RECONCILING THE GLOBAL NORTH-SOUTH DIVIDE ON THE USE OF FORCE: ECONOMIC COERCION AND THE EVOLVING INTERPRETATION OF ARTICLE 2(4)

JACOB BATINGA*

ABSTRACT

Article 2(4) of the United Nations Charter prohibits the "threat or use of force" in interstate relations. States and scholars from the Global North have traditionally interpreted this article as an instrument-based prohibition: the employment of military weapons was necessary to qualify as a use of force, and therefore economic sanctions could never implicate Article 2(4). In contrast, scholars and states from the Global South have objected to this narrow interpretation, arguing that since economic coercion can produce disastrous humanitarian consequences that mirror the effects of traditional military acts, economic sanctions should thus qualify as a use of force. Despite this alternative approach, the Global North's instrument-based interpretation of Article 2(4) has been adopted as customary international law, and economic coercion is explicitly disqualified from classification as a use of force under the current international legal framework. However, due to the rising threat of cyberattacks, the Global North has begun to recognize that the conventional interpretation of "force" is insufficient in an era of digitized economies and advancing technology. In recent years, scholars and states have increasingly abandoned the instrument-based approach in favor of an alternative framework: violations of Article 2(4) should be determined based on the "scale and effects" of a state action, rather than on the instrument used.

In light of the evolution of Article 2(4) interpretation, this Article presents a novel contribution to scholarship by applying the new "scale and effects" framework to the traditional debates around economic coercion, arguing that certain economic sanctions—those which are both extraterritorially applied and comprehensive in nature—may constitute a use

* Jacob Batinga received his J.D. from Berkeley Law School in 2023 and now works as a Humanitarian Policy Fellow with Oxfam. I would like to thank Daniela Wertheimer for her support and close reading of earlier drafts. Her insights were, as always, instrumental. Finally, I would like to thank Rachael Johnson, Lily Muelrath, and the staff of the Wisconsin International Law Journal for their excellent editorial work. Any remaining errors are mine alone.

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of force when their "scale and effects" resemble acts universally recognized as violating Article 2(4). In applying this new framework, this Article suggests that the Global South's traditional conception of economic coercion is increasingly viable in light of the newly adopted Article 2(4) interpretation.

INTRODUCTION

The United States heavily relies on economic sanctions as a tool of foreign policy. Since the 1990s, the United States has imposed around 75 percent[1] of the world's total economic sanctions, and it currently maintains thousands of sanctions on individuals, corporations, industries, and states.[2] The United States' frequent use of economic sanctions is highly controversial, and a growing number of human rights organizations, experts, and states have increasingly criticized the civilian harm these measures cause.[3]

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1 Manu Karuka, *Hunger Politics: Sanctions as Siege Warfare*, *in* 212 SANCTIONS AS WAR 51, 55 (Stuart Davis & Immanuel Ness eds., 2021).

2 Kathy Gilsinan, *A Boom Time for U.S. Sanctions*, THE ATL. (May 3, 2019), https://www.theatlantic.com/politics/archive/2019/05/why-united-states-uses-sanctions-so-much/588625 [https://perma.cc/5X28-GEL4].

3 *See* Press Release, Office of the United Nations High Commissioner for Human Rights, UN Experts Urge States to Consider Humanitarian Impacts When Imposing or Implementing Sanctions (Mar. 25, 2022).

In 2022, a group of United Nations human rights experts issued a joint letter expressing concern over the humanitarian impact of economic sanctions imposed on developing countries.[4] According to the experts, economic sanctions can jeopardize the rights to health, life, housing, food, sanitation, water, and education, and the "impact is often greatest for vulnerable groups."[5] When comprehensively applied, economic sanctions can drastically increase poverty among the targeted state's population, while generating a scarcity of lifesaving pharmaceuticals, medical technology, food, electricity, and other basic necessities.[6] These consequences—which disproportionately impact the civilian population of a sanctioned state—can sometimes resemble the effects of acts typically considered a "use of force" under international law.[7] Yet despite this potential for significant humanitarian harm, there is remarkably little regulation of economic sanctions under the current international legal framework.[8]

Since the founding of the United Nations Charter, the use of economic sanctions (also known as economic coercion) in international relations has been the subject of contentious debate between the Global North and the Global South.[9] Many states in the Global South have argued that economic coