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THE LEGALITY OF EXECUTIVE ORDERS 13628 AND 13645: A BIPARTITE ANALYSIS

ABSTRACT

Executive Orders 13628 and 13645 contribute questionable sanctions to the United States' arsenal. Once again, the President has unilaterally and unlawfully enlarged the United States' global authority, as the latest sanctions threaten third-party states and innocent Iranians. In order to comply with international law, the United States must eliminate any provision directly regulating a non-U.S. citizen's conduct outside the United States while simultaneously limiting the scope of prohibited conduct. Under international law, a state's authority to impose sanctions correlates with international law's recognition of sovereignty, but rarely has legality simultaneously been tied to human rights. This Comment attempts to do so with respect to Executive Orders 13628 and 13645.

The Executive Orders will be dissected by first clarifying "sanction" and then by focusing on the traditional principles that establish jurisdiction—nationality and territoriality. However, since sovereignty and human rights are not mutually exclusive, this Comment continues by addressing the second argument for illegality—overly comprehensive prohibitions. The conclusions drawn herein illustrate the importance of contemporaneous sovereignty and human rights analyses, as well as why the United Nations makes the best imposer of sanctions.

INTRODUCTION

The United States' expansive imposition of sanctions generates a polarized discussion wherein many commentators conclude the U.S. sanctioning-regime¹ exemplifies poorly constructed economic coercion.² Poor construction primarily exists when a regime restricts too much, posing a threat to human rights,³ and when a regime restricts beyond its internationally recognized reach, threatening the sovereignty of foreign states.⁴

As to *only* those sanctions targeting Iran—beginning in 1995 and most recently with Executive Order 13628 and Executive Order 13645 (collectively, the “Recent Orders;” individually referenced hereafter as E.O.)⁵—the United States has issued twenty-four E.O.s, passed ten acts of legislature, authored twenty-eight Federal Register Notices, and devoted five parts of the Code of Federal Regulations to sanctions targeting Iran.⁶ Essentially, the U.S. sanctioning-regime targeting Iran stands at a point where third-party states, as well as their citizens and corporations, can no longer maintain Iranian business relations without fear of penalty or losing the United States as a trade partner, a

¹ When referring to a sanctioning-regime, this Comment means the entirety of the sanctions that the state or organization has imposed targeting another state. In other words, the United States' sanctioning-regime targeting Iran would include all sanctions in force that target Iran and not only the specific Executive Orders at issue.

² See *infra* Parts II.B, IV; see also GEOFF SIMONS, IMPOSING ECONOMIC SANCTIONS: LEGAL REMEDY OR GENOCIDAL TOOL? 121 (1999); Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 7 (2001). Acting alone, the United States has targeted, often on more than one occasion, the following countries: Japan, Argentina, the Netherlands, Israel, the United Kingdom, France, Laos, The Dominican Republic, Cuba, Ceylon, the United Arab Republic, Indonesia, South Vietnam, Chile, India, Peru, Pakistan, South Korea, USSR, Vietnam, South Africa, Uruguay, Taiwan, Ethiopia, Paraguay, Guatemala, Nicaragua, El Salvador, Brazil, Iran, Bolivia, Iraq, Poland, Zimbabwe, Syria, Angola, Panama, Haiti, Libya, and Sudan. SIMONS, *supra* note 2, at 121.

³ Human rights are rights afforded to individuals concerning freedom from general human suffering and state suppression of that said freedom. See BARRY E. CARTER, INTERNATIONAL LAW 20, 63 (1999). They apply indiscriminately and “are often expressed and guaranteed by law, in the form[] of treaties, customary international law, general principles and other sources of international law.” *What Are Human Rights*, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (last visited Jan. 26, 2015).

⁴ Sovereignty is the crux of the international community's relationship with the state and includes concepts such as “authority, power, autonomy, freedom, government, control, independence and territoriality.” TANJA E. ALBERTS, CONSTRUCTING SOVEREIGNTY BETWEEN POLITICS AND LAW 15 (2012).

⁵ See also Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996) [hereinafter ILSA]; Exec. Order No. 13645, 77 Fed. Reg. 62,139 (June 5, 2013) [hereinafter E.O. 13645]; Exec. Order No. 13628, 78 Fed. Reg. 33,945 (Oct. 12, 2012) [hereinafter E.O. 13628].

⁶ *Iran Sanctions*, U.S. DEPT. OF THE TREASURY, <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx> (last visited Feb. 21, 2014).

reality that impacts businesses and citizens, as well as importers and exporters, alike.⁷

On a recent trip to Iran, the International Monetary Fund (IMF) met with Iranian leaders,⁸ concluding that while Iran's overall "contraction in economic activity is slowing," the Iranian economy is still dwindling.⁹ Specifically, Iran's shrinking gross domestic product and continuous instability has crippled the State's business sector and contributed to high unemployment.¹⁰ While the IMF has all but attributed Iran's economic weakness to sanctions, such as the Recent Orders,¹¹ the Iranian government, after receiving visits from foreign investors, insists the sanctions will collapse first.¹² The President of the United States of America disagrees.

Putting the world on notice, President Obama warned that anyone evading the Recent Orders does so at their own risk, because if caught, the United States will hit them "like a ton of bricks."¹³ With respect to certain provisions, however, the United States is not the only one throwing bricks.

The United Nations (U.N.) also employs sanctions,¹⁴ yet the U.N. avoids issues similar to those of the Recent Orders for two reasons. First, the U.N. is a

⁷ See *infra* Part IV.

⁸ International Monetary Fund, *Statement at the Conclusion of the 2014 Article IV Consultation Mission to the Islamic Republic of Iran*, IMF (Feb. 12, 2014), <http://www.imf.org/external/np/sec/pr/2014/pr1450.htm>; Rick Gladstone, *I.M.F. Study Details Perils of Iranian Economy*, N.Y. TIMES (Feb. 12, 2014), http://www.nytimes.com/2014/02/13/world/middleeast/irans-economy-is-weak-imf-finds.html?_r=1.

⁹ International Monetary Fund, *supra* note 8.

¹⁰ See *id.*

¹¹ Gladstone, *supra* note 8.

¹² *Id.*; Mark Landler, *Obama Greeted France's Leader, but Warns Against Doing Business with Iran*, N.Y. TIMES (Feb. 11, 2014), http://www.nytimes.com/2014/02/12/world/middleeast/obama-warns-companies-against-trying-to-evade-iran-sanctions.html?ref=world&_r=0.

¹³ Landler, *supra* note 12.

¹⁴ In the late 1960s, the United Nations imposed its first mandatory sanctions, keeping them in place for close to fifteen years. See GOLNOOSH HAKIMDAVAR, A STRATEGIC UNDERSTANDING OF UN ECONOMIC SANCTIONS: INTERNATIONAL RELATIONS, LAW, AND DEVELOPMENT 33–39 tbl.2.2 (2014); SIMONS, *supra* note 2, at 62–114. The international organization imposed sanctions only one more time until Iraq's invasion of Kuwait; however, a decade of sanctioning followed in which the Security Council imposed broad economic restrictions targeting more than ten entities. Vera Gowlland-Debbas, *UN Sanctions and International Law: An Overview*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 1 (Vera Gowlland-Debbas et al. eds., 2001). The sanctioning continued into the new millennia and primarily targeted violators of human rights and those accused of continued nuclear proliferation. See HAKIMDAVAR, *supra*, at 33–39 tbl.2.2. Iran's non-stop meddling in nuclear technology led the U.N. to impose more sanctions on point, yet the breadth of the U.N.'s regime pales in comparison to the United States'. *UN Sanctions Against Iran*, GLOBAL POLICY FORUM, <http://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/iran.html> (last visited Jan. 26, 2015).

large international organization with consensual authority over its members, which equates to a respect of sovereignty. Second, the U.N. has acknowledged the disastrous results produced by overbroad sanctioning in the past, altering its regimes accordingly. Thus, by limiting its sanctioning-regime to voluntary participation and specific conduct, the U.N. distinguishes itself as a desirable model for the creation and enforcement of exemplary sanctions.

In light of the above contrast, this Comment expounds upon President Obama's Recent Orders, addressing how the orders not only violate international law's notion of sovereignty, but also muddle the United States' reputation as a firm protector of human rights. It is important to note, however, that this Comment does not declare the Recent Orders completely defiant of international law. The United States' exclusion of certain conduct and partial adherence to well-known principles of sovereignty deserves a closer look—particular provisions within the Recent Orders legally control individuals and conduct well within the United States' jurisdiction while also providing humanitarian-focused flexibility. Nonetheless, the forthcoming analysis uncovers why the United States should alter its regime to compliment that of the U.N.

However, before delving into an analysis of the U.S. sanctioning-regime, Part I of this Comment discusses 'sanction' as a broad term, fleshing out the accompanying subtleties that tend to confuse or preoccupy readers and, as a result, can overshadow detailed dissection. Following these clarifications, Part II sets the stage for analysis by examining the variables that distinguish sanctions based upon form, thereafter providing the correlating legal principles of international law. Part III contextualizes the United States' controversial regime with a brief summary of the volatile United States–Iranian relationship and the legislation from which the Recent Orders stem. The historical summary precedes Part IV, which analyzes the Recent Orders' most controversial provisions and identifies conflicts with international law's notion of sovereignty and human rights. In Part V, a discussion of the U.N. sanctioning-regime establishes why it is the best source of sanctions, and in conclusion, Part VI explains how the United States should alter its regime.

I. GETTING A GRASP ON THE TYPES OF SANCTIONS

Without a general discussion of sanctions, an in-depth analysis quickly becomes unmanageable, a result of terms possessing multiple connotations and

denotations.¹⁵ While the terms may occasionally appear interchangeable, their nuances remain relevant;¹⁶ incorrect use and casual substitution obscure a regime's substance, which in turn impacts the regime's legal analysis, an analysis hinged upon who or what the regime regulates, as well as the location of who or what is regulated.

First, to clarify one of the premier misnomers, the 'Iranian Sanctions' at issue do not directly regulate Iranian conduct, they regulate the conduct of U.S. citizens and third-party actors transacting with Iran¹⁷ and target Iran. This brief but vital clarification allows for a more thorough development of the term 'sanction', which helps provide clarity to the forthcoming analysis.

Second, the general use of 'sanction' encapsulates various terms, including 'boycott,'¹⁸ 'embargo,' 'political restriction,' 'financial sanction,' and even all-out 'military onslaught.'¹⁹ The broad definition of a sanction is any "penalty imposed against a nation to coerce it into compliance with international law or to compel an alteration in its policies in some other respect."²⁰ The evolution of sanctioning, moving from general coercion to coercive regimes lacking overt threats of violence, led to the following narrow definition of sanction.²¹ A state action that is "generally less offensive than a blockade and not

¹⁵ To begin with the most basic example, "sanction" is an "auto-antonym;" auto-antonyms are words with a homograph—i.e., two words with the same spelling but different meanings—that is also an antonym. Brad Leithauser, *Unusable Words*, NEW YORKER (Oct. 14, 2013), <http://www.newyorker.com/online/blogs/books/2013/10/unusable-words.html> (last visited Jan. 25, 2015). Sanction can mean to permit or penalize. *Id.*

¹⁶ Cf. SIMONS, *supra* note 2, at 8.

¹⁷ See Cristian DeFrancia, *Enforcing the Nuclear Nonproliferation Regime: The Legality of Preventative Measures*, 45 VAND. J. TRANSNAT'L L. 705, 751 (2012) ("States issuing unilateral sanctions do not actually regulate the conduct of the targeted state, but the conduct of those within the sanctioning state's jurisdiction that are doing business with the targeted state.").

¹⁸ As with other economic sanctions, boycotts are typically remedial counteractions. Although closely related, boycotts in their pure form involve "suspensions of business and trade relations by nationals of the injured state with the citizens of the offending state." GERHARD VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 543 (7th ed. 1996); SIMONS, *supra* note 2, at 8–9. Boycotts are campaigns organized *by the people* to express disapproval by way of isolation and, notably, lack state involvement. SIMONS, *supra* note 2, at 8–9. Thus, boycotts are typically permissible under international law—because it does not apply—and if deemed illegal under international law, boycotts cease to be boycotts, in the strict sense. VON GLAHN, *supra*, at 543–44. International law does apply, however, when governments begin coercing their citizens into participation. *Id.* The most widely recognized example is the Arab League's Boycott of Israel following the Arab-Israeli War of 1948. *Id.* In reality, the Arab League's policy was not a boycott but a sanction, thus contributing to the term's confusion. Despite requiring a clarifying mention due to misuse and multiple connotations, boycotts are technically different than sanctions, and their relevance to this Comment ends with their defining characteristic, a lack of state action. *Id.*

¹⁹ SIMONS, *supra* note 2, at 8–9, 117.

²⁰ *Id.* at 9.

²¹ VON GLAHN, *supra* note 18, at 7.

amounting to economic warfare.”²² Today, this definition includes political sanctions, communication restrictions, and economic sanctions.²³

Economic sanctions are the most utilized coercive policy during times of peace²⁴ and often respond to suppressions of democracy, state-sponsored violations of human rights, and continuous nuclear proliferation.²⁵ Although disputes will arise as to why a sender might have imposed a sanction,²⁶ economic sanctioning’s ultimate and undeniable goal is to coerce targets into conformity with the sanctioning state’s “preferences and interests” through “the imposition of economic pain.”²⁷

States typically generate economic pain through marketplace constriction.²⁸ Logically, the broader a restriction, the tighter the constriction; however, as breadth increases, so does the potential for violating human rights, making breadth a vital component of legal analyses. The importance of breadth to an analysis necessitates the segregation of two tools commonly used to create economic pain: embargos and financial regulations.

First, embargos relate specifically to trade and are defined as a prohibition “on the movement of goods to a foreign country by land, sea or air.”²⁹ While embargoes often involve the export-control of military-purposed materials, an embargo may also restrict the trade of various other goods as well,³⁰ and while modern embargos often focus on a specific good, they do not necessarily draw the line at a single product or material.³¹ For example, the Recent Orders

²² See SIMONS, *supra* note 2, at 1; THE MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW, ECONOMIC SANCTIONS para. 4, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1521?rskey=bNFazO&result=2&q=sanction&prd=OPIL>.

²³ See ANDREAS E. LOWENFELD, INTERNATIONAL ECONOMIC LAW 850 (2d ed. 2008).

²⁴ THE MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW, ECONOMIC SANCTIONS paras. 2, 4, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1521?rskey=bNFazO&result=2&q=sanction&prd=OPIL> (quoting GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT, KIMBERLEY ANN ELLIOTT, & BARBARA OEGG, ECONOMIC SANCTIONS RECONSIDERED 10 (3d ed. 2007)).

²⁵ See HAKIMDAVAR, *supra* note 14, at 23; LOWENFELD, *supra* note 23, at 849–50, 891–92.

²⁶ See LOWENFELD, *supra* note 23, at 849.

²⁷ Miroslav Nincic & Peter Wallensteen, *Economic Coercion and Foreign Policy*, in DILEMMAS OF ECONOMIC COERCION 4 (Nincic & Wallensteen eds., 1983).

²⁸ *Id.* at 4; VON GLAHN, *supra* note 18, at 543.

²⁹ SIMONS, *supra* note 2, at 8. Historically, embargos were aggressive acquisitions of another state’s vessels. See VON GLAHN, *supra* note 18, at 543. This evolved alongside modern society to include less forceful actions aimed at preventing a foreign state from building its military machine out of fear of an attack. *Id.* at 542.

³⁰ SIMONS, *supra* note 2, at 8–9; VON GLAHN, *supra* note 18, at 542.

³¹ *Cf.* SIMONS, *supra* note 2, at 8.

restrict an entire industry, and in doing so, exponentially expand the U.S. sanctioning-regime targeting Iran.

Second, financial sanctions deal with capital and other transfers of wealth.³² When enacted as punishment for policy violations, financial sanctions obstruct the assets of those who deal with a target state, and when enacted to curb a target state's behavior, financial sanctions prohibit, for example, the issuing of debt to a target state. Importantly, financial sanctions can always be tapered, like embargos, thereby directing the imposition of economic pain towards specific entities and individuals.³³

When analyzing the legality of a provision, commentators will often refer to a provision as a 'sanction'; and, although this is not incorrect, it does not completely allude to what the policy entails. Effectively, and in order to coerce a target into submission, economic sanctions seek to elicit economic pain either by limiting the importation or exportation of goods—ranging from the ordinary to high-tech—or by establishing holds and fines on currency and debt transfers.³⁴

By discussing the different types of 'sanctions' and providing a general foundation, this Comment can now explore the international law at issue, and how it relates to the Recent Orders.

II. DISTINGUISHING THE VARIABLES OF SANCTIONS THAT MOST OFTEN DETERMINE LEGALITY

As previously mentioned, sanctions come in various types, target different conduct, restrict various goods, and the term itself can mean a variety of things. However, a proper analysis of the Recent Orders requires dissecting sanctioning-regimes without any regard to Part I. The subsequent categories in Part II.A. and Part II.B. distinguish sanctions based on the parties involved and the regime's breadth, respectively.

³² See Nincic & Wallenstein, *supra* note 27, at 15. Financial restrictions are a favorite, especially after proving their worth against the Taliban. HAKIMDAVAR, *supra* note 14, at 146. The recent financial crisis and subsequent institutional transparency has only increased the popularity of financial restrictions, as the international community can now monitor financial restrictions with relative ease. *Id.*

³³ See *infra* Part V (discussing the freezing of specific individuals' assets).

³⁴ VON GLAHN, *supra* note 18, at 543.

A. *The Parties to a Sanction and How They Impact Legality*

The natural way to begin dissecting a sanction is by determining the states, businesses, and individuals involved. The logical place to commence is on the giving-end with the sanctioning state(s), which can be referred to as the enactor(s), imposer(s), or sender(s).³⁵ As a result of a “sender analysis,” a sanction will be placed into one of three subcategories—unilateral, multilateral, or universal.³⁶ After establishing the sender(s), a proper analysis must then determine exactly whom the sanction directly regulates—the receiver(s)—which creates two more subcategories—primary and secondary.

The categories can be mixed and matched, creating even more diversity amongst sanctions, such as unilateral, primary sanctions (E.O. 1645 Section 5); universal, primary sanctions (Security Council Resolution 1747); or unilateral, secondary sanctions (E.O. 12957).

1. *Describing a Sanction in Terms of the Sender(s)—the Parties on the Giving-End*

A state imposing sanctions by itself faces many issues in the later steps of analysis that states acting in accord and non-governmental agencies, generally, do not.³⁷ By determining which state, states, or non-governmental organization has prohibited particular conduct, one can ascertain what duties and obligations were owed and possibly violated.³⁸ The following terms of art are used to describe the giving-end of sanctions: unilateral (a single state acting alone to forward its interests); multilateral (multiple states collaboratively acting to forward common interests); or universal (e.g., sanctions imposed by the U.N.).³⁹

Occasionally, scholars agree that states enacting unilateral sanctions do so completely within the confines of established international law;⁴⁰ however, these assertions focus on unilateral sanctions that do not control activity outside the enacting state’s jurisdiction.⁴¹ While unilateral sanctions, such as

³⁵ LOWENFELD, *supra* note 23, at 849. *See also* HAKIMDAVAR, *supra* note 14.

³⁶ *See infra* Part II.A.1.

³⁷ *Compare infra* Part IV, with Part V.

³⁸ *See infra* Parts II.3.A, IV, & V.

³⁹ SIMONS, *supra* note 2, at 1. “Multilateral sanctions are also commonly referred to in the academic literature as well as in popular press as *universal* sanctions.” HAKIMDAVAR, *supra* note 14, at 146.

⁴⁰ DeFrancia, *supra* note 17, at 749–51.

⁴¹ *Id.*; *see infra* Part II.A.3.

those in the Recent Orders, tend to raise considerable legal questions, multilateral sanctions and universal sanctions usually elicit less discourse because the sanctioned actor, or its government, is more likely to have assented to the prohibition of the relevant conduct.⁴²

The U.S. sanctioning-regime contains both unilateral sanctions and universal sanctions—certain provisions of prohibited conduct are prescribed pursuant to its membership in the United Nations.⁴³ This difference affords various provisions different legal weights when dissecting the regime as a whole; however, the Recent Orders contain mostly unilateral sanctions. With the unilateral nature of the Recent Orders in mind, the analysis next moves to the receiving-end.

Establishing the party on a sanction's receiving-end will clarify what makes a unilateral sanction lawful with respect to sovereignty and, therefore, is necessary to the Recent Orders' analysis.

2. *Describing a Sanction in Terms of the Receiver(s)—the Parties on the Receiving-End*

A proper legal determination typically requires establishing which actors a regime literally sanctions while remembering that a sanctioned actor and the sender's target are not necessarily the same party.⁴⁴ Simply put, the sanctioned actor is the party whose conduct is directly regulated⁴⁵ and is also what separates sanctions into the next subcategories: primary and secondary.

Primary sanctions regulate the conduct of the sender's citizens and companies or the conduct within the sender's territory, restricting only the activity between the sending and target states or within the sender's domain.⁴⁶ For example, if the United States desires a change in Iran's behavior and implements a unilateral, primary sanction, then the United States prevents its citizens from transacting with Iran.⁴⁷ Historically, the United States' most commonly imposed sanction is the primary sanction.⁴⁸ Minimal discourse

⁴² See LOWENFELD, *supra* note 23, at 841; SIMONS, *supra* note 2, at 11; see also Part V.

⁴³ As a state, the United States has enacted unique prohibitions, such as the Recent Orders, but it also follows Security Council Resolutions. See *infra* Parts III–IV.

⁴⁴ See *infra* Part III.

