_russland_ukraine.html).

<sup>90</sup>IRIS Observations juridiques de l'Observatoire européen de l'audiovisuel, 'Les sanctions contre RT and Sputnik ne seront pas adoptées en Norvège', <https://merlin.obs.coe.int/article/9488>; see also I Popovic, 'The EU Ban of RT and Sputnik: Concerns Regarding Freedom of Expression' (*EJIL:Talk!*, 30 March 2022), <https://www.ejiltalk.org/the-eu-ban-of-rt-and-sputnik-concerns-regarding-freedom-of-expression/>.

<sup>91</sup>R Horowitz, 'Waging War by Other Means: Juan Zarate Explains the New Sanctions on Russia' (*Octavian*, 4 March 2022) <https://octavian.substack.com/p/waging-war-by-other-means-juan-zarate>.

<sup>92</sup>'Unprecedented Western Sanctions Strangling Russian Economy' (*The Hill*, 28 February 2022), <https://thehill.com/policy/finance/596144-unprecedented-western-sanctions-strangling-russian-economy/>.

<sup>93</sup>Friedlander, 'Opinion: The West Has Declared Financial War on Russia. Is It Prepared for the Consequences?' (*Politico*, 8 March 2022), <https://www.politico.com/news/magazine/2022/03/08/west-gamble-financial-war-russia-00015156>.

<sup>94</sup>'Weaponisation of Finance: How the West Unleashed "Shock And Awe" on Russia' (*Financial Times*, 6 April 2022), <https://www.ft.com/content/5b397d6b-bde4-4a8c-b9a4-080485d6c64a>.

<sup>95</sup>Ibid.

Whereas von der Leyen referred to the sanctions as ‘targeted’, the article notes that she sought ‘consensus among western governments for the most far-reaching and punishing set of financial and economic sanctions ever levelled at an adversary’. During his speech at Warsaw in March 2022, President Biden claimed: ‘These economic sanctions are a new kind of economic statecraft with the power to inflict damage that rivals military might’. Ultimately, the sanctions are not being employed as an alternative to war but as an alternative form of war.<sup>96</sup>

It would therefore be fair to say that the packages of sanctions against Russia have been adopted in such a way that, taken together, they are comprehensive;<sup>97</sup> they may even constitute economic and financial warfare.<sup>98</sup> This is in spite of the fact that the EU attempts to phrase the measures as targeted and its claim that the goal is not to harm Russian civilian society but only those responsible for the war. To the extent that the goal is to weaken Russia’s economy one wonders how this could be a realistic statement. The question at this stage is what their actual impact, including their humanitarian consequences, will be. It is notoriously difficult to measure the impact of sanctions, and reports are frequently contradictory. That said, as noted throughout this article, experience with broad, far-reaching sanctions is demonstrative of their potential harmful effects. Furthermore, it is the outspoken intention of the sanctioners.<sup>99</sup> Against this backdrop, this section argues that the financial and sectoral sanctions could be disproportionate due to their potential impact the Russian civilian population (A) and third states (B). Each of these issues will be discussed below, with the caveat that it is highly complicated to assess sanctions’ precise impact, particularly in the context of an armed conflict which also affects civilians, third states and economic operators.

### A. The Humanitarian Impact on Russian Society

According to Nicholas Mulder, author of *The Economic Weapon*:<sup>100</sup>

[I]f you look at sanctions in the world today, some of the effects of them include incredibly severe shortages of essential goods and a kind of immediate crisis of the economy of the ability of countries to get what they need from the rest of the world that translates into high prices, into basic essentials and necessities—food, fuel, medicine—becoming not just more expensive but sometimes even entirely impossible to find. [...] [I]f you’re an ordinary working person in a society under sanctions, you’re not just dealing with inflation, you’re dealing with shortages, inability to get money from the bank, very likely your employer or the place your work will go out of business or will be forced to cut your pay.

