

# The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts

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## INTRODUCTION

This essay offers an installment of what would have been a continuing conversation with David D. Caron, a close colleague in the field of international law, on themes that engaged both of us across multiple phases of our intersecting careers. The issues are fundamental ones for both the theory and the practice of international law, involving such core concerns as how international law can be enforced in an international system that is not yet adequately equipped with institutions to determine the existence and consequences of violations or to impose sanctions against violators; and how to ensure that self-help enforcement measures in a largely decentralized and still incomplete system are consistent with the principles and values underlying the international legal order. David Caron was uniquely positioned to speak and write on these issues, not only with a mature scholar's authority, but also with the authoritativeness conferred by the judicial appointments he held in recent years and the cases on which he would have deliberated and rendered judgments, but for his untimely death. Without his eloquent voice to provide wisdom and reach decisions in the context of concrete disputes, I venture still-evolving thoughts on what may well seem unanswerable questions.

The topic of economic sanctions as countermeasures for internationally wrongful acts provides the opportunity to revisit questions that I encountered for the first time as a brand-new international lawyer in the Office of the Legal Adviser of the U.S. Department of State; these questions would later engage David Caron's interest as well. Two of my earliest cases—an aviation dispute between the United States and France, arbitrated in 1978;<sup>1</sup> and the *Tehran Hostages* dispute between the United States and Iran, pending at the International

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1. *Case Concerning the Air Services Agreement of 27 March 1946* (U.S.-France), 54 I.L.R. 304 (Arbitral Trib. 1978).

Court of Justice (ICJ or the Court) between 1979 and 1981<sup>2</sup>—both involved the application by the United States of economic sanctions as countermeasures in response to breaches of international obligations; and in both cases, the tribunal was invited to consider the legality or legitimacy of the U.S. countermeasures. In the aviation arbitration, France asked the tribunal to rule on the merits that the United States had engaged in illegal unilateral self-help which could not be justified under the international law of countermeasures; the tribunal rejected France’s claim and upheld the U.S. measures.<sup>3</sup> In the *Hostages* case, in which Iran refused to appear—instead, it sent a message urging the Court not to decide the case—two judges maintained in a separate opinion that the United States had disqualified itself from seeking judicial remedies by resorting to self-help measures while the case was pending;<sup>4</sup> the other thirteen members of the Court, however, found that the United States had applied economic sanctions “in response to what the United States believed to be grave and manifest violations of international law by Iran”<sup>5</sup>—a belief vindicated when the Court unanimously ruled in favor of the United States at both the provisional measures and merits phases—and thus was entitled to judicial relief.

As a then-novice in the field of international law, assigned to research novel questions about an area where there were few if any precedents at the time, I found no ready answers in jurisprudence or in scholarship. The questions continued to intrigue me even after the cases were resolved, and I decided not only to tackle them in my first scholarly article,<sup>6</sup> but to return to them in a more systematic way from time to time after I entered legal academia.<sup>7</sup>

From the 1980s onward, I found that I was increasingly hearing about, and then meeting, and then collaborating with, David Caron, who had served with the inaugural group of law clerks at the Iran-United States Claims Tribunal from 1983 to 1986 and then returned to his alma mater, Berkeley, to teach law starting from 1987.<sup>8</sup> David and I had many overlapping interests—among them, the acute and still chronic problems in U.S.-Iranian relations, for which the Iran-United

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2. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Provisional Measures, 1979 I.C.J. 7 (Dec. 15); Merits, 1980 I.C.J. 3 (May 24).

3. See Lori Fisler Damrosch, *Retaliation or Arbitration – Or Both? The 1978 United States-France Aviation Dispute*, 74 AM. J. INT’L L. 785 (1980) [hereinafter Damrosch, *Retaliation*].

4. U.S. v. Iran, Merits, 1980 I.C.J. at 51, 52-55 (May 24) (dissenting opinion by Morozov, J.); U.S. v. Iran, 1980 I.C.J. at 58, 63-65 (May 24) (dissenting opinion by Tarazi, J.).

5. U.S. v. Iran, 1980 I.C.J. 27-28, para. 53.

6. Damrosch, *Retaliation*, *supra* note 3.

7. See Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 COLL. COURSES HAGUE ACAD. INT’L L. 9, 41-101 (1997) [hereinafter Damrosch, *Hague Lectures*]; see also INTERNATIONAL LAW: CASES AND MATERIALS, ch. 8, sec. 6 on Countermeasures (Lori F. Damrosch & Sean D. Murphy eds., 7th ed. 2019).

8. We had a shared mentor, Stefan Riesenfeld, a long-time member of the Berkeley law faculty. Riesenfeld had been Counselor on International Law in the State Department when I served in the Office of the Legal Adviser and pointed me toward research materials on countermeasures in the *Air Services* arbitration and the *Hostages* case.