⁴⁵ DeFrancia, *supra* note 17, at 751.

⁴⁶ *Id.* at 750–51.

⁴⁷ See Jeffrey A. Meyer, *Symposium Article: Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905, 907–08 (2009).

⁴⁸ *Id.* at 905.

surrounds primary sanctions, yet sanctions warranting the label “secondary” seem to invite debate.⁴⁹

Secondary sanctions diverge from the conventional sanction and receive the following denotation: “restrictions designed to deter third-country actors from supporting a primary target.”⁵⁰ For instance, if we bring Germany into the picture, what allows the United States to restrict activity in Germany by non-U.S. citizens in order to alter the policies Iran?⁵¹ A state imposing a secondary sanction goes past its *primary* target—Iran in the immediately preceding example—to restrict third parties—Germany and its citizens—from dealing with the primary target. The sender strives not only to control its nationals, but also those of a foreign sovereign and, as a result, has constructed a secondary sanction.⁵²

A sender can impose secondary sanctions in a variety of ways.⁵³ For example, Section 5 of E.O. 13645 prohibits foreign companies from selling automotive goods to Iran, while Section 7 allows President Obama to prohibit U.S. citizens from investing in a foreign company that acts in contradiction to Section 5.⁵⁴ In both sections, the order targets Iran and uses foreign entities as conduits. Thus, regardless of a company’s stance on Iran, the company will financially suffer from the direct regulation of its conduct, requiring it to decide whether to continue its business with Iran or lose U.S. investors.⁵⁵ Moreover, the foreign company’s state of incorporation will likely frown upon the hit its economy will take as a result.

Understandably, major controversy surrounds secondary sanctions, and many believe secondary sanctions exemplify one of the foremost issues of

⁴⁹ DeFrancia, *supra* note 17, at 751–52. States go beyond primary sanctions because the limited reach artificially impacts supply and demand, and the artificial economic fluctuation creates a void foreign states happily fill. Meyer, *supra* note 47, at 906.

⁵⁰ *Id.* Meyer goes on to describe secondary sanctions “to mean any form of economic restriction imposed by a sanctioning or sending state (e.g., the United States) that is intended to deter a third-party country or its citizens and companies (e.g., France, the French people and French companies) from transacting with a sanctions target (e.g., a rogue regime, its high government officials, or a non-state terrorist entity).” *Id.* at 926.

⁵¹ Andreas Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT’L L. 419, 429–30 (1996).

⁵² Meyer, *supra* note 47, at 907–08.

⁵³ Lowenfeld, *supra* note 51, at 429.

⁵⁴ See E.O. 13645, *supra* note 5, at Sections 5, 7.

⁵⁵ Lowenfeld, *supra* note 51, at 424–30.

international law, intrusions upon the domain of other states.⁵⁶ However, because the Recent Orders contain various provisions that treat individuals and entities differently—some provisions control the conduct of U.S. citizens, while others additionally encapsulate, or only regulate, foreign actors—a complete analysis cannot end with a segregation of the parties involved. Moving forward, the following subpart, Part II.A.3, provides a dissection of “sovereignty,” the legal concept associated with the parties to a sanction.

3. *The Legal Issues: Sovereignty*

In the context of customary international law, jurisdiction plays an important role by establishing the boundaries in which states are to remain, and while primary sanctions are typically legal, secondary sanctions frequently generate significant issues as a result of the imposing-state’s reach becoming “extraterritorial.”⁵⁷ A sender acts extraterritorially when it infringes upon another state’s right to control its respective jurisdiction, and when a state exceeds the established limitations, it risks violating the sovereignty of others.⁵⁸

a. *The Concept of Sovereignty*

Although sovereignty can be manipulated into an ambiguous and evasive notion,⁵⁹ C.A.W. Manning succinctly described it as “the sum total, at any given moment, of a state’s existing legal liberties.”⁶⁰ Put another way, sovereignty constructs perimeters for which states must remain while interacting, doing so by bisecting authority, which results in the existence of “outside authority” and “inside authority.”⁶¹

While a sender may claim that it holds the status of an “original generator[] of international law,” placing its sanctioning-regime beyond review, an

⁵⁶ Meyer, *supra* note 47, at 907–08. Meyer proposes the opposite, claiming secondary sanctions should be viewed “as presumptively permissible and reasonable” because primary sanctions are generally permissible but still impact the behavior of foreigners. *Id.* at 908.

⁵⁷ *Id.* at 933.

⁵⁸ Cleveland, *supra* note 2, at 56–57; DeFrancia, *supra* note 17, at 751.

⁵⁹ Similar to defining ‘sanction’, much of the confusion exists due to the multiple “usages of sovereignty . . . in relation to the existence of international legal obligations.” ALBERTS, *supra* note 4, at 119.

⁶⁰ ALBERTS, *supra* note 4, at 119, 156 (quoting C.A.W. Manning, *The Legal Framework in a World of Change*, THE ABERYSTWYTH PAPERS: INTERNATIONAL POLITICS, 1919-1969 308 (1972)). For instance, a member of the United Nations agrees to uphold resolutions of the Security Council and, in doing so, limits its ability to act contrarily thereto or cry afoul when regulated accordingly.

⁶¹ ALBERTS, *supra* note 4, at 15.

argument such as this clearly fails⁶² “[s]ince sovereignty is not any longer regarded as a status of independence from the legal.”⁶³ Therefore, a sender typically violates international law by unilaterally imposing a sanction that trespasses upon another state’s domain. In certain instances, however, a sender may avoid transgressing a receiver’s sovereignty despite imposing a secondary sanction, which gives rise to the concept of jurisdiction.

b. Determining when a State’s Sanction Insults the Sovereignty of Another

The legal ability of a sender to regulate a receiver flows from two concepts, the sender’s jurisdiction to prescribe and jurisdiction to enforce.⁶⁴ Jurisdiction to prescribe “refers to the authority of a state as a matter of international law to *make its law applicable* to the activities, relations, or status of persons or the interests of persons in things.”⁶⁵ Jurisdiction to enforce “refers to the authority of a state to induce or compel compliance, or to *punish non-compliance*, with its laws or regulations.”⁶⁶ Logically, states lack jurisdiction to enforce what they cannot prescribe; therefore, a sender must establish a foundation of jurisdictional authority to prohibit conduct, as well as enforce conduct.⁶⁷

States assert their authority to prescribe crimes and enforce penalties under one or more of the five principles of jurisdiction: national, territorial, protective, passive, and universal.⁶⁸ First, nationality jurisdiction is the basis of a state’s jurisdiction to prescribe laws or enforce penalties upon its nationals.⁶⁹ Second, territoriality jurisdiction is “[t]he jurisdiction of a nation within its own territory” and is “necessarily exclusive and absolute.”⁷⁰

Third, passive jurisdiction affords a state jurisdiction to prescribe or enforce “conduct outside its territory that has or is intended to have substantial

⁶² *An Example of Jus Cogens: The Status of Prisoners of War*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES 41–43 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006) [hereinafter THE FUNDAMENTAL RULES].

⁶³ *See id.* at 41–43.

⁶⁴ LOWENFELD, *supra* note 23, at 900. Although some refer to an additional type of state assertion of jurisdiction known as jurisdiction to adjudicate, this Comment combines adjudication with enforcement. *See* DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 180 (3d ed. 2010).

⁶⁵ LOWENFELD, *supra* note 23, at 900 (emphasis added).

⁶⁶ *Id.* (emphasis added).

⁶⁷ *Id.*

⁶⁸ CARTER, *supra* note 3, at 712.

⁶⁹ BEDERMAN, *supra* note 64, at 188.

⁷⁰ *Schooner Exchange v. McFaddon*, 11 U.S. 116, 136 (1812).

effect within its territory,” unless such jurisdiction would be unreasonable.⁷¹ Fourth, protective jurisdiction exists when a state believes its national security or territory is at risk.⁷² Finally, the universality principle holds that some offenses are so egregious they concern all of mankind and thus, as the principle’s name suggests, states are universally granted jurisdiction, essentially making jurisdiction to prescribe unnecessary and dissolving the concept of sovereignty.⁷³

The existence of either nationality or territoriality jurisdiction has almost universally been held to be an essential element of legal sanctions,⁷⁴ and as will be seen, certain provisions of the Recent Orders contain one or both principles.⁷⁵ In addition to the existence of nationality and territoriality jurisdiction, the U.S. sanctioning-regime targeting Iran raises issues regarding protective jurisdiction by way of Iran’s disdain for the United States and the potential that Iran’s acquisition of nuclear technology could be detrimental to national security. While certain provisions prescribing the re-exportation of sensitive technology to Iran raise protective jurisdiction directly, the sanctioning-regime in its entirety could similarly, but arguably, be supported.

Clearly, provisions within a regime that do not comport with the traditional and most-literal meanings of nationality *and* territoriality tend to obscure legality under international law. To elucidate, provisions based upon principles other than nationality and territoriality will typically receive additional critique, as will those provisions that, for example, restrict the re-exportation of

⁷¹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 402(1)(C) (1987). Where the line between territorial jurisdiction and passive jurisdiction ends and begins can be argued, because as Andreas Lowenfeld stated, an examination of a law’s territorial jurisdiction raises the issue of whether it is more appropriate to look at the location of the conduct’s effect rather than the location of the conduct itself. *Cf.* Andreas Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT’L L. 42, 46 (1995). Because the regulation of individuals and conduct within a sender’s territory is widely accepted while passive prescription and enforcement is not, assertions of passive jurisdiction can quickly polarize a sanction’s analysis. *See* LOWENFELD, *supra* note 23, at 901.

⁷² *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 402(C) (1987). While passive jurisdiction relates to a “substantial effect,” protective jurisdiction requires more and exists when national security or territory is at risk. *Id.*

⁷³ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 404 (1987). These offenses—war crimes, piracy, slavery, hijacking, acts of terror (possibly), torture, and genocide—offend the world to such a degree that no consideration is given to the actor’s citizenship or the crime’s location. *Id.* A receiver who commits an act such as these is deemed an enemy of mankind, which grants the sender jurisdiction to enforce punishment. BEDERMAN, *supra* note 64, at 181.

⁷⁴ LOWENFELD, *supra* note 23, at 901.

⁷⁵ Jeffrey Meyer coined the term “terrnational sanction,” meaning those sanctions “based exclusively on a combination of territoriality and nationality jurisdiction.” Meyer, *supra* note 47, at 908, 908 n.5.

U.S. goods or regulate foreign subsidiaries of domestic companies, as seen in the Recent Orders.⁷⁶ After all, who is to decide at what point a United States' foreign subsidiary is no longer a citizen of the United States but instead a citizen of the foreign state?⁷⁷

On occasion, a legality determination can avoid these issues altogether and does not require one to look towards the parties involved. While sovereignty principles and associated terminology are “a nice self-indulgence of lawyers and academics,” in reality, an economic sanction can be devastating beyond finance, comfort, and the loss of *de facto* authority.⁷⁸ Therefore, an analysis of a sanction's breadth can lead to the discovery of violations, and at the very least, add weight to arguments in favor of reconstructing a sanction.