Sanctions practitioners Richard Nephew and Agathe Demarais are very candid about the human costs of sanctions and confirmed that they are designed to be weapons that will inevitably have humanitarian consequences. If sanctions do not inflict pain, they are not ‘working’.<sup>101</sup>

The question is to what extent pain is being imposed on Russia. When the sanctions were first adopted, it was noted that: ‘Although western sanctions are unlikely to force Putin to abort his

<sup>96</sup>Lowe and Tzanakopoulos, note 14 above, para 28.

<sup>97</sup>Meissner and Graziani, note 23 above.

<sup>98</sup>Which, from under international law, does not mean that much. Lowe and Tzanakopoulos, note 14 above, para. 1. (“‘Economic warfare’ is not a term of art in international law, and it is difficult to define the concept with precision”).

<sup>99</sup>R Nephew, *The Art of Sanctions: A View from the Field* (Columbia University Press, 2018), p 12.

<sup>100</sup>The Ezra Klein Show, ‘Sanctions Against Russia Are a Form of War. It is Time We Recognize That’ (*NY Times*, 1 April 2022), <https://www.nytimes.com/2022/04/01/opinion/ezra-klein-podcast-nicholas-mulder.html?showTranscript=1>.

<sup>101</sup>Nephew, note 99 above, p 12 (‘Denying some of that pain may make for better public relations for a sanctions program, but it also undermines the contention that sanctions work and may even interfere with their effectiveness on a practical level if the sanctioner adjusts the regime to address a humanitarian problem and, in doing so, reduces the very pain the sanctions are intended to create’); A Demarais, *Backfire: How Sanctions Reshape the World Against U.S. Interests* (Columbia University Press, 2022), ch 4.

invasion of Ukraine, Russian citizens will certainly be hurt<sup>102</sup> While the sanctions did hit the Russian economy, according to the World Bank and the International Monetary Fund ('IMF'), the government's fiscal policy has been able to soften the blow.

Two of the more severe sanctions were the freezing of Russia's Central Bank assets and the removal of several Russian banks from SWIFT. This meant that Russia's ability to trade and transact was reduced significantly, preventing them, *inter alia*, from importing goods.<sup>103</sup> The ruble's value declined sharply and the country was hit by a high inflation, impacting those with a lower income who are not able to afford higher prices. Investment also fell as many foreign companies departed. In April 2022, the World Bank commented that the sanctions caused Russia to go into a deep recession and that its economy would contract by 11% in 2022.<sup>104</sup> In October 2022, it was said the economy would contract by 'only' 4.5%, 'thanks to the strong fiscal response and the surge in energy prices which helped increase fiscal revenues'.<sup>105</sup> Whereas the sanctions had a 'significant adverse economic impact', it was less severe than anticipated as the government's fiscal package provided a buffer.<sup>106</sup> Crucially, Russia has been able to pivot to non-sanctioning countries (for instance by selling oil to India, China and Turkey) and benefit from rising energy prices.<sup>107</sup> According to the IMF, the contraction was not that severe. In spite of the desire to 'cripple to Russian economy' and severely interrupt its economic growth, the IMF predicted the Russian economy would grow modestly in 2023 and continue to do so in 2024.<sup>108</sup>

All this therefore suggests that Russia's economy is impacted but is resisting. According to a paper published by researchers at Yale in July 2022, this is incorrect. Instead, they find that 'business retreats and sanctions are catastrophically crippling the Russian economy'.<sup>109</sup> They argue that Russia has been unable to pivot its oil exports to Asia and it has not been able to rely on the continent to make up for lost imports. They also contend that domestic consumption and consumer health have been severely weakened and that global businesses withdrawal from Russia have caused an increase in unemployment. This would suggest that the Russian civilian population is suffering the sanctions' impact, and that contrary to 'defeatist claims' the measures are working. A similar analysis was made by German researchers in February 2023, but they found that energy restrictions have not been that effective.<sup>110</sup> Milov also finds that the sanctions are hurting Russia, arguing that the macro data assessed by the World Bank and the IMF are not appropriate indicators.<sup>111</sup> Rather, data from industries suggests that they have been hit and that these may have consequences in the long term (such as a decrease in manufacturing and an increase in unemployment). Based on his