States Claims Tribunal has served as one forum for potential resolution;<sup>9</sup> peaceful settlement of disputes through arbitration and adjudication in many other contexts;<sup>10</sup> and the international law applicable to (and generated by) United Nations organs, including the Security Council,<sup>11</sup> the ICJ, and the UN International Law Commission.<sup>12</sup> Over the years, we joined together in many conferences and collaborative projects to debate and write about these and other interconnected themes and intractable problems—for example, the theory and practice of harnessing the collective authority of the Security Council in order to compensate victims of aggression or to control weapons of mass destruction.<sup>13</sup>

I will return to Caron’s enduring contributions to problems of legitimacy throughout this essay, which proceeds as follows. Part I offers definitions and conceptual tools for understanding “legitimacy” and the other terms in the title—“economic sanctions,” “countermeasures,” and “wrongful acts”—illustrated with examples from economic sanctions against Iran and Iraq. Part II then highlights controversies over legitimacy of economic sanctions against violations of international law, as framed by the decades-long debates resulting in the adoption by the UN International Law Commission in 2001 of Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA or ILC Articles),<sup>14</sup> which deal in Articles 49-54 with countermeasures. The last Part concludes.

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9. See David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT’L L. 104 (1990).

10. See David D. Caron & Galina Shinkaretskaya, *Peaceful Settlement of Disputes Through the Rule of Law*, in BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA, at 309 (Lori F. Damrosch, Gennady Danilenko & Rein Müllerson eds., 1995).

11. See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552 (1993) [hereinafter Caron, *Legitimacy*]. Versions of the Legitimacy article were presented at a conference in Moscow in 1992 (of which I was co-organizer); see 87 AM. J. INT’L L. 552, 552 n. \*, and at a panel I chaired at the annual meeting of the American Society of International Law in 1993 (see David D. Caron, *Strengthening the Collective Authority of the Security Council*, 87 AM. SOC’Y INT’L L. PROC. 303 (1993)). Rereading the article at a quarter-century’s distance brings back a vivid memory of taking the night train with David from Moscow to Minsk at a time of great turmoil within the post-Soviet geographic space, yet also at a time of optimism that persistent Cold War divisions within the Security Council might finally be relegated to history.

On the continuing relevance of Caron’s original ideas to problems of Security Council authority in the current period, see Jean Galbraith, *Ending Security Council Resolutions*, 109 AM. J. INT’L L. 806, 806-07, 812-13 (2015) (engaging with Caron’s proposals for termination mechanisms for Security Council resolutions, in the subsequent context of suspending and terminating Council-mandated sanctions against Iran).

12. See David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT’L L. 857 (2002) [hereinafter Caron, *State Responsibility*].

13. See, e.g., our respective contributions to a symposium issue on *The Impact on International Law of a Decade of Measures Against Iraq*: David D. Caron & Brian Morris, *The UN Compensation Commission: Practical Justice, Not Retribution*, 13 EUR. J. INT’L L. 183 (2002); Lori F. Damrosch, *The Permanent Five as Enforcers of Controls on Weapons of Mass Destruction: Building on the Iraq “Precedent”?*, 13 EUR. J. INT’L L. 305 (2002).

14. G.A. Res. 56/83, Articles on Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001) [hereinafter ARSIWA].

Parts I and II draw on illustrative controversies over economic sanctions as countermeasures, focusing in particular on two pending cases between Iran and the United States, involving U.S. economic sanctions against Iran. The U.S. sanctions respond to what the United States has alleged to be Iran's sponsorship of terrorist acts and noncompliance with obligations concerning nuclear nonproliferation. Iran denies the U.S. allegations and insists, to the contrary, that the United States has violated treaty obligations owed to Iran.

Between 2016 and 2018, Iran brought two applications to the ICJ against the United States under a 1955 Treaty of Amity, Economic Relations, and Consular Rights,<sup>15</sup> claiming that the United States has violated Iran's treaty rights through economic sanctions. In the first case, *Certain Iranian Assets*, which involves measures of execution against Iranian state assets under the "terrorism exception" to the U.S. Foreign Sovereign Immunities Act (FSIA),<sup>16</sup> the United States had designated David Caron to serve as an ICJ judge *ad hoc* (in lieu of the judge of U.S. nationality who sits as an elected member of the Court but had recused herself from the case in question).<sup>17</sup> The second case, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights*,<sup>18</sup> involves economic sanctions imposed by the United States against Iran in 2018, following the U.S. withdrawal in May 2018 from a 2015 multilateral agreement, the Joint Comprehensive Plan of Action,<sup>19</sup> which had suspended most nonproliferation-related sanctions against Iran as of January 2016. Although the second case was brought after Caron's death, the issues it raises resonate with longstanding themes in his scholarship on legitimacy.