B. The Breadth of Sanctions and the Flaws Associated

As previously addressed, sanctions come in almost forty-one different flavors based upon the identity of the sender and receiver,⁷⁹ yet even if the requisite variables exist to defeat a claim regarding sovereignty, a sanction may still be unlawful. On the surface, sanctions attack finances, capital, and goods, but underneath, sanctions tend to punish innocent civilians. As one author has stated, “it should be obvious that the language is less important than the practicalities” because whether a policy contains sanctions, embargos, or financial restrictions will not be of relevance when a population is starving to death.⁸⁰

Scholars no longer “question the binding force of human rights as principles of present day international law with legal force.”⁸¹ Human rights are undeniably a permanent principle of modern civilized society and stem from a complex interplay of treaties, as well as established “customary prohibitions.”⁸² Furthermore, humanitarian concerns frequently arise from sanction imposition, which is arguably the purpose—sanctions keep goods and services from citizens, which in turn equates to a lower quality of life and,

⁷⁶ See E.O. 13628, *supra* note 5; see also Meyer, *supra* note 47, at 911.

⁷⁷ BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: REMOVING THE HAPHAZARD LEGAL REGIME 83–85 (1988), reprinted in INTERNATIONAL LAW 738, 738 (Barry E. Carter & Phillip R. Trimble eds., 3d ed. 1999).

⁷⁸ SIMONS, *supra* note 2, at 11.

⁷⁹ See *infra* Part IV.A.

⁸⁰ SIMONS, *supra* note 2, at 11.

⁸¹ Jochen A. Frowein, *Opening Remarks: Sanctions and Human Rights Law*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 125 (Vera Gowlland-Debbas et al. eds., 2001).

⁸² Cleveland, *supra* note 2, at 20.

hopefully, changed policies.⁸³ Accordingly, there exists a trend of denouncing overbroad regimes as potential human rights violations.⁸⁴

Categorizing sanctions based upon breadth requires labeling provisions as targeted or comprehensive. “Targeted sanction” is a self-defining term in that a targeted sanction’s focal point is solely on the trade of certain, significant items or on high-ranking individuals of the target state.⁸⁵ Targeted sanctions elicit relatively little controversy, as the main goal is to limit humanitarian effects, but with each additional amendment and condemnation of conduct, a sanctioning-regime is pushed further towards illegality.⁸⁶

A state seeking to create a drastic effect will implement the broadest of sanctions, described as “comprehensive sanctions.”⁸⁷ Comprehensive sanctions strive to obtain the complete subjugation of a state, which tends to increase the likelihood of illegality as a result of causing unwarranted suffering to the target’s general population.⁸⁸ Because sanctioning-regimes generally last years if not decades, the tendency for human rights violations can exponentially increase with a sanction’s age.⁸⁹

The humanitarian consequences of comprehensive sanctions were clearly seen after the devastation of Iraq’s population in the 1990s.⁹⁰ The United Nations sanctioning of Iraq is considered to be “the most draconian sanctions regime in the history” of the organization.⁹¹ It not only prohibited the importation of Iraqi products, as well as activities that would promote the exportation of Iraqi products, the sanctioning-regime also prohibited financial support of Iraq.⁹² Only humanitarian items were excluded; however, due to no income and a “cumbersome and procrastinatory licensing bureaucracy,” Iraq and its population could hardly get a hold of what little they could afford.⁹³

⁸³ HAKIMDAVAR, *supra* note 14, at 21.

⁸⁴ *Cf.* Cleveland, *supra* note 2.

⁸⁵ HAKIMDAVAR, *supra* note 14, at 23. *See also Sanctions*, GLOBAL POLICY FORUM, <http://www.globalpolicy.org/component/content/article/202/42495.html> (last visited Feb. 11, 2015).

⁸⁶ HAKIMDAVAR, *supra* note 14, at 23; *Sanctions*, *supra* note 85. Each additional amendment to a regime acts as a building block, creating a wall and placing the targeted state into involuntary isolation.

⁸⁷ *See* HAKIMDAVAR, *supra* note 14, at 23.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*; SIMONS, *supra* note 2, at 171.

⁹¹ SIMONS, *supra* note 2, at 171; Sharon Otterman, *Iraq: Oil for Food Scandal*, COUNCIL ON FOREIGN RELATIONS (Oct. 28, 2005), <http://www.cfr.org/iraq/iraq-oil-food-scandal/p7631>.

⁹² S.C. Res. 661, paras. 3–4, U.N. DOC S/RES/661 (Aug. 6, 1990).

⁹³ SIMONS, *supra* note 2, at 171.

The United Nations' sanctions against Iraq, along with the United States' own unilateral regulations, inflated the price of food to the point that an average citizen could not afford to eat, leading to predictions that over 170,000 children under the age of five would die within one year.⁹⁴ Although a more precise estimate later determined that "only" 5600 children were dying each *month*, another study calculated that 560,000 children died within five years of the sanctioning⁹⁵ and almost 880,000 children died in total.⁹⁶ As a result, the United Nations abandoned its use of comprehensive sanctioning altogether, which is neither exculpatory nor conclusive evidence of the Recent Orders' guilt.

The controversy understandably increases when humanitarian provisions, such as Section 2 of E.O. 13628⁹⁷ are imposed, because as one Iranian foreign minister contends, "you cannot claim your eagerness for democracy, human rights and all of these things and through unilateral sanctions, try to put all sorts of suffering and hardship [on] other people."⁹⁸ While this assertion is partially invalidated in Part IV, the U.N.'s confirmation of the severe damage caused by comprehensive sanctions does lend some level of credence to those opposing the U.S. sanctioning-regime. However, before analyzing the Recent Orders in regards to sovereignty and human rights, a brief discussion of the historical context is necessary in order to display, along with Part V, why some level of restriction is warranted—some 'warranted restriction' does not, however, completely excuse the U.S. sanctioning-regime's breadth or choice of receivers.

III. THE CAUSE AND CREATION OF EXECUTIVE ORDERS 13628 AND 13645

The volatile relationship between the Islamic Republic of Iran and the United States spans multiple generations, and for decades, the United States has targeted Iran with complex sanctions focused on trade and investment⁹⁹

⁹⁴ *Id.* at 174.

⁹⁵ *Id.* at 175.

⁹⁶ *Id.* at 177.

⁹⁷ For example, E.O. 13628 Section 2(a) blocks the property of "any person determined . . . (i) to have knowingly . . . transferred . . . goods . . . to Iran . . . for use in or with respect to Iran, that are likely to be used by the Government of Iran . . . to commit serious human rights abuses against the people of Iran." E.O. 13628, *supra* note 5, at Section 2(a).

⁹⁸ HAKIMDAVAR, *supra* note 14, at 44.

⁹⁹ *U.S. Relations with Iran: Fact Sheet*, U.S. DEPT. OF STATE (Aug. 28, 2013), <http://www.state.gov/t/pa/ei/bgn/5314.htm>; *see, e.g.*, Exec. Order No. 12163, 44 Fed. Reg. 56,673 (Sept. 29, 1979), (banning the import of Iranian goods and services); Exec. Order No. 12959, 60 Fed. Reg. 24, 757 (May 6, 1995)

“whether conducted or facilitated by U.S. persons, their non-U.S. subsidiaries or, to an increasing extent, by non-U.S. persons acting wholly outside U.S. jurisdiction.”¹⁰⁰ In order to enforce the restrictions, the U.S. government, may, among other things, seize assets, freeze bank accounts, and restrict trade with violators—all three of which E.O.s 13628 and 13645 provide. Before analyzing the contents of the Recent Orders, one must recognize and appreciate that the Recent Orders did not come about overnight. While Part III.A provides the context that the Recent Orders crave, Part III.B discusses the legislation that to the Recent Orders.

A. The Facts Behind the Contemporary U.S. Sanctioning-Regime

Years of consistent turmoil tested the U.S.–Iranian relationship, until 1979 when the Iranian hostage crisis triggered the United States’ termination of diplomacy with what had become a rogue regime.¹⁰¹ As one scholar stated, “[t]he Iranian revolution was not only anti-shah but also anti-Western and particularly anti-American,”¹⁰² and the new Iranian government was soon declared a state sponsor of terrorism captivated with the idea of developing nuclear technology and, therefore, a serious threat to international stability and peace.¹⁰³

In response to the crisis, President Carter declared a state of emergency, initiating the sanctioning-regime targeting Iran.¹⁰⁴ President Carter authorized the Secretary of the Treasury to use congressionally-granted emergency powers to block “all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran” within the United States.¹⁰⁵ However, as discussed above and further addressed

(banning specified exports and investments); Exec. Order No. 13059, 62 Fed. Reg. 44,531 (Aug. 19, 1997) (merging previous executive orders thereby virtually banning all commercial activity conducted by United States citizens with Iran).

¹⁰⁰ See KAY C. GEORGI & PAUL M. LALONDE, HANDBOOK OF EXPORT CONTROLS & ECONOMIC SANCTIONS 245 (2014).

¹⁰¹ *U.S. Relations with Iran: Fact Sheet*, *supra* note 99. Iran experienced a change in government multiple times throughout the 20th Century, until Iranian students, enraged over the United States’ grant of asylum to the deposed Shah, took fifty-two Americans hostage. *Id.*

¹⁰² LEILA AHMED, A QUIET REVOLUTION: THE VEIL’S RESURGENCE, FROM THE MIDDLE EAST TO AMERICA 115 (2011). The hostility towards the United States was so severe that a burning American flag became an unofficial sign of the new Islamic government. *Id.* at 116.

¹⁰³ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-326, U.S. AND INTERNATIONAL SANCTIONS HAVE ADVERSELY AFFECTED THE IRANIAN ECONOMY (Feb. 25, 2013).

¹⁰⁴ Exec. Order No. 12170, 44 Fed. Reg. 65,729 (Nov. 14, 1979).

¹⁰⁵ *Id.*

in Part IV, the Recent Orders and other provisions in the regime extend far beyond President Carter's historic order.

B. The Legislation Leading to Executive Orders 13628 and 13645

In 1996, the United States tightened its vise on Iran by enacting the Iran and Libya Sanctions Act (ILSA),¹⁰⁶ thereby sowing what would eventually become the current sanctioning-regime.¹⁰⁷ Following 1996 and frustrated with a lack of adherence to its policies and foreigners dealing with the 'international pariah,' Congress continued to expand the President's authority to sanction.¹⁰⁸ Ultimately, the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA) passed in 2010, which applied existing sanctions extraterritorially.¹⁰⁹

Most notably, provisions in CISADA enabled the President to exploit the United States' global influence in banking.¹¹⁰ Specifically, if the United States government finds that a foreign bank substantially engages in activity with Iranian banks, CISADA grants the Executive branch the authority to force domestic banks to terminate contact with the offending bank.¹¹¹

In an attempt to subdue Iran's continuing development of nuclear technology, Congress yet again authorized an extension of the controversial regime,¹¹² and on August 10, 2012, President Obama, as promised during his 2012 State of the Union Address, continued the relentless quest to tame Iran with the signing of the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA).¹¹³ ITRA, amends ILSA, *inter alia*, and addresses petroleum

¹⁰⁶ ILSA, *supra* note 5.

¹⁰⁷ *Id.*; see also Michael Asaro, *The Iran & Lybia Sanctions Act of 1996: A Thorn in the Side of the World Trading System*, 23 BROOK. J. INT'L L. 505, 508 n.22 (1997).

¹⁰⁸ See HAKIMDAVAR, *supra* note 14, at 70.

¹⁰⁹ DeFrancia, *supra* note 17, at 754.

¹¹⁰ Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195 § 1321, 124 Stat. 1312.

¹¹¹ *Id.*; see also U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 103.

¹¹² Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158 § 101, 126 Stat. 1214 [hereinafter ITR]. "Let there be no doubt: America is determined to prevent Iran from getting a nuclear weapon, and I will take no options off the table to achieve that goal." *Id.* § 101.

¹¹³ As his campaign advisor Michele Flournoy stated, "[President Obama] has led the international community in imposing the most crippling sanctions ever imposed on any country . . . the President has been clear, and consistently clear in his determination to absolutely prevent Iran from acquiring a nuclear weapon." *Pres. Obama rep on Iran: Red line has been "laid out"*, CNN (Sept. 26, 2012), <http://cnnpressroom.blogs.cnn.com/2012/09/26/pres-obama-rep-on-iran-red-line-has-been-laid-out/>.

development partnerships outside Iran.¹¹⁴ This provision applies if the Iranian government is substantially involved or if Iran could receive relevant knowledge or technology as a result of the partnership.¹¹⁵ Furthermore, ITRA prohibits individuals from being involved with the transportation of crude oil on vessels—either through vessel ownership, operation, control, or insurance—and contains financial provisions prohibiting the issuance of debt to Iran.¹¹⁶ However, not all regime changes stemming from ITRA are controversial, as will be seen with E.O. 13628.

On January 2, 2013, the Iran Freedom and Counter-Proliferation Act (IFCA) became law, making it the fourth statutory expansion of federal sanctions against Iran in the last few years.¹¹⁷ The IFCA addresses concerns related to the facilitation of a transaction for particular goods or services related to energy development, weapons programs, or shipbuilding¹¹⁸ and provides the Executive Branch with the authority to seize assets of persons discovered to be a part of a violation of the aforementioned prohibition; persons found dealing with blacklisted individuals; and persons providing insurance, reinsurance, or underwriting for previously prohibited conduct.¹¹⁹ In the same way the United States' sanctioning-regime targeting Iran expanded in terms of receivers, it has also grown in a manner that leaves few items and little conduct untouched.

Although additional legislation drifts through the Senate intending to catalyze Iran's compliance with the United States' demands pertaining to nuclear technology, human rights, and terrorism, for the first time in recent years, it is to the dismay of the President.¹²⁰ However, it is unlikely that

¹¹⁴ ITR § 102.

¹¹⁵ *Id.*

¹¹⁶ ITR § 202(A)(7). The Securities Exchange Act amendment requires entities to self-disclose in quarter or annual reports any activity engaged in that violated ILSA, CISADA, or the various E.O.s that prohibit dealings with blacklisted persons. *Id.* § 219. The public shaming entailed in the required report must include "(A) the nature and extent of the activity; (B) the gross revenues and net profits, if any, attributable to the activity; and (C) whether the issuer or the affiliate of the issuer (as the case may be) intends to continue the activity." *Id.* at § 218. Failing to follow this provision exposes the violator to both civil and criminal penalties. *Id.*

¹¹⁷ *See generally*, Iran Freedom and Counter-Proliferation Act, 22 U.S.C. §§ 8801–8811 (2013).

¹¹⁸ *Id.* § 8803.

¹¹⁹ *Id.* § 8805.

¹²⁰ *See* GEORGI & LALONDE, *supra* note 100, at 245. Supporters of the bill essentially intend to eliminate Iran's oil exportation, a resource that makes up nearly four-fifths of the Iranian Government's revenue. Paul Richter, *State Dept. Official Urges Congress to Delay New Iranian Sanctions*, L.A. TIMES (Oct. 3, 2013, 2:14 PM), <http://www.latimes.com/world/worldnow/la-fg-wn-state-congress-iran-sanctions-20131003,0,1909747.story#axzz2j2xBhqtS>.

President Obama's recent change in attitude stems from a newfound discovery of international law violations. Nonetheless, receivers arguing against the regime's legality amount to additional pressure, constraining foreign affairs.

IV. LEGALITY ISSUES OF EXECUTIVE ORDERS 13628 AND 13645

International law may primarily be "marked not by subordination, but by coordination, basing itself on the written or unwritten consensus of sovereign States"¹²¹ and may continuously receive criticism as soft and lacking enforcement mechanisms,¹²² yet "the violation of law, or even the failure to inflict punishment for the violation, [does not] abrogate the law or prove its non-existence."¹²³ Sanctions are a prominent example of these concerns and raise issues of observance, obligation, and enforcement,¹²⁴ the Recent Orders are no different.

Contemporary scholars maintain that sanctions "are without a doubt 'legal' in the sense that they are fixtures of international law, and are imposed by written acts of international and domestic bodies with authority and general consent of the governed."¹²⁵ However, much discourse exists beyond this agreement, which solely addresses unilateral and universal, primary sanctions. Thus, a state enacting a sanctioning-regime risks exposing itself to extensive criticism from the international community and to multiple violations of international law—from intrusions upon sovereignty to violations of human rights.

A. Executive Orders 13628 and 13645 Contain Provisions that Violate the Sovereignty of Other States

Violations of international law frequently occur as a result of a state breaching its consensual duties and obligations established pursuant to international treaty agreements *or* customary international law.¹²⁶ Therefore, the United States, even without a treaty constraint on point, cannot impose a sanction with complete disregard.

¹²¹ Thomas Giegerich, *Do Damage Claims Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts*, in *THE FUNDAMENTAL RULES*, *supra* note 62, at 203–05.

¹²² See GEORGE A. FINCH, *THE SOURCES OF MODERN INTERNATIONAL LAW* 46 (1937) (quoting the Honorable Elihu Root).

¹²³ *Id.* at 46.

¹²⁴ SIMONS, *supra* note 2, at 163.

¹²⁵ HAKIMDAVAR, *supra* note 14, at 14–15, 169 n.41.

¹²⁶ See generally CARTER, *supra* note 3.

President Obama issued E.O.s 13628 and 13645 as part of his continued “commitment to prevent Iran from acquiring a nuclear weapon, by raising the cost of Iran’s defiance of the international community”¹²⁷ and with the belief that the “policies of the Government of Iran constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.”¹²⁸ The Recent Orders, however, appear to disregard the traditional concepts of sovereignty and jurisdiction containing numerous unilateral sanctions with only a slight nexus to the United States, at most.

Pursuant to ITRA and similar acts of Congress, the President issued E.O. 13628 on October 9, 2012.¹²⁹ At first glance, the order appears to respect the sovereignty of foreign states; however, Section 4 prohibits “entit[ies] owned or controlled by a United States person and established or maintained outside the United States” from engaging in transactions with Iran or those subject to Iran’s jurisdiction where those transactions would previously only be illegal if “engaged in by a United States person or [conducted] in the United States.”¹³⁰ Section 4 relates back to executive orders from decades ago, for example E.O. 12957.¹³¹

Previously, this provision was unilateral, primary, and lawful—although it regulated conduct outside the United States, it applied to U.S. citizens.¹³² With Section 4’s extension of liability to “entit[ies] . . . established or maintained outside the United States”¹³³ prevents a quick labeling and blurs the distinction between primary and secondary sanctions, creating possible discourse about the nationality principle.

The extension of liability only *appears* to be a lawful assertion of jurisdiction¹³⁴ because international viewpoints on “ownership” vary, and

¹²⁷ Office of the Press Secretary, *Statement by the Press Secretary on the Announcement of Additional Sanctions Related to Iran*, THE WHITE HOUSE (June 3, 2013), <http://www.whitehouse.gov/the-press-office/2013/06/03/statement-press-secretary-announcement-additional-sanctions-related-iran>.

¹²⁸ Exec. Order No. 12957, 60 Fed Reg. 14,615 (Mar. 15, 1995) [hereinafter E.O. 12957].

¹²⁹ E.O. 13628, *supra* note 5.

¹³⁰ *Id.* at Section 4.

¹³¹ *Id.*; E.O. 12957, *supra* note 128, at Section 1 (prohibiting U.S. citizens and entities from contracting to manage or finance activities related to petroleum development in Iran).

¹³² *See* E.O. 12957, *supra* note 128.

¹³³ E.O. 13628, *supra* note 5.

¹³⁴ H.R. Res. 1905, 112th Cong. § 218(b)(2004)(enacted). E.O. 13628 runs into similar issues as Section 218 of ITR, where the statutory definition of “own or control” is holding “more than 50 percent of the equity interest by vote or value[,] . . . a majority of seats on the board of directors[,] . . . or to otherwise control the actions, policies, or personnel decisions of the entity.” *Id.* § 218(a)(2)(A)-(C).

depending on the definition of “ownership,” Section 4 may potentially constitute an unlawful secondary sanction.¹³⁵ Andreas Lowenfeld, however, raises the question, why exactly should provisions such as this violate the nationality principle?¹³⁶ After all, the receiver company’s nerve center is *in* the United States, and the nerve center is where the decision to violate a sanction would be made.¹³⁷ Nonetheless, additional provisions in the Recent Orders irrefutably transgress the sovereignty of foreign states, regardless of one’s stance on the proper formula for determining the nationality of a foreign subsidiary. For example, President Obama’s most recent order targeting Iran, E.O. 13645, contains a restriction on foreign entities that clearly imposes a secondary restriction and, therefore, eliminates the foreign subsidiary conundrum previously addressed.¹³⁸

Section 1 of E.O. 13645 authorizes the sanctioning of foreign financial institutions that conduct or facilitate significant transactions related to “contracts whose value is based on the exchange rate of the Iranian rial” or that have “maintained significant funds or accounts outside the territory of Iran denominated in the Iranian rial.”¹³⁹ With Section 1 of E.O. 13645, President Obama unambiguously exceeded his authority to prescribe and enforce, pursuant to the traditional principles of jurisdiction—nationality and territoriality.

First, the nationality principle clearly does not apply because E.O. 13645 explicitly states “*foreign* financial institutions.”¹⁴⁰ Second, as to the territoriality principle, the rial transaction provision under Section 1(b), limits penalties to the United States soil—(1) the President can “prohibit the opening, and prohibit or impose strict conditions on the maintaining” of payable through accounts; or (2) block all property in the United States belonging to the receiver.¹⁴¹ While seemingly valid at first, an argument for territorial jurisdiction does not compute, as this is a provision to enforce punishment, and as previously stated, states cannot enforce that which they cannot prescribe.¹⁴²

¹³⁵ See Andreas Lowenfeld, *Unilateral versus collective Sanctions*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 101, 95–103 (Vera Gowlland-Debbas ed., 2001).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ E.O. 13645, *supra* note 5, at Section 1(a)(i).

¹³⁹ *Id.* at Section 1(a)(i)–(ii).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at Section 1(b)(i)–(ii).

¹⁴² LOWENFELD, *supra* note 23.

Therefore, Section 1 of E.O. 13645 transgresses the principles of sovereignty and is in opposition to established norms of international law.¹⁴³

Section 5 of E.O. 13645, previously mentioned in Part II.A.3, also flagrantly disregards the principles of jurisdiction. Section 5 prohibits a *person* from selling automotive goods to Iran, where the definition of “person” ends and begins with “means an individual or entity,” and does not mention a particular location where the conduct must occur, thus facilitating the regulation of non-U.S. citizens outside the United States.¹⁴⁴ However, Section 5 also inherently restricts the conduct of U.S. citizens, which would be one way in which E.O. 13645 is a legal primary sanction—the United States has the authority to restrict its citizens under the nationality principle.¹⁴⁵ Other than this conspicuous agreement with international law, E.O. 13645 permits the sanctioning of non-U.S. individuals abroad and is an unlawful secondary sanction.¹⁴⁶

While the United States clearly lacks jurisdiction to prescribe Section 5, Section 7—Section 5’s penal counterpart—creates ambiguity with respect to the United States’ jurisdiction to enforce.¹⁴⁷ Under Section 7, the Secretary of State or the Secretary of the Treasury has the authority to take action against a violator of Section 5 by, for example, prohibiting U.S. citizens from investing in the violator.¹⁴⁸ This section presents a similar scenario to Section 1’s analysis, but instead of the nationality principle, Section 7 is disguised as lawful under the territorial principle.¹⁴⁹ If Section 7 stood alone, which could have been wrongly interpreted in Part II of this Comment, a strong argument would exist in favor of labeling it a primary sanction, meaning the United States would possess jurisdiction to prescribe and enforce.

The United States has the authority to regulate its citizens’ conduct and enforce punishments against those who do not obey. However, this provision fails when read in conjunction with Section 5, as Section 7 then assumes its proper role under E.O. 13645; it is the enforcement tool of prohibited conduct the United States lacks jurisdiction to prescribe. Therefore, Section 7 violates

¹⁴³ E.O. 13645, *supra* note 5, at Section 1.

¹⁴⁴ *See id.* at Section 5.

¹⁴⁵ *See supra* Part II.A.3.

¹⁴⁶ *See* E.O. 13645, *supra* note 5, at Section 5.

¹⁴⁷ *Id.* at Section 7.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

international law, as a secondary sanction encroaching upon the sovereignty of other states.¹⁵⁰

The United States cannot display either one of the traditional principles of jurisdiction—nationality or territoriality—in the majority of the Recent Orders’ provisions. If it can enforce punishment on a receiver, it often lacks the jurisdiction to prescribe the conduct in the first instance. With a few exceptions, Section 4 of E.O. 13628 and Sections 1(a)-(b), 5, and 7 of E.O. 13645 are violations of international law’s notion of sovereignty; and therefore, the United States should amend the Recent Orders in this respect, at the very least. In addition to the Recent Orders violating the sovereignty of foreign states, issues exist over whether the United States’ regime violates the human rights of Iranians as a result of being too broad.¹⁵¹

B. Executive Orders 13628 and 13645 Respect Human Rights, Contain Questionable Provisions, and Contribute to the Regime’s Breadth, Nonetheless

As we will see, individuals question the United States’ commitment to the elimination of human suffering in Iran, and certain provisions of the sanctioning-regime arguably cover too broad of a market sector alone. But, even the narrow provisions contribute to the large wall isolating Iran. With respect to the ongoing suffering of Iranians, one journalist articulated,

[w]hatever the goals of the United States (such as toppling the Islamic Republic or stopping its nuclear program), the Iranian people have been, and are continuing to be the victims of such goals. When it comes to systematic violation of human rights, there is no difference between a dictator like Ayatollah Ali Khamenei¹⁵² and those who claim to be democrats.¹⁵³

¹⁵⁰ *Id.*

¹⁵¹ See e.g., Akbar Ganji, *U.S. Crippling Sanctions Against Iran, Part II: A National Anti-Sanction Movement by the Civil Society*, HUFFINGTON POST, (Sept. 7, 2013, 6:43 PM), http://www.huffingtonpost.com/akbar-ganji/us-sanctions-iran_b_3887401.html (discussing the alleged human rights violations of the West on Iran). Dr. Mohammad Taghi Karoubi received a Ph.D. in international laws in Britain and has been quoted for his opinion that “the collective punishment of the [Iranian] people by the sanction’ [is] a violation of international laws.” *Id.*

¹⁵² *History of Iran: Ayatollah Seyed Ali Khamenei*, IRAN CHAMBER SOCIETY, http://www.iranchamber.com/history/akhamenei/ali_khamenei.php. Not to be confused with Ayatollah Khomeini, the leader of the Shah’s opposition in 1979, founder of the Islamic Republic and its new Constitution, and former supreme spiritual leader. *Id.*

¹⁵³ Ganji, *supra* note 151.

Other Iranians opposing the United States' regime claim that the United States is not trying to prevent human rights violations with the use of sanctions, but that the sanctions are fueled by a desire for oil.¹⁵⁴ Some making these claims even hold close ties to political prisoners of Iran.¹⁵⁵ Begging the question, what are we to believe if the United States' adversaries that share a common enemy with the United States claim the sanctions are too harsh?

1. *The United States' Respect of Human Rights*

The United States has responded to accusations of shameful and hypocritical human rights violations with a caveat known as the humanitarian exception.¹⁵⁶ The U.S. sanctioning-regime does not impose penalties, so long as the transaction is for the sale of "food,¹⁵⁷ agriculture commodities, medicine, and medical devices" not intended for certain "designated person (such as Iran's Islamic Revolutionary Guard Corps (IRGC) or a designated Iranian bank) or proscribed conduct."¹⁵⁸ The humanitarian exception applies to both U.S. citizens and non-U.S. citizen, as well as to the actual seller of the aforementioned items.¹⁵⁹ The United States' inclusion of the exception does

¹⁵⁴ *See id.*

That the U.S. has imposed unilateral sanctions and applied pressure on Iran is not strange, because it is in its national interests. We cannot expect a wolf not to be a wolf. Sanctions are part of the U.S. policy and inseparable from its diplomacy . . . the imperialist issues that the U.S. has with Iran were raised when its interests became aligned with those of a small minority [the Ahmadinejad cabal] in Iran. The [true] issue is that there are five oil-exporting countries in the region that can be influential nations in the future, four of which are occupied or under political influence of the U.S. The only country that is not is Iran that does not act aligned with the U.S. policy, or is not occupied by it.

Id. (quoting economist and former political prisoner Saeed Leylaz).

¹⁵⁵ *See, e.g., id.* (Dr. Karroubi's son is an Iranian political activist and under house arrest).

¹⁵⁶ Guidance Letter, Dep't of the Treasury, Guidance on the Sale of Food, Agricultural Commodities, Medicine, and Medical Devices by Non-U.S. Persons to Iran (July 25, 2013), *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran_guidance_med.pdf.

¹⁵⁷ Regarding what constitutes "food," the federal regulations state the following:

[f]or purposes of this general license, the term *food* means items that are intended to be consumed by and provide nutrition to humans or animals in Iran, including vitamins and minerals, food additives and supplements, and bottled drinking water, and seeds that germinate into items that are intended to be consumed by and provide nutrition to humans or animals in Iran. For purposes of this general license, the term *food* does not include alcoholic beverages, cigarettes, gum, or fertilizer.

Definition of Food, 31 C.F.R. § 560.530 (2013).

¹⁵⁸ Guidance Letter, *supra* note 156.

¹⁵⁹ *Id.*

recognize human rights, but was deemed inadequate, as evidenced by E.O. 13645.¹⁶⁰

President Obama, with the issuance of E.O. 13645, went beyond excluding additional humanitarian transactions. Section 8 of this order provides penalties against any persons who partake “in corruption or other activities relating to the diversion of goods” excluded under the humanitarian exception and against any persons who misappropriate proceeds from the sale of such humanitarian items.¹⁶¹ It essentially protects the humanitarian exception by prescribing and authorizing the enforcement of punishment for negative conduct where the sanctioning-regime previously only excluded positive humanitarian conduct.

Sections 2 and 3 of E.O. 13628 also include provisions that go beyond exclusion and authorize punishment.¹⁶² The sections extend sanctionable activity beyond those who directly abuse human rights by including penalties for those who facilitate such activity with the support of special knowledge, services, or goods.¹⁶³ If involvement is discovered, Sections 2 and 3 block the violator’s property that is in the United States or that comes into the “possession or control of a United States person, including any foreign branches.”¹⁶⁴

By way of cross-references, the punishment for violating these provisions extends beyond the initial lost assets. Section 9 subjects individuals to sanctions if they “contribute funds, goods, or services” to any person whose assets are frozen as a result of providing goods or technology under Sections 2 and 3.¹⁶⁵ This essentially isolates the human rights violator and anyone who dare support him after the fact, thereby providing even greater incentive to refrain from human rights abuses. Section 9 of E.O. 13628 therefore provides for isolation, similar to what is feared with overly broad provisions, but does so for undeniably good reason. The breadth of the sections described below, however, are much more controversial.

¹⁶⁰ Section 3 of E.O. 13645 also precludes the rial transaction provision under the humanitarian exception.

¹⁶¹ E.O. 13645, *supra* note 5, at Section 8.

¹⁶² *Id.* at Section 3.

¹⁶³ E.O. 13628, *supra* note 5, at Section 3. Censorship is targeted by the section’s prohibition on “sensitive technology,” which includes equipment that restricts “the free flow of unbiased information in Iran; or to disrupt, monitor or otherwise restrict speech of the people of Iran.” ITR §403. Additionally, those “Engaged in censorship or other activities, on or after June 12, 2009, with respect to Iran that prohibit, limit or penalize the exercise of freedom of expression or assembly by citizens of Iran, or limit access to print or broadcast media.” E.O. 13628, *supra* note 5, at Section 3(a)(i).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at Section 9.

2. *The Recent Sanctions are Too Broad*

President Obama's humanitarian provisions in the Recent Orders are commendable for striving to end human rights violations in Iran. Nonetheless, the sanctioning-regime's breadth keeps controversy fresh. The Recent Orders exemplify the enlarging scope of conduct the United States prohibits; with numerous internal cross-references and references to preceding orders, the Recent Orders quickly compound and contribute to the metaphorical wall surrounding Iran.¹⁶⁶ In addition to the human rights provisions previously addressed, the President's goal behind the Recent Orders is clear: place constraints on Iran to the point that little capital remains to support the development of nuclear technology.¹⁶⁷ As its neighbor's history reveals, however, ultimate goals do not always justify the impact on innocent civilians.¹⁶⁸ The more comprehensive a sanctioning-regime, the more likely it will cause severe harm to the target's population.

Section 5 of E.O. 13645 appears to be a proper, targeted sanction,¹⁶⁹ but the restrictions on the "sale, supply, or transfer" of goods relating to Iran's automotive sector, while "targeted" at a particular industry, do not strike precisely at Iran's ruling elite.¹⁷⁰ However, this provision is not necessarily comprehensive, either. What it certainly does qualify as is an embargo and additional source of economic pain that indiscriminately restricts.

Less controversial, but still a block in the wall, is Section 3, which prohibits the significant financing of conduct prescribed by Section 5. Smaller transactions that do not need significant capital can still occur under Section 3's financial restriction, limiting its detrimental impact on the population. Nonetheless, Section 5 remains, preventing most operations.

A clear example of the regimes' exponential growth and move towards comprehensive application is seen in Section 4 of E.O. 13628.¹⁷¹ With this provision, President Obama extends the regime by what appears to be one new sanction; however, in reality, Section 4 prohibits what would ordinarily take multiple E.O.s to prescribe.¹⁷² It cross-references four previous E.O.s in their

¹⁶⁶ E.O. 13645, *supra* note 5, at Section 1(b)(ii), 10(a).

¹⁶⁷ See E.O. 13628, *supra* note 5, at Section 3.

¹⁶⁸ See *supra* Part III.B.

¹⁶⁹ E.O. 13645, *supra* note 5, at Section 5.

¹⁷⁰ See *infra* Part V (discussing the United Nations' targeting of Iran's ruling elite).

¹⁷¹ E.O. 13628, *supra* note 5, at Section 4.

¹⁷² See *id.*

entirety and one section of a fifth.¹⁷³ The foreign subsidiaries' conduct that was previously only illegal when undertaken by U.S. citizens or in the United States is now prohibited.¹⁷⁴ By prescribing such a large scope of conduct, Section 4 of E.O. 13628 is essentially a comprehensive sanctioning-regime itself.¹⁷⁵ If the foreign subsidiary expansion does not proffer enough evidence of unjust breadth, Section 1 of E.O. 13645 does.

By restricting the actual use of Iranian currency, the regime now has its hands in every Iranian's pocket.¹⁷⁶ Although Section 1 is a financial restriction, which this Comment previously described as less controversial, it is the exception, not the rule. The goal of preventing collateral damage is completely subverted by the rial provision's indiscriminate application.¹⁷⁷ A financial restriction has the capability of being targeted and "smart" beyond most sanctions.¹⁷⁸ However, this is because bank accounts and the like can be directly pinpointed.¹⁷⁹ Higher regard is also held for those provisions that block the assets of the most egregious offenders, such as the concerted attack on human rights abusers by Section 2 and 9 of E.O. 13628. By limiting the power of the United States to punishing those who abuse and support abuse, collateral damage will be limited, but when a comprehensive regime such as the United States' is implemented, it is no surprise negative responses are drawn.¹⁸⁰

V. THE UNITED NATIONS: A MODEL WORTHY OF ADOPTING

Iranian Ambassador and Permanent Representative to the United Nations, Mohammad Khazaee, claims that the Islamic Republic of Iran, as a founding member, "believes deeply in the ideals of the organization and the purposes and principles of [the United Nations Charter]," and asserts that "[t]he United Nations is the sole organization with the capacity to address issues" such as

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ E.O. 13628 encompasses E.O. 12957 and E.O. 12959 of May 6, 1995; E.O. 13059 of August 19, 1997; E.O. 13599 of February 5, 2012; and Section 5 of E.O. 13622 of July 30, 2012. *Id.*

¹⁷⁶ See E.O. 13645, *supra* note 5.

¹⁷⁷ *Id.*

¹⁷⁸ See *infra* Part V.

¹⁷⁹ See *infra* Part V.

¹⁸⁰ "What sanctions have produced is basically 19,000 centrifuges and a lot of resentment among the Iranian population that the United States Congress is against their buying medicines. [This is] because it restricts the possibility for banks to open Letters of Credit for Iranian corporations to import medicine." *US Proponents of Sanctions on Iran Won't Like Consequences—Iranian FM to RT*, RT (Jan. 16, 2014, 9:47 AM), <http://rt.com/news/iran-foreign-minister-zarif-700/> (quoting Foreign Minister of Iran Javad Zarif).

“drugs, terrorism, weapons of mass destruction, [and] poverty.”¹⁸¹ Historically, the United Nations Security Council, by way of Security Council Resolution, disagrees with Mohammad Khazaei’s assertion of Iran’s devotion to the Charter.¹⁸²

For years, the United States held tightly to its belief that Iran was seeking to develop weapons of mass destruction,¹⁸³ and in 2002, satellite evidence allegedly confirmed two Iranian compounds devoted to the development of long-range weapons capable of mass destruction.¹⁸⁴ Among other things, the International Atomic Energy Agency (IAEA) ordered Iran to fully suspend all activities related to the enrichment of uranium, achieve transparency as requested by the Director-General, and adopt and ratify additional protocols.¹⁸⁵ In 2006, the Security Council adopted Resolution 1737, imposing sanctions as an attempt to force Iran’s compliance with the demands set forth by the IAEA.¹⁸⁶ As a result of Iran’s continued enrichment and for the purpose “of averting the proliferation of nuclear weapons and preventing acts of nuclear terrorism,” the Security Council passed three subsequent resolutions targeting Iran: Resolutions 1747, 1803, and 1929 (collectively with Resolution 1737, “the Iranian Resolutions”).¹⁸⁷

The Iranian Resolutions restrict the export of materials related to nuclear proliferation and materials that are necessary for the creation of other weapons.¹⁸⁸ Additionally, the Iranian Resolutions require the freezing of designated assets and impose travel bans.¹⁸⁹ In all, the Iranian Resolutions list

¹⁸¹ *Welcome Message*, PERMANENT MISSION OF THE ISLAMIC REPUBLIC OF IRAN TO THE UNITED NATIONS NEW YORK, <http://www.iran-un.org/> (last visited Jan. 19, 2015). Iran joined the United Nations at its founding in 1945 and has maintained an in-country United Nations presence for over sixty years. *United Nations Resident Coordinator Office*, PERMANENT MISSION OF THE ISLAMIC REPUBLIC OF IRAN TO THE UNITED NATIONS NEW YORK, <http://iran-un.org/en/u-n/> (last visited Jan. 19, 2015).

¹⁸² *UN Sanctions Against Iran*, *supra* note 14.

¹⁸³ YAËL RONEN, *THE IRAN NUCLEAR ISSUE 1* (Stefan Talmon ed., 2010).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1–3.

¹⁸⁶ *Id.* at 3.

¹⁸⁷ *Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Materials Software, and Related Technology*, INFCIRC, 254/Rev.8/part 2 (June 2010), available at <http://www.un.org/sc/committees/1737/pdf/INFCIRC254Rev.8Part2.pdf>; see also S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 27, 2006).

¹⁸⁸ *Security Council Committee established pursuant to Resolution 1737*, UNITED NATIONS, <http://www.un.org/sc/committees/> (last visited Feb. 12, 2015).

¹⁸⁹ *Id.*

roughly forty individuals and close to eighty entities.¹⁹⁰ The individuals range from the heads of trade and weapons research to the leaders of Iran's Revolutionary Guard,¹⁹¹ while the entities targeted range from companies charged with attempting to purchase illicit goods to banks intertwined with illicit activities.¹⁹² Furthermore, the asset freezes incorporate "any individuals or entities acting on behalf of, or at the direction of, the designated persons and entities, and to entities owned or controlled by them."¹⁹³

The United Nations is far from perfect, but the United Nations Charter (the "Charter"), as opposed to the United States' domestic political process, ensures the most equitable policy that a sender can currently afford. The Charter effects the obligations of all members and affords impacted-states opportunities to be heard. Furthermore, the Charter defines rules for imposing sanctions and is naturally in accord with international law.

A. The United Nations Has Jurisdiction over Its Members, and Receivers Have a Voice

The Iranian Resolutions undoubtedly require member states to reach beyond their borders and act extraterritorially, which arguably creates a right "to exercise state control over private activities both at home and abroad."¹⁹⁴ Membership to the United Nations requires a state to be willing and able to carry out obligations in the Charter,¹⁹⁵ and under Article 25 of the Charter,

The asset freeze is set out in paragraph 12 of resolution 1737 (2006), paragraph 4 of resolution 1747 (2007), paragraph 7 of resolution 1803 (2008) and paragraphs 11, 12, and 19 of resolution 1929 (2010). Exemptions to that measure are set out in paragraphs 13, 14, and 15 of resolution 1737 (2006). Exemptions are also set out in paragraph 12 of resolution 1737 (2006), paragraph 4 of resolution 1747 (2007), paragraph 7 of resolution 1803 (2008) and paragraphs 11, 12, and 19 of resolution 1929 (2010). Exemptions to that measure are set out in paragraphs 13, 14, and 15 of resolution 1737 (2006). *Id.* The travel bans are set out as follows: in paragraph 5 of the resolution 1803 (2008) and paragraph 10 of the resolution 1929 (2010). Exemptions to that measure are set out in paragraph 6 of resolution 1803 (2008) and paragraph 10 of resolution 1929 (2010).

INDIVIDUALS AND ENTITIES DESIGNATED AS SUBJECT TO THE TRAVEL BAN AND ASSETS FREEZE PURSUANT TO RESOLUTIONS 1737 (2006), 1747 (2007), 1803 (2008), and 1929 (2010) AND TO THE COMMITTEE DECISIONS OF 18 APRIL 2012 AND 20 DECEMBER 2012, SECURITY COUNCIL COMMITTEE ESTABLISHED PURSUANT TO RESOLUTION 1737, available at <http://www.un.org/sc/committees/1737/pdf/1737ConsolidatedList.pdf>.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Gowlland-Debbas, *UN Sanctions and International Law: An Overview*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW, *supra* note 14, at 21.

¹⁹⁵ U.N. Charter art. 2, para. 4.

members “agree to accept and carry out the decisions of the Security Council.”¹⁹⁶ With 193 members in the U.N., it would be difficult for all but a hand-full of states to legitimately claim a violation of sovereignty,¹⁹⁷ yet third-party concerns may still arise.¹⁹⁸ Accordingly, the Charter has a built in provision allowing aggrieved states to be heard regarding any negative consequences of Security Council sanctions.¹⁹⁹

The Charter addresses the negative impact of sanctions through Articles 48 and 50. Regardless of membership status, Article 50 grants any state “which finds itself confronted with special economic problems arising from the carrying out of [imposed] measures” the ability to be heard by the Security Council in order to propose actions to mitigate damage.²⁰⁰ Correspondingly, Article 48 permits the Security Council to omit states as the Council sees fit in regards to actions taken for international peace and security.²⁰¹

In addition to widespread membership and a grievance process, the United Nations requires firm justification before imposing a sanction, and when justified, the U.N. implements targeted, smart sanctions.