<sup>102</sup>S Kwaku Afesorbor and P A G van Bergeljik, 'Economic Sanctions Will Hurt Russians Long Before They Stop Putin's War in Ukraine' (*The Conversation*, 1 March 2022), <https://theconversation.com/economic-sanctions-will-hurt-russians-long-before-they-stop-putins-war-in-ukraine-178009>; see also G T Chin, 'From Soaring Gas Prices to Another World War, Economic Sanctions Can Lead to Dire Unintended Consequences' (*The Conversation*, 11 March 2022), <https://theconversation.com/from-soaring-gas-prices-to-another-world-war-economic-sanctions-can-lead-to-dire-unintended-consequences-178873>; Meissner and Graziani, note 23 above, p 388.

<sup>103</sup>Horowitz, note 91 above.

<sup>104</sup>World Bank Press Release, 'Russian Invasion to Shrink Ukraine Economy by 45 Percent this Year' (10 April 2022), <https://www.worldbank.org/en/news/press-release/2022/04/10/russian-invasion-to-shrink-ukraine-economy-by-45-percent-this-year>.

<sup>105</sup>World Bank, 'Social Protection for Recovery: Europe and Central Asia Update' (Fall 2022), p 149, <https://www.worldbank.org/en/country/russia>.

<sup>106</sup>Ibid.

<sup>107</sup>World Bank, note 105 above; 'Ask Prof Wolff: What Europe got Wrong about Sanctions on Russia' (*Democracy at Work*, 22 March 2023), [https://www.democracyatwork.info/askprofwolff\\_what\\_europe\\_got\\_wrong\\_about\\_sanctions\\_on\\_russia](https://www.democracyatwork.info/askprofwolff_what_europe_got_wrong_about_sanctions_on_russia).

<sup>108</sup>IMF, 'World Economic Outlook' (January 2023), <https://www.imf.org/en/Publications/WEO/Issues/2023/01/31/world-economic-outlook-update-january-2023>.

<sup>109</sup>J Sonnenfeld, S Tian, F Sokolowski, M Wyrebkowski, and M Kasprowicz, 'Business Retreats and Sanctions Are Crippling the Russian Economy' (19 July 2022), <https://ssrn.com/abstract=4167193>.

<sup>110</sup>A Rác, O Spillner, and G B Wolff, 'Why Sanctions Against Russia are Working' (2023) 58(1) *Intereconomics* 52.

<sup>111</sup>V Milov, 'Yes, It Hurts: Measuring the Effects of Western Sanctions Against Russia' (*Globsec*, 21 July 2022), <https://www.globsec.org/news/yes-it-hurts-measuring-the-effects-ofwestern-sanctions-against-russia/>.

assessment, sanctions have led to a ‘plunge in household living standards’ due to ‘output disruptions, inflation, collapse of imports’ and Russia’s exclusion from international capital markets will prevent economic growth.<sup>112</sup>

Through its restrictions, the EU clearly wants to diminish Russia’s economy, which it says will reduce the Kremlin’s ability to finance the war. It is a fallacy to believe this can be achieved without impacting Russian society as a whole. Even if the EU claims its ‘restrictive measures do not target Russian society’ because ‘areas such as food, agriculture, health and pharmaceuticals are excluded from the restrictive measures imposed’,<sup>113</sup> this does not mean that such goods would not be more difficult for Russians to access, either because imports and production are reduced, wages have declined, prices have increased, etc. Macro assessments suggest however that Russia has been able to shield its economy from the restrictions’ worst effects, although this is debated. The next question is whether the global economy has been spared.