## I. TERMINOLOGY AND CONCEPTS: LEGITIMACY, ECONOMIC SANCTIONS, COUNTERMEASURES, AND WRONGFUL ACTS.

### A. Legitimacy

As Bernard Oxman has pointed out in his contribution to the present symposium,<sup>20</sup> the fundamental scholarship of Thomas Franck is a reference point for any treatment of legitimacy in international law.<sup>21</sup> According to Franck's theory of legitimacy, rules of international law vary in their capability to attract compliance in relation to several indicators, including the extent to

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15. 8 U.S.T. 899, 284 U.N.T.S. 93.

16. 28 U.S.C. § 1605A.

17. *Certain Iranian Assets* (Iran v. U.S.), Preliminary Objections, 2019 I.C.J. (Feb. 13), para. 4.

18. *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Iran v. U.S.), Provisional Measures, 2018 I.C.J. (Oct. 3).

19. Joint Comprehensive Plan of Action, S.C. Res. 2231 (2015), Annex A.

20. Bernard H. Oxman, *Nonparticipation and Perceptions of Legitimacy*, 46 ECOLOGY L.Q. 81, 37 BERKELEY J. INT'L L. 235 (2019).

21. Thomas M. Franck, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

which they operate within a coherent framework of principles of general applicability:<sup>22</sup>

Coherence legitimates a rule . . . because it provides a reasonable connection between a rule, or the application of a rule, to (1) its own principled purpose, (2) principles previously employed to solve similar problems, and (3) a lattice of principles in use to resolve different problems.<sup>23</sup>

Whereas Franck's theory is addressed to the legitimacy of rules from the point of view of voluntary compliance rather than coercive sanctions, Caron focused as well on the legitimacy of application of coercive power, whether by institutions authorized to act on behalf of an organized community or by other actors. Both Franck and Caron were concerned, among other questions, with legitimacy of process—in Franck's case, the "pedigree" by which a rule has been adopted; in Caron's case, such attributes as representativeness, transparency, and fair procedure.<sup>24</sup> Beyond process considerations, both Franck and Caron also emphasized substantive justice as a component of legitimacy. Their legitimacy frameworks can guide our inquiry into the legitimacy of economic sanctions as countermeasures against violations of international law.

## B. Economic Sanctions

### 1. General Considerations, with Iran Sanctions Example

As a predicate for evaluating legitimacy of economic sanctions, I give a functional definition first and then illustrate problems of economic sanctions with examples drawn not only from economic sanctions against Iran, but also from the Iraq sanctions of 1990-2003.

For definitional purposes, I use the term "economic sanctions" generically to refer to any type of economic detriment (as distinct from diplomatic or military sanctions, or from positive rewards or incentives), which could be imposed against a target State by another State acting unilaterally, by a group of States in coordination, or by a multilateral institution like the United Nations.<sup>25</sup> Article 41 of the UN Charter gives an illustrative catalogue: "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication." Examples from U.S. legislation could include export or import controls, blocking of assets, suspension or termination of foreign assistance, and denial of access to programs such as government credit

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22. The property of coherence identified in the text is one of Franck's four indicators of legitimacy: the others are determinacy, symbolic validation, and adherence.

23. Franck, *supra* note 21, at 147-48; see also Caron, *Legitimacy*, *supra* note 11, at 556 n.19, 559 n.28 (on preserving belief in legitimacy of institutions as well as rules).

24. Caron & Morris, *supra* note 13, at 190-91 (one means of assessing legitimacy is to inquire into procedural fairness).

25. For taxonomy and examples, see Damrosch, Hague Lectures, *supra* note 7, at 43-54.

or loan guarantee programs.<sup>26</sup> One of the most comprehensive recent programs of U.S. economic sanctions is the Iranian Transactions and Sanctions Regulations, as re-imposed and strengthened in May through November of 2018. The Iranian Transactions and Sanctions Regulations broadly prohibit almost all transactions with Iran and threaten negative consequences for U.S. and third-country nationals and companies who engage in such dealings.<sup>27</sup>

While many economic sanctions are imposed for reasons of foreign policy rather than as instruments of law enforcement, the sanctions of concern for this essay have the purpose of enforcing international law by inducing the target to come into compliance with its legal obligations. Economic sanctions for enforcement purposes are measures taken by a State that perceives itself aggrieved by a breach of international law to affirm its own rights, impose costs on the alleged violator, deter future violations, and potentially provide a means to make itself whole, for example by sequestering funds from which reparations for injuries could ultimately be paid. The economic sanctions applied by the United States against Iran during the hostage crisis of 1979-1981 were enforcement measures in this sense.<sup>28</sup>

Until the 1990s, most applications of economic sanctions were essentially unilateral in character, albeit occasionally undertaken by like-minded States acting in cooperation with each other or through an available regional institution. Starting from 1991, the UN Security Council opened a new era in sanctions practice, with comprehensive sanctions adopted to respond to the situations in Iraq, former Yugoslavia, and Haiti in the early 1990s, as well as arms embargoes and other limited sanctions for certain other situations. Thereafter the Council refined its sanctions practice toward more precisely targeted sanctions for numerous other situations, taking account of lessons learned from the painful experiences of the first major sanctions episodes.

A large and growing literature in several disciplines (international relations, international political economy, and ethics, as well as law) now addresses the effectiveness and the legitimacy of unilateral and collective economic sanctions, in specific cases and in general.<sup>29</sup> Particular sanctions episodes, especially if prolonged over an extended period of time with adverse humanitarian effects on

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26. See, e.g., Arms Export Control Act of 1976, Pub. L. 94-329, 90 Stat. 729; International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq.; Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2151 et seq.

27. 31 C.F.R. § 560 (2019). See discussion below.

28. The enforcement dimension of the 1979-1981 Iran sanctions and subsequent measures through the mid-1990s is discussed in Damrosch, Hague Lectures, *supra* note 7, at 78-91.

29. On effectiveness, the leading reference work is Gary Clyde Hufbauer, Jeffrey Schott & Kimberly Ann Elliott, *ECONOMIC SANCTIONS RECONSIDERED* (3rd ed. 2007). On the long-running efforts to influence Iranian behavior through the application of U.S. economic sanctions, see Richard Nephew, *THE ART OF SANCTIONS: A VIEW FROM THE FIELD* (2018). On legality and legitimacy of sanctions from various perspectives, see generally *Symposium on Unilateral Targeted Sanctions*, 113 AM. J. INT'L L. UNBOUND 130 (2019).

the population of the target, have been widely criticized as illegitimate—if not in initial conception or objectives, then in their indiscriminate and excessive application to the detriment of civilians who bear little or no responsibility for the wrongdoings of regimes and are powerless to bring about changes in the behavior of elites. The collective sanctions in place against Iraq from 1990 until 2003 exemplify these legitimacy concerns.

## 2. *Iraq Sanctions 1990-2003: UN Measures*

Robust sanctions imposed by the UN Security Council in response to Iraq's invasion of Kuwait in August of 1990,<sup>30</sup> which were maintained in the April 1991 ceasefire,<sup>31</sup> had legitimate objectives—to induce Iraq to withdraw from Kuwait; to put in place measures to secure the reparation of injuries unlawfully inflicted by Iraq; to ensure the elimination of its programs for weapons of mass destruction—but the prolongation of draconian sanctions for more than twelve years produced not only a humanitarian disaster but a crisis of legitimacy.

Toward the end of the Iraq sanctions regime, David Caron—who was serving at the time as a commissioner of the United Nations Compensation Commission (UNCC) established to adjudicate claims of individuals, companies, and governments directly injured by Iraq's invasion of Kuwait—co-authored an article responding to unease expressed in some quarters that the UNCC, notwithstanding its compensatory purpose, “should instead be viewed as a part of the system of international economic sanctions.”<sup>32</sup> After reviewing prior work (including his own) on the meaning of the term “sanction” in international law,<sup>33</sup> Caron and his co-author distinguished between a mechanism created to award compensation and one designed to mete out retribution or punishment. The UNCC, being the former rather than the latter, “is not an economic sanction as that term is understood in international relations and law.”<sup>34</sup> Caron's analysis is persuasive in respect of the UNCC, a rare institution that came into existence to implement a compensation program resulting from Security Council sanctions but not itself an enforcement organ exerting coercive power against Iraq.

## 3. *U.S. Iraq Sanctions and the State Terrorism Exception to Sovereign Immunity*

The second military operation against Iraq in spring 2003 led to a new legal regime and the lifting of all UN sanctions and most unilateral sanctions against

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30. S.C. Res. 661 (Aug. 6, 1990); S.C. Res. 665 (Aug. 25, 1990); S.C. Res. 670 (Sept. 25, 1990).

31. S.C. Res. 687 (Apr. 3, 1991).

32. Caron & Morris, *supra* note 13, at 183.

33. *Id.* at 185 n.4.

34. *Id.* at 185.

Iraq.<sup>35</sup> U.S. economic sanctions against Iraq had been imposed under a number of U.S. laws and regulations, including those applicable to state sponsors of terrorism—a designation given to Iraq in September 1990, a few weeks after its invasion of Kuwait. One effect of that designation was to lift Iraq’s immunity from suit in U.S. courts under the “terrorism exception” to the FSIA,<sup>36</sup> and several lawsuits against Iraq under that exception were pending in early 2003.<sup>37</sup> After the U.S.-led coalition initiated military action in 2003, which soon resulted in the collapse of Saddam Hussein’s regime and a period of occupation by coalition forces, U.S. policy objectives shifted toward the stabilization and reconstruction of Iraq. With that policy transformation, the longstanding U.S. economic sanctions against Iraq were no longer useful, and Congress and the Executive moved speedily to lift them.

Among other developments, Congress enacted a measure authorizing the President to “make inapplicable with respect to Iraq . . . any other provision of law that applies to countries that have supported terrorism”—in other words, to lift the application of terrorism sanctions to Iraq.<sup>38</sup> The President exercised that authority in May 2003.<sup>39</sup> However, a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit concluded that the authority conferred by the act did not extend to restoration of the sovereign immunity that Iraq had been denied during the period of its designation as a state sponsor of terrorism.<sup>40</sup> Congress in the meantime conferred on the President further authority to waive Iraq sanctions, which was promptly and fully exercised; and Iraq asked the Supreme Court to resolve whether the terrorism exception to sovereign immunity was among the “sanctions” that had now been effectively lifted by a combination of congressional and presidential action. In a passage of relevance to the present inquiry into definition of “sanctions,” the Court observed:

Allowing lawsuits to proceed certainly has the extra benefit of facilitating the compensation of injured victims, but the fact that [the terrorism exception] targeted only foreign states designated as sponsors of terrorism suggests that the law was intended as a sanction, to punish and deter undesirable conduct. Stripping the immunity that foreign sovereigns ordinarily enjoy is as much a sanction as eliminating bilateral assistance or prohibiting export of munitions (both of which are explicitly mandated by § 586F(c) of the Iraq Sanctions Act). The application of this sanction affects

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35. S.C. Res. 1483 (May 22, 2003) (lifting UN sanctions); S.C. Res. 1546 (June 8, 2004) (lifting occupation regime).

36. See 28 U.S.C. § 1605A.

37. *Republic of Iraq v. Beatty*, 556 U.S. 848 (2009) (two cases brought by different sets of claimants, involving (1) American nationals who alleged they had been captured and mistreated by Iraqi officials during the 1991 Gulf War, and (2) children of Americans allegedly abused by Saddam Hussein’s regime in the aftermath of that war).

38. Emergency Wartime Supplemental Appropriations Act, 117 Stat. 559, § 1503 (2003).

39. 68 Fed. Reg. 26459 (2003).

40. *Acree v. Iraq*, 370 F.3d 41, 48 (D.C. Cir. 2004).

the jurisdiction of the federal courts, but that fact alone does not deprive it of its character as a sanction.<sup>41</sup>

We will return later to the application of the terrorism exception to sovereign immunity, in the context of the pending dispute between Iran and the United States over the import of that exception for lawsuits against Iran and execution of judgments against Iranian assets in the United States.<sup>42</sup>

#### 4. *Economic Sanctions at the ICJ*

Within the last few years, several legal disputes involving economic sanctions have reached the ICJ. As already noted, Iran has initiated two such cases against the United States, the first involving sovereign immunity in 2016, and the second involving the sanctions re-imposed or added when the United States withdrew from the Joint Comprehensive Plan of Action in 2018. Iran's application in the latter case asks the Court to order the United States to terminate all such sanctions. In its provisional measures order of October 3, 2018, the Court for unexplained reasons puts the term "sanctions" between quotation marks dozens of times throughout the decision (without defining it, but apparently intending to refer to all the measures of which Iran complains in its application).<sup>43</sup> Still another case, outside the scope of the present essay, has been brought by Qatar against the United Arab Emirates, claiming that an economic embargo and other coercive measures imposed against Qatar by the UAE and other Gulf States violate rights of Qatar and Qatari nationals under a treaty prohibiting racial discrimination.<sup>44</sup>

#### C. *Countermeasures*

The focus of this essay is only a subset of the broad category of economic sanctions described in the prior section—namely, those economic sanctions constituting countermeasures for internationally wrongful acts. The UN International Law Commission, in its extensive treatment of State responsibility in international law,<sup>45</sup> has clarified the legal concept of countermeasures under the heading of "Circumstances Precluding Wrongfulness": that is, an act that would otherwise be wrongful toward another State is not considered wrongful if and to the extent that it is taken against that State in order to induce it to comply with its own obligations and furthermore comports with the limits and conditions on countermeasures set forth in the chapter of the ILC Articles addressed to that

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41. *Republic of Iraq*, 556 U.S. at 859-60.

42. *Certain Iranian Assets*, *supra* note 17.

43. *Certain Iranian Assets*, *supra* note 17, ¶¶ 16, 18-22, 31, 33, 37, 55-61, 72, 80, 84, 86.

44. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. U.A.E.), Provisional Measures, 2018 I.C.J. (July 23).

45. ARSIWA, *supra* note 14.

topic.<sup>46</sup> The ILC's articulation of those limits and conditions will be addressed in Part II below.