B. The United Nations is Justified in its Imposition of Sanctions Targeting Iran

Article 2(7) of the United Nations Charter limits the United Nations’ power by not allowing it “to intervene in matters which are essentially within the domestic jurisdiction of any state.”²⁰² The restriction is qualified in that “th[e] principle shall not prejudice the application of enforcement measures under Chapter VII.”²⁰³ Chapter VII requires an action taken by the Security Council to remain proportional, meaning it is “appropriate and necessary for the

¹⁹⁶ U.N. Charter art. 25.

¹⁹⁷ *UN Member States on the Record: What are member states?*, UNITED NATIONS, <http://www.un.org/depts/dhl/unms/whatisms.shtml> (last visited Feb. 24, 2015). It is worth noting that the imposition of a U.N. sanction does not occur with the direct involvement of every member state. HAKIMDAVAR, *supra* note 14, at 25.

¹⁹⁸ *Security Council Sanctions Committee: An Overview*, UNITED NATIONS, <http://www.un.org/sc/committees/> (last visited Feb. 24, 2015).

¹⁹⁹ U.N. Charter art. 50.

²⁰⁰ U.N. Charter art. 50.

²⁰¹ *Id.*

²⁰² U.N. Charter art. 2, para. 7.

²⁰³ *Id.*

achievement of its stated purpose . . . and may not affect other interests to an extent which is disproportionate to the advantage obtained or pursued.”²⁰⁴

1. *The Principle of Proportionality*

The principle of proportionality entails an interpretation of the facts by the Security Council, which first concludes with a determination as to whether a threat exists.²⁰⁵ Thus, before the United Nations, or any state belonging thereto, can impose sanctions on another state, the action must first be authorized by the Security Council, which receives its non-military powers pursuant to Article 41 of the Charter.²⁰⁶

Chapter VII of the Charter grants the Security Council broad authority, which supports the enforcement of sanctions in order to “restore or maintain international peace or security.”²⁰⁷ This grant of authority requires the Security Council to “determine the existence of a threat to the peace,”²⁰⁸ yet what exact activities amount to a threat remains undefined.²⁰⁹ As will be seen, such a threat exists with Iran, and the Security Council was thus justified in its authorization of sanctions against Iran.

2. *A Threat Exists Within Iran*

The Security Council clearly issued Resolution 1737 and the subsequent Iranian Resolutions with Iran’s nuclear development in mind.²¹⁰ “Reaffirming its commitment to the Treaty on the Non-Proliferation of Nuclear Weapons,” the Security Council took issue with the continued secrecy surrounding Iran’s nuclear program, the military nature of the program, and the involvement of sensitive technologies relating to missile programs.²¹¹ While the existence of hard evidence may not be relevant, as the Security Council has discretion to

²⁰⁴ Nicolas Angelet, *International Law Limits to the Security Council*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW, *supra* note 14, at 72.

²⁰⁵ *Id.* at 73.

²⁰⁶ U.N. Charter art. 41. See also *Frequently Asked Questions about the United Nations Security Council*, UNITED NATIONS, <http://www.un.org/en/sc/about/faq.shtml> (last visited Feb. 12, 2015).

²⁰⁷ *Security Council Sanctions Committee: An Overview*, *supra* note 198.

²⁰⁸ U.N. Charter art. 39.

²⁰⁹ Gowlland-Debbas, *UN Sanctions and International Law: An Overview*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW, *supra* note 14, at 21.

²¹⁰ See S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 27, 2006).

²¹¹ *Id.* at 1.

establish what constitutes a threat to the peace, with Iran such evidence exists in the form of self-admittance.²¹² Although Iran maintains that the illegal activities are solely for the benefit of its energy sector, it nonetheless remains in violation of its previous commitments regarding nuclear technology.²¹³

3. *The Iranian Resolutions Proportionately Address the Threat*

The Security Council established the Sanctions Committee in an attempt to improve “the design, application, and implementation of mandatory sanctions,” which it has clearly done.²¹⁴ The strides taken by the U.N. to minimize collateral damage have not gone unnoticed; the U.N. has ceased the imposition of comprehensive sanctions and currently employs targeted sanctions in an effort to mitigate collateral damage.²¹⁵ The targeted sanctions, otherwise known as smart sanctions, attack a State’s elite decision makers in an attempt to spare ordinary citizens.²¹⁶ “These sanctions are seen as more rational than previous ambiguous trade sanctions, because the new ‘smart’ sanctions are clearly defined: they identify specific, concrete individuals, firms, bank account numbers, etc.”²¹⁷

The Iranian Resolutions do not target common goods or general dealings in order to destabilize Iran. Instead, the resolutions begin with a prohibition on selling equipment to Iran that could be used to develop weapons of mass destruction and on purchasing weapons from Iran.²¹⁸ The mention of finances and Iran only urges and does not prohibit dealings, unless in relation to otherwise prohibited activity.²¹⁹ Additionally, the sanctions expand on the goal of preventing arms dealing by requiring members to deny entry to Iranian arms dealers or developers.²²⁰ Finally, as previously mentioned, the financial

²¹² *Nuclear deal to be implemented in January – Iran*, RT (Dec. 31, 2013, 11:42PM), <http://www.rt.com/iran-agreement-set-date-042/>.

²¹³ See Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

²¹⁴ See *Security Council Sanctions Committee: An Overview*, *supra* note 198.

²¹⁵ HAKIMDAVAR, *supra* note 14, at 26.

²¹⁶ Neta C. Crawford & Audie Klotz, *How Sanctions Work: A Framework for Analysis*, HOW SANCTIONS WORK: LESSONS FROM SOUTH AFRICA 25, 30 (1999).

²¹⁷ HAKIMDAVAR, *supra* note 14, at 146.

²¹⁸ S.C. Res. 1737, ¶3, U.N. Doc. S/RES/1737 (Dec. 27, 2006).

²¹⁹ S.C. Res. 1747, ¶7, U.N. Doc. S/RES/1747 (Mar. 24, 2007).

²²⁰ S.C. Res. 1929, ¶10, U.N. Doc. S/RES/1929 (June 9, 2010); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008).

sanctions imposed by the Iranian Resolutions target specific entities and individuals.²²¹

CONCLUSION

Ad hoc analyses of a sanctioning-regime are essential to reaching a determination on each particular provision's legality, as the relationships between a sender, receiver, and target establish the key components of sovereignty and often change with respect to the particular prescribing document. Beyond noting what type of conduct is restricted, the conduct must be pinpointed to a location, and the nationality of those involved must be determined.²²² Prior obligations raise other issues as well, such as a receiver's consent, which disfigures the traditional notion of sovereignty. If a receiver has voluntarily consented to an organization that in turn targets a state with sanctions, then the receiver-state's ability to cry foul all but disappears, thus making it a wise choice for senders to conform their policies accordingly.

Realistically, the lifting of the U.S. sanctioning-regime will take time, as the United States and Iran have polar-opposite intentions. For example, in a recent response to what it would take for the two nations to reach an agreement, Iran's Foreign Minister stated, "Iran's nuclear technology is non-negotiable," while President Obama's former top expert on weapons of mass destruction claims, "Iran would have to drastically limit the number of centrifuges," "tak[e] down their supply of low-enriched uranium," and agree to "enhanced monitoring and verification."²²³ Nonetheless, the parties have agreed to the Joint Plan, which has momentarily altered the enforcement of the Recent Orders.²²⁴

Pursuant to the Joint Plan, the United States has diminished the provisions within E.O. 13645 relating to Iran's automotive industry and removed one

²²¹ S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007).

²²² Additionally, a sender's previous commitments to refrain from particular behavior, although not widely discussed here, should be considered.

²²³ *Rejecting US Remarks on Nuke Program, Iran FM says Fordow Arak are non-negotiable*, THE JERUSALEM POST (Feb. 5, 2014), <http://www.jpost.com/Middle-East/Rejecting-US-comments-on-its-nuclear-program-Iran-FM-says-Fordo-Arak-are-non-negotiable-340458>; Jeffrey Goldberg, *Obama Weapon Expert: No Chance of Success with Iran*, BLOOMBERG OPINION (Feb. 18, 2004), <http://www.bloomberg.com/news/2014-02-18/obama-weapons-expert-no-chance-of-success-with-iran.html>.

²²⁴ Negotiation for a Joint Plan of Action to Ensure Iran's Nuclear Programme is Peaceful, Nov. 24, 2013, [hereinafter the Joint Plan of Action].

possible source of international law violations.²²⁵ The alteration of this provision, however, only covers transactions that are fully completed during the Joint Plan's duration and does not apply to U.S. citizens,²²⁶ which dissolves sovereignty issues, but only slightly restricts the provision's breadth. Although the provision is now less-comprehensive in the sense that the United States is not prescribing the entire world's conduct, the U.S.–Iranian relationship does not make its duration likely. The United States Treasury even stipulated on the day the plan was to go into effect that the Joint Plan only provides “limited, temporary, and reversible relief.”²²⁷ Therefore, more-permanent revision should occur to the Recent Orders.

It is not likely the United States will completely mirror the Iranian Resolutions, but as a start, the Recent Orders should only regulate U.S. citizens and conduct in the United States. Next, the President should provide flexibility in the definition of “owned or controlled.” While not defined in international law, limiting jurisdiction over foreign subsidiaries to compliment the receiver-state's definition will prevent claims of sovereignty violations. If either of these is not possible, the President should constrain the scope of the Recent Orders in other ways.

While certain provisions, such as the automotive prohibitions, are narrowly drafted, they are not “smart” like the Iranian Resolutions. Therefore, the United States should adopt the Security Council's requirement of only taking measures “appropriate and necessary for the achievement of its stated purpose . . . and not [impacting] other interests to an extent which is disproportionate to the advantage obtained or pursued.” In doing this, the United States' intent would be clear and observers' disdain would dissipate. While the Recent Orders could maintain restrictions on designated persons and those who perpetrate human rights violations, the broad prohibitions on the rial would have to be struck. The rial provision is not just another block in the wall, like

²²⁵ *Id.*

²²⁶ U.S. Treasury, *Frequently Asked Questions Relating to the Temporary Sanctions Relief to Implement the Joint Plan of Action between the P5 + 1 and the Islamic Republic of Iran* (Jan. 20, 2014), available at http://www.treasury.gov/resource-center/sanctions/Programs/Documents/jpoa_faqs.pdf.

²²⁷ *Id.*

the automotive restrictions; it *is* a comprehensive sanction. Furthermore, as it currently exists, U.S. sanctioning-regime targeting Iran is so comprehensive that even its narrowly drafted prohibitions become of concern.

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