### **B. Impact on Third Countries and Economic Operators**

Beyond the impacts on Russian daily life, there is also the concern about the potential disruptions that the sanctions may have on the global economy, particularly the supply chain. It has been acknowledged that given Russia’s economic position, the sanctions can have a global ripple effect, increasing inflation worldwide in a manner that hits the poorer segments of the population who are not able to afford higher costs. To quote Mulder again: ‘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’.<sup>114</sup> According to economist Richard Wolff, by causing energy price spikes, supply chain disruptions, massive market shifts, worsening inflation, an increase in interest rates, etc, the economic war between the West and Russia is having broader ramifications than the war in Ukraine.<sup>115</sup>

The most compelling illustration of sanctions’ ripple effect is their impact on agricultural products, which can spread the human costs of sanctions. Speaking on behalf of the African Union, Senegal’s President Macky Sall expressed concern ‘about the collateral impact of the disruptions caused by blocking the SWIFT payment system as a result of sanctions’, rendering it more difficult for African countries to buy foodstuffs and fertilizer from Russia.<sup>116</sup> A Brookings research paper predicted that Africa could be hit by the financial sanctions as it becomes difficult to import from Russia.<sup>117</sup> Publicly, the EU adopted a rather defensive tone: ‘Russia is solely responsible for the global food crisis and that EU sanctions do not target food and agricultural products’.<sup>118</sup> Whereas it retorted that ‘[a]nyone can operate, buy, transport, ensure food and fertilisers out of Russia’, to the extent that non-EU buyers are struggling to pay for the Russian products due to

<sup>112</sup>Ibid.

<sup>113</sup>European Council, ‘Infographic - Impact of Sanctions on the Russian Economy’, <https://www.consilium.europa.eu/en/infographics/impact-sanctions-russian-economy/>.

<sup>114</sup>N Mulder, ‘The Sanctions Weapon’ (*IMF*, June 2022), ch 6, <https://www.imf.org/en/Publications/fandd/issues/2022/06/the-sanctions-weapon-mulder>. Discussed also in Demarais, note 101 above, ch 6.

<sup>115</sup>R D Wolff, ‘The Economic Realities We Face at the End of 2022’ (24 December 2022), [https://www.rdwolff.com/the-economic\\_realities\\_we\\_face\\_at\\_the\\_end\\_of\\_2022](https://www.rdwolff.com/the-economic_realities_we_face_at_the_end_of_2022).

<sup>116</sup>‘African Union Warns of ‘Collateral Impact’ as EU’s Russia Sanctions Hit Food Supplies’ (*Financial Times*, 31 May 2022), <https://www.ft.com/content/e558de33-6064-4b10-a784-eb344cb17915>; see also ‘Russia SWIFT Sanctions Impeding Food Payments, African Union tells EU’ (*Wall Street Journal*, 31 May 2022), <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-05-31/card/russia-swift-sanctions-impeding-food-payments-african-union-tells-eu-Dw6bwQVL5YRw2PgRy2x7>.

<sup>117</sup>C Heitzig, A Uche Ordu, and L Holtz, ‘How Currency Sanctions On Russia Could Disrupt African Trade’ (*Brookings*, 23 May 2022), <https://www.brookings.edu/articles/how-currency-sanctions-on-russia-could-disrupt-trade-with-africa/>.

<sup>118</sup>European Council, note 4 above; see also European Council, 23–24 June 2022, <https://www.consilium.europa.eu/en/meetings/european-council/2022/06/23-24/>.



the sanctions this may not be the full picture. The EU may not have taken the unattended effect of its own measures into account. Although foodstuff and fertilisers are not directly targeted, the CEOs of Russia's biggest fertilizer producers have been listed.<sup>119</sup> According to the Commission's Consolidated FAQs on the sanctions against Russia:<sup>120</sup>

if the listed person is deemed to own or control a non-listed entity, it can be presumed that the control also extends to the assets of that entity, and that any funds or economic resources made available to that entity would reach or benefit the listed person.

This further complicates conducting business with a company that is owned or controlled by a listed individual, particularly when that entity is listed to provide identifying information or a reason for the listing. Whereas this restriction should only have an effect on the EU market (in the sense that EU member states cannot trade with a company owned by a sanctioned individual), to the extent that certain Russian goods need to transit through the EU in order to reach third countries the sanctions may cause a disruption in the food supply chain. Politico reported that: 'Fertilizer shortages and rising prices as a result of Russian supplies being held up in European ports have a direct impact on African food production'.<sup>121</sup>

Moreover, US Ambassador O'Brien has pointed to the problem of over compliance, stating that '[s]ometimes companies are confused about what's allowed and what's not' and prefer to steer clear of doing business with Russian companies to avoid hefty fines.<sup>122</sup> This challenge has been conveyed by Bloomberg, where an article reads:

The EU and the US have built exemptions into their restrictions on doing business with Russia to allow trade in fertilizer, of which Moscow is a key global supplier. But many shippers, banks and insurers have been staying away from the trade out of fear they could inadvertently fall afoul of the rules. (...) Shipping companies remain extremely wary of the Black Sea given sanctions and security fears, and industry officials say a more concerted international push will be needed to reassure them.<sup>123</sup>

Reuters has also reported that:

Sanctions have disrupted sales of fertilizer and crops from Russia. Many Western banks and traders are steering clear of Russian supplies for fear of running afoul of the rapidly changing rules, while shipping firms are avoiding the Black Sea region due to safety concerns.<sup>124</sup>

<sup>119</sup>'Sanctions on Russian Fertilizer Exports Could Hinder Global Food Supply' (*BrownField*, 20 April 2022), <https://brownfieldagnews.com/news/sanctions-on-russian-fertilizer-exports-could-hinder-global-food-supply/> ('In recent months, leading figures in the Russian mineral fertilizer industry—beneficiaries and top management of EuroChem, PhosAgro, Uralchem, Uralkali, and Akron—have been included on the EU and UK sanctions lists'); 'Albeit Not Included in Sanctions, Russian Fertilizer Companies are "Strangled"' (*Datamar News*, 22 April 2022), <https://www.datamarnews.com/noticias/albeit-not-included-in-sanctions-russian-fertilizer-companies-are-strangled/>.

<sup>120</sup>European Commission, 'Frequently Asked Questions: Concerning Sanctions Adopted Following Russia's Military Aggression Against Ukraine and Belarus' Involvement in It, p 20, [https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine/frequently-asked-questions-sanctions-against-russia\\_en](https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine/frequently-asked-questions-sanctions-against-russia_en) (see also: 'If non listed entities are deemed to be owned or controlled by listed persons or entities, their assets must be frozen as well, and no funds or economic resources can be made available to them').

<sup>121</sup>'EU Agrees to Ease Russia Fertilizer Curbs After Row, Angering Ukraine' (*Politico*, 15 December 2022), <https://www.politico.eu/article/fertilizer-row-holds-up-eu-latest-russia-ukraine-war-sanctions-package-famine-food-supplies/>.

<sup>122</sup>US Department of State, note 11 above.

<sup>123</sup>'US Quietly Urges Russia Fertilizer Deals to Unlock Grain Trade' (*Bloomberg*, 13 June 2022), <https://www.bloomberg.com/news/articles/2022-06-13/us-quietly-urges-russia-fertilizer-deals-to-unlock-grain-trade>.

<sup>124</sup>'As Sanctions Bite Russia, Fertilizer Shortage Imperils World Food Supply' (*Reuters*, 23 March 2022), <https://www.reuters.com/business/sanctions-bite-russia-fertilizer-shortage-imperils-world-food-supply-2022-03-23/>.

Due to the legal uncertainty, member states were reported to have requested guidance from the EU and for to it unblock Russian food shipments.<sup>125</sup> The following paragraph was eventually added to the preamble of Regulation 833/2014:

the Union is committed to avoiding all measures which might lead to food insecurity around the globe. Consequently, none of the measures in this Regulation or any of those adopted earlier in view of Russia's actions destabilising the situation in Ukraine target in any way the trade in agricultural and food products, including wheat and fertilisers, between third countries and Russia.

The European Commission website furthermore added that the sanctions 'are targeted, are not affecting energy and agrifood export from Russia to third countries, and are well coordinated with our allies'.<sup>126</sup> Nonetheless, it would seem that the sanctions against Russia impacted food and grain exports with the potential to negatively affect the African continent, even if these goods are not *directly* targeted. This is to be expected from far-reaching sanctions, particularly financial and banking restrictions, against one of the major world economies.

At the time of writing, the blame game for the food crisis has resumed between Russia and the sanctioners. On 17 July 2023, Russia refused to renew the 'Black Sea Grain Initiative',<sup>127</sup> a negotiated agreement between Russia and Ukraine that was achieved by the UN and Türkiye. It allowed food and fertilizer to be exported from Ukrainian ports and to safely transit through the Black Sea. In refusing to renew the deal, Russia withdrew its security guarantees. Russia said it would resume the commitment following, amongst others, 'the lifting of sanctions on the provision of its grain and fertilizers to global markets' and 'the lifting of obstacles imposed on its banks'.<sup>128</sup> UN Secretary-General Antonio Guterres has reportedly sought Russian cooperation with the Grain Deal by proposing a subsidiary of Rosselkhozbank, Russia's agricultural bank, be reconnected to SWIFT.<sup>129</sup> The UN had previously negotiated reassurances from the US government to allow JP Morgan Chase to process Russian grain export payments.<sup>130</sup> It has been argued that Africa is not the only continent that is impacted by the failure of the initiative, but that global food security more generally is at risk.<sup>131</sup>

Lastly, it is noteworthy that some the EU's restrictive measures against Russia have an extraterritorial flair, and this even though EU countries typically condemn extraterritorial sanctions as illegal.<sup>132</sup> In December 2021 the EU Commission submitted its 'anti-coercion instrument',<sup>133</sup> which was proposed as a tool to protect the EU from coercive policies, such as US extraterritorial

<sup>125</sup>Politico, note 121 above.

<sup>126</sup>European Commission, note 6 above.

<sup>127</sup>United Nation, 'Initiative on the Safe Transportation of Grain and Foodstuffs from Ukrainian Ports', [https://www.un.org/sites/un2.un.org/files/black\\_sea\\_grain\\_initiative\\_full\\_text.pdf](https://www.un.org/sites/un2.un.org/files/black_sea_grain_initiative_full_text.pdf).

<sup>128</sup>UNSC Press Release, 'Russian Federation Attacks on Ukrainian Ports Risk Far-Reaching Impacts for Food in Developing Countries, Under-Secretary-General Tells Security Council' (21 July 2023), <https://press.un.org/en/2023/sc15362.doc.htm>.

<sup>129</sup>'UN Asks Putin to Extend Black Sea Grain Deal in Return for SWIFT Access, Sources Say' (*Reuters*, 12 July 2023), <https://www.reuters.com/markets/commodities/un-chief-sends-putin-proposal-keep-black-sea-grain-deal-alive-2023-07-12/>.

<sup>130</sup>*Ibid.*

<sup>131</sup>O Olaigbe, 'The Black Sea Grain Initiative Is Not About Hungry Kids in Africa' (*Foreign Policy*, 1 August 2023), <https://foreignpolicy.com/2023/08/01/black-sea-grain-russia-ukraine-africa-hunger/> ('The fallout from the cancellation of the Black Sea Grain Initiative is mostly the same in Africa as in the wider world: The exit of a major food producer such as Ukraine would be terrible for food security globally and not only for kids in the Horn of Africa').

<sup>132</sup>Y Kerbat, 'Unilateral/Extraterritorial Sanctions as a Challenge to the Theory of Jurisdiction' in Beaucillon, note 71 above, p 183; J Schmidt, 'The Legality of Unilateral Extra-territorial Sanctions under International Law' (2022) 27(1) *Journal of Conflict and Security Law* 53.

<sup>133</sup>COM(2021) 775 final *Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union and its Member States from Economic Coercion by Third Countries* (8 December 2021).

sanctions.<sup>134</sup> Such sanctions are imposed upon non-nationals of the sending country; they subject private persons and entities that are outside the sanctioner's territorial scope.<sup>135</sup> The argument could be made that these measures are disproportionate because they apply to third States' directly and interfere with their rights to trade and conduct foreign policy unhindered.<sup>136</sup> In February 2023, the European Parliament explicitly called for the adoption of secondary sanctions to prevent circumvention and block any loopholes, thereby contradicting the EU's general condemnation of such measures.<sup>137</sup>

Some of the EU's regulations are not explicitly extraterritorial, in that the EU has not framed its measures in this manner, nonetheless they could be extraterritorial in their effect.<sup>138</sup> In October 2022, the EU adopted Council Regulation 2022/1905, which expands the EU's sanctions against Russia to 'natural or legal persons, entities or bodies facilitating infringements' of the Union's restrictions.<sup>139</sup> As noted by Timofeev, this provision could be applied extraterritorially as it does not specify that only EU nationals would be subjected to it, giving the EU the ability to apply it to nationals of third countries.<sup>140</sup> Furthermore, under Council Regulation 2022/1904, the EU's price cap on Russia oil is extended to vessels from third countries. The Regulation prohibits EU ports from providing services to ships that do not respect the EU's price restriction,<sup>141</sup> potentially putting them in the position of having to abide by EU regulations. Council Regulation 2022/1909 extends 'the import ban on steel products that either originate in the Russian Federation or have been exported from it' and impose 'import restrictions on additional items that generate significant revenues for the Russian Federation', such as wood pulp and paper.<sup>142</sup> This means that if a third country buys Russian steel and transforms it into another product it would be barred from selling it to the EU, as the steel originated from Russia.

In June 2023 the EU adopted 'anti-circumvention sanctions', which aspire to ensure the EU's restrictions are effective by preventing Russia from acquiring prohibited goods and technology via third states.<sup>143</sup> To achieve this, the EU could prohibit the sale, supply, transfer or export, either directly or indirectly, of goods and technology to a third country 'whose jurisdiction is

<sup>134</sup>For a commentary, see T Ruys and F Rodriguez Silvestre, 'Economic Statecraft: A Closer Look Inside the European Union's Expanding Toolbox' (2023) 51(3) *Georgia Journal of International and Comparative Law* 647, pp 661 ff.

<sup>135</sup>Kerbat, note 132 above, p 166.

<sup>136</sup>Hofer, note 44 above, p 408; see also Lim and Mitchell, note 46 above, pp 22–23.

<sup>137</sup>European Parliament Resolution of 16 February 2023 on One Year of Russia's Invasion and War of Aggression Against Ukraine (2023/2558(RSP)), [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0056\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0056_EN.html) ('Calls for the EU, the Member States and their allies to strengthen the effectiveness of the sanctions already imposed, to take urgent steps to block any attempt to circumvent these sanctions and to work on a secondary sanctions mechanism that would close any loopholes').

<sup>138</sup>J Dunun-Wasowicz, 'The Long Arm of EU Sanctions' (*EU Law Live*, 25 October 2022), <https://eulawlive-com.proxy.library.uu.nl/op-ed-the-long-arm-of-eu-sanctions-by-jan-dunun-wasowicz/>.

<sup>139</sup>Council Regulation (EU) 2022/1905 of 6 October 2022 Amending Regulation (EU) No 269/2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, OJ L 259 I/76.

<sup>140</sup>I Timofeev, 'New Stage of EU Sanctions Policy: Extraterritorial Measures' (*Valdai Club*, 18 March 2022), <https://valdaiclub.com/a/highlights/new-stage-of-eu-sanctions-policy-extraterritorial/>.

<sup>141</sup>Council Regulation (EU) 2022/1904 of 6 October 2022 Amending Regulation (EU) No 269/2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, OJ L 259 I/3, see specifically L 259/10.

<sup>142</sup>Council Regulation (EU) 2022/1909 of 6 October 2022 Amending Regulation (EU) No 269/2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, OJ L 259 I/3, see specifically L 259/122, L 259/124.

<sup>143</sup>Council Regulation (EU) 2023/1214 of 23 June 2023 Amending Regulation (EU) No 833/2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine, OJ L 159/1; see also European Commission, 'Questions and Answers on the 11th Package of Restrictive Measures Against Russia' (23 June 2023), [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_23\\_3449](https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_3449). On EU anti-circumvention clauses more generally, see F Finelli, 'Countering Circumvention of Restrictive Measures: the EU Response' (2023) 60 *Common Market Law Review* 733.

demonstrated to be at a continuing and particularly high risk of being used for circumvention'.<sup>144</sup> In essence, states that do not abide by the EU's sanctions against Russia run the risk of being sanctioned themselves through export controls. Regulation 2023/1214 notes that: 'Such action should be targeted, proportionate and solely aimed at depriving Russia of the resources which allow it to pursue its war of aggression against Ukraine'.<sup>145</sup>

In adopting these measures, the EU is seeking to improve the effectiveness of its restrictive measures and ensure no leaks are possible. It should however be mindful that 'the long arm of sanctions' is not usually appreciated by third states and can backfire.<sup>146</sup> At the time of writing, the US is having to grapple with the fact that its enthusiastic use of extraterritorial sanctions is undermining the US dollar's primacy as countries aspire to use different currencies and avoid the reach of US sanctions.<sup>147</sup>

Based on the above, it appears that, far from being targeted, the sanctions were designed to have a maximum impact on Russia, the goal being to target Russia's economy and apply 'maximum pressure' to end the war in Ukraine. Under these circumstances, it is to be expected that the measures will have a significant impact on Russian society and repercussions on third states and economic operators, especially when considering Russia's position in the global economy. Even in areas where the EU wants to avoid disruption, notably in the global food supply chain, there is the risk of their being unintended consequences. All this suggests that its sanctions packages can, when assessed in their entirety, be considered disproportionate.

## V. Conclusion

If the shift from comprehensive towards targeted sanctions was supposed to be an improvement the issue remains that unilateral sanctions are unregulated. Targeted sanctions were supposed to be proportionate in that they were intended to be a more efficient means to achieving policy goals by pressuring those directly responsible and avoiding adverse consequences on innocent civilians and third parties. However, the proportionality principle's application to sanctions is extremely limited. Not only are there no clear guidelines on how it should apply to sanctions—which is unsurprising due to the principle's indeterminate nature—in circumstances where the principle would apply, the sanctioner is given plenty of leeway due to the nature of the interests it seeks to safeguard. The higher the stakes, the more sanctioners will seek to impose costs. Whereas the proportionality principle should serve as a guide to limit sanctions repercussions, there seems to be an inherent tension between the goals pursued by the senders and the needed for limited, targeted sanctioning. Policymakers and sanctions practitioners appear to forego considerations of proportionality in order to increase the impact of sanctions, which they believe will improve their effectiveness.

The EU's 'massive and targeted' restrictive measures implemented against Russia's act of aggression against Ukraine are no exception. In an effort to constrain and/or deter Russia from engaging in war against Ukraine, the Russian economy has been treated as a military object and the EU has engaged in economic warfare by adopting a series of unprecedented and far-reaching financial and sectoral sanctions against Russia. The underlying rationale is that crippling the Russian economy will prevent Russia from carrying out its unlawful war. If the sanctioners succeed in imposing costs as intended, then the brunt is felt not only by the Russian civilian population, but also by

<sup>144</sup>Council Regulation (EU) 2023/1214, note 143 above, Art 12(f)(1); Rec 13.

<sup>145</sup>Ibid, Rec 9.

<sup>146</sup>Demarais, note 101 above.

<sup>147</sup>For example, the US Congress, Subcommittee on National Security, Illicit Finance, and International Financial Institutions, held a hearing on 'Dollar Dominance: Preserving the U.S. Dollar's Status as the Global Reserve Currency', on 7 June 2023, <https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=408831>. See the memorandum prepared ahead of the hearing: Memorandum (2 June 2023), <https://democrats-financialservices.house.gov/uploadedfiles/hhrg-118-ba10-20230607-sd002.pdf>.

the populations and economic operators of third states. Ultimately, geopolitics 'led the EU to adopt a more punitive rationale, maximizing the costs for the target'<sup>148</sup> and, consequently, impose disproportionate sanctions that impact third parties. If history is to provide any insight, maximum pressure hardly succeeds in changing or deterring behaviour. More sobering, it can have counterproductive effects.<sup>149</sup>

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<sup>148</sup>Meissner and Graziani, note 23 above, p 391.

<sup>149</sup>Mulder, note 18 above; see also Demarais, note 101 above.