The conceptualization of countermeasures in the ILC Articles has replaced the prior terminology of "reprisal" in international law. Earlier generations maintained a traditional distinction between "reprisals" and "retorsion," according to which "retorsion" is an unfriendly (but not otherwise illegal) act taken in response to an unfriendly or illegal act; "reprisal" is an otherwise illegal act rendered justifiable because of a prior violation of legal obligation on the part of the State to which it is directed.<sup>47</sup> Economic sanctions as discussed in the prior section may be unfriendly but are not necessarily otherwise illegal ("retorsion"); or they may be otherwise illegal but justified as a response to a prior illegal act ("reprisal" in the earlier terminology; "countermeasures" in contemporary usage). We are concerned here only with the justification as countermeasures of otherwise illegal acts, aimed at restoring a state of legality by imposing lawful consequences in response to prior illegal acts.

#### D. *Wrongful Acts*

The ILC Articles likewise provide a convenient starting point for the concept of internationally wrongful acts. Article 2 specifies:

*Elements of an internationally wrongful act of a State*

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

Breaches of an international obligation can arise from customary international law—for example, the obligation of States to refrain from sponsoring terrorism—or from treaties—for example, the obligation of States parties to treaties on terrorism or nonproliferation to comply with the obligations thereunder, or the obligation of members of the United Nations to carry out decisions of the Security Council or to comply with judgments of the International Court of Justice in accordance with the UN Charter.<sup>48</sup> As the ILC has underscored, "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."<sup>49</sup>

We turn now to the analysis of economic sanctions as countermeasures for internationally wrongful acts, with reference to the criteria developed by the ILC for appraisal of countermeasures.

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46. ARSIWA, *supra* note 14, arts. 22, 49-54.

47. Oscar Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE 185-86 (1991).

48. U.N. Charter arts. 25, 94.

49. ARSIWA, *supra* note 14, art. 12.

## II. COUNTERMEASURES UNDER THE ILC'S CRITERIA

A. *The Status and Authority of the ILC Articles*

Before taking up the specific criteria that the ILC has elaborated as limits and conditions on countermeasures, it is necessary to place in context the status and authority of the ILC Articles, with reference to David Caron's insightful treatment of those questions in an influential symposium piece.<sup>50</sup> By contrast to other sets of articles formulated by the ILC over the years, many of which became the working drafts for intergovernmental negotiations leading to widely adopted multilateral treaties,<sup>51</sup> the ILC Articles were never put forward as a draft treaty, nor was a diplomatic conference ever convened at which States might have negotiated over their specific terms. Although lacking formal treaty status, they have enjoyed a high degree of authority in their reception by the ICJ and other international tribunals, which were already citing early drafts of what would become the Articles even prior to their final adoption and continue to do so. While acknowledging the great influence that the Articles had already had and would continue to have in international jurisprudence, Caron cautioned against treating the text of the ILC Articles as if it were a treaty: it is not. Attempting to parse the words of the Articles as if they were treaty terms would lead to the double errors of "false concreteness" and "false consensus." He expressed concern over the tendency of international tribunals to take the Articles as a shortcut, without subjecting their formulations to critical scrutiny or making serious inquiries into whether their formulations reflect state practice as it actually is, rather than what scholars and arbitrators or judges might wish it to be.<sup>52</sup> I share his concern.

Nowhere is the problem more visible than with the Articles' treatment of criteria for legitimate countermeasures. In its efforts to formulate propositions expressing limits on unilateral self-help measures, the ILC endeavored to strike a balance between arguably irreconcilable positions. On the one hand were the views of States that understood countermeasures as a necessary instrument of enforcement against violators, while on the other hand were the desires of others to place significant limitations on self-help remedies, which many saw as a tool too often abused when exercised by powerful States against weaker ones. The countermeasures articles thus embody a series of uneasy compromises, which in

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50. See Caron, *State Responsibility*, *supra* note 12, in a symposium of the American Journal of International Law published the year after the ILC adopted ARSIWA and forwarded ARSIWA to the UN General Assembly, which took note of the Articles and commended them to the attention of states. In the same symposium, and of particular interest for the present inquiry into countermeasures, see David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT'L L. 817 (2002).

51. E.g., the Vienna Convention on the Law of Treaties, to which ARSIWA is often compared.

52. See, e.g., Caron, *State Responsibility*, *supra* note 12, at 861 (the way that tribunals are treating ARSIWA as if it were a treaty will result in the Articles "inappropriately and essentially accorded the authority of a formal source of law").

some respects appear to go beyond the limits actually observed in state practice.<sup>53</sup> While some of the criteria are well-founded at least in principle, others call for closer scrutiny. For illustration, I turn to the pending issues in dispute between Iran and the United States, as evidenced by the *Certain Iranian Assets* and *Alleged Violations of the 1955 Treaty of Amity* cases.

*B. Denial of Sovereign Immunity as a Countermeasure Under the ILC Criteria*

Recall that ever since 1984, in the aftermath of the 1983 bombing of the U.S. barracks in Beirut, Iran has been designated by the U.S. Secretary of State as a state sponsor of terrorism, thereby becoming subject to a variety of economic sanctions under U.S. antiterrorism laws. Among other consequences, since the adoption more than twenty years ago of a “terrorism exception” to the FSIA,<sup>54</sup> States designated as sponsors of terrorism are denied the immunities from suit and execution to which they would otherwise be entitled. Several States, including Iraq and Libya, that had formerly been so designated have had their sovereign immunities restored after the Secretary of State was able to conclude that they were no longer engaged in state sponsorship of terrorism.<sup>55</sup> Iran, however, continues to be viewed as an active state sponsor of terrorism and thus falls under the full range of U.S. antiterrorism sanctions, including the removal of otherwise-applicable sovereign immunities, which the U.S. Supreme Court has treated as a “sanction” in the context of the now-suspended Iraq sanctions.<sup>56</sup>

Plaintiffs claiming to be victims (or family members of victims) of terrorist acts sponsored by Iran have invoked the FSIA’s terrorism exception quite a few times, winning default judgments against Iran amounting to hundreds of millions of dollars. To facilitate their ability to collect such judgments against assets of Iran located in the United States, Congress made further amendments to the FSIA, easing the FSIA’s provisions on immunity from execution (separate from the terrorism exception). The U.S. Supreme Court rejected Iran’s challenge to the constitutionality of the latter amendments in April 2016 in *Bank Markazi Iran v. Peterson*.<sup>57</sup> A few weeks later, Iran initiated the *Certain Iranian Assets* case at the ICJ, claiming (as noted in the Introduction) that by depriving it of sovereign

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53. See Damrosch & Murphy, *supra* note 7, at 482-83 (expressing doubt that the articles on countermeasures actually reflect state practice in certain respects).

54. Enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 and codified at 28 U.S.C. § 1607 from 1997 to 2008; currently codified at 28 U.S.C. § 1605A.

55. On the removal of Iraq’s designation and restoration of its immunity, see *Republic of Iraq v. Beatty*, discussed *supra* note 37, text at notes 37-41. On Libya’s renunciation of terrorism and settlement of litigation brought by the families of victims of the Pan Am 103 explosion over Lockerbie, Scotland, see Jonathan B. Schwartz, *Dealing with a “Rogue State”*: *The Libya Precedent*, 101 AM. J. INT’L L. 553 (2007).

56. See discussion of *Republic of Iraq v. Beatty*, *supra* note 37.

57. *Bank Markazi Iran v. Peterson*, 578 U.S. \_\_\_ (2016).

immunity and subjecting its assets to execution, the United States had violated Iran's treaty rights.

When the Court reaches the merits of *Certain Iranian Assets*, it may well be confronted with questions of first impression concerning the potential justification of alleged U.S. treaty violations as countermeasures against prior wrongful acts of Iran. Although the United States has interposed several objections to the jurisdiction of the Court and admissibility of the claims, the Court's ruling on preliminary objections has upheld jurisdiction at least in part; and thus the parties will complete their briefing on the merits and the Court will eventually be called upon to rule on Iran's claim on the merits and any defenses that the United States may put forward at the merits phase. Several such defenses have already been suggested in the preliminary pleadings, though issue has not yet been joined on a potential countermeasures defense. In essence, the countermeasures defense would take the following form: assuming *arguendo* that the United States had violated rights to which Iran was entitled under the Treaty of Amity, any such violations were justified as lawful countermeasures to Iran's prior wrongful acts.

Commentators writing about the Supreme Court's decision in *Bank Markazi Iran v. Peterson* and the pending *Certain Iranian Assets* case at the ICJ have speculated about the viability of a potential countermeasures defense to Iran's claims and have not discerned much prospect that such a defense could be successful. Naturally enough, the starting point for such inquiries has been the articulation of limits on countermeasures in the ILC Articles. Two examples will suffice. In a short blog post, one commentator asserted:

Under international law, to set aside immunity from execution, without prejudice to the protection of diplomatic or consular properties, a State can only resort to a countermeasure as defined in the 2001 Draft articles on Responsibility of States for Internationally Wrongful Acts. Assuming that the US really was an injured State and could act in this way, its distribution of frozen assets would clearly infringe the law of countermeasures by preventing the reversibility of the measure.<sup>58</sup>

In a more detailed treatment, two co-authors alluded to the reversibility issue and other possible objections to a countermeasures defense in the following terms:

Alternatively, the US might argue that its measures were justified as a countermeasure taken in response to internationally wrongful acts of Iran. Even if terrorist groups' actions are not attributable to Iran, financial and material support to them probably amounts to a prohibited intervention in the internal affairs of other States. However, apart from procedural rules, that

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58. Victor Grandaubert, *Is there a place for sovereign immunity in the fight against terrorism? The US Supreme Court says 'no' in Bank Markazi v. Peterson* (May 19, 2016), available at <https://www.ejiltalk.org/is-there-a-place-for-sovereign-immunity-in-the-fight-against-terrorism-the-us-supreme-court-says-no-in-bank-markazi-v-peterson/>.

defence might prove problematic on the requirement that the effects of countermeasures should be, as far as possible, reversible. Again, the issue lies with allowing execution into the assets of Iranian entities. While financial damages are generally considered to be reversible, this might be doubtful with regard to execution against blocked real property.<sup>59</sup>

Now, what is the basis for the contention that countermeasures must (per the first author), or at least should (per the second ones), be reversible? The ILC expressed the idea of reversibility in Article 49 of ARSIWA, quoted in full in the footnote.<sup>60</sup> The key concepts are (with emphasis added): (1) that the object of countermeasures is “to *induce*” a wrongdoing State to comply with its obligations, thus not to punish it (nor to coerce it beyond the goal of bringing about compliance); (2) that the measures “are limited to the non-performance *for the time being*” of the obligations of the State taking countermeasures, thus they are to be temporary; and (3) that the measures “shall, *as far as possible*, be taken in such a way as to permit the resumption of performance of the obligations in question”—that is, they are to be reversible, though this is a relative rather than absolute condition.

In the application of the ILC’s articulated “limits” to the measures at issue in *Certain Iranian Assets*, we see the prescience of David Caron’s warning against trying to parse the words of the ILC Articles as if they were treaty obligations, when they manifestly do not enjoy the same type of authority as treaty requirements. The ILC may have provided sensible guidance for appraisal of degrees of “legitimacy” of countermeasures, using the quoted term in a sense that blurs the line between moral-political evaluation and legality *stricto sensu*. It did not, and could not have, laid down hard-and-fast rules by which to judge whether exceptional measures denying treaty rights to a State responsible for terrorist acts are legally prohibited.

### C. Human Rights and Humanitarian Limitations on Countermeasures

The ILC Articles quite properly underscore that countermeasures are illegitimate to the extent that they inflict harm on human beings who are not

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59. Philipp Janig & Sara Mansour Fallah, *Certain Iranian Assets: The Limits of Anti-Terrorism Measures in Light of State Immunity and Standards of Treatment*, 59 GERMAN Y.B. INT’L L. 355, 388 (2016) (footnotes omitted; citations include ARSIWA art. 49(3) and James Crawford, *Counter-Measures as Interim Measures*, 5 EUR. J. INT’L L. 65, 68 (1994)).

60. *Article 49*

*Object and limits of countermeasures*

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

themselves committing internationally wrongful acts. This principle is expressed in Article 50(1), quoted in full in the footnote.<sup>61</sup> It finds an echo in the ICJ's ruling on Iran's request for provisional measures in the *Alleged Violations* case, which is not strictly speaking a countermeasures case (or at least the issues have not yet been framed that way) but entails similar legitimacy considerations. There the Court unanimously found that the requirements for prescribing urgent measures to prevent irreparable injury under ICJ jurisprudence had been met, and it ordered the United States to put in place humanitarian exceptions to its Iranian sanctions program, in particular with respect to foodstuffs, medicines, and aircraft spare parts. Even if, as the United States asserts (and Iran denies), its economic sanctions are necessary responses to Iranian noncompliance with nonproliferation obligations, measures interfering with basic human needs like food, medicine, and transportation safety are illegitimate, thereby justifying the ICJ in making a binding order requiring the United States to refrain from such measures.

#### CONCLUSION: COHERENCE AND LEGITIMACY

The overview of legitimacy theories in the Introduction took note of Tom Franck's persuasive claim that in order for rules to be perceived as legitimate and therefore attract compliance, they should cohere with a lattice of principles connecting them to other rules. In that sense, certain of the ILC criteria for appraisal of countermeasures—for example, the requirement of compliance with human rights, humanitarian obligations, and peremptory norms—are principled and therefore legitimate. For similar reasons, the criterion of proportionality coheres with numerous other contexts in which responses to illegal acts must be proportional to the underlying illegality—for example, the requirement that justified force in self-defense must be proportional to the unlawful attack to which it responds.<sup>62</sup> The legitimacy of economic sanctions as countermeasures for internationally wrongful acts properly depends on coherence with principles in the deepest senses. Some of the U.S. sanctions against Iran may meet those tests, but others surely do not.

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61. *Article 50*

*Obligations not affected by countermeasures*

1. Countermeasures shall not affect:

- (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
- (b) Obligations for the protection of fundamental human rights;
- (c) Obligations of a humanitarian character prohibiting reprisals;
- (d) Other obligations under peremptory norms of general international law.

62. For the requirement of proportionality in countermeasures, see ARSIWA, *supra* note 14, art. 51.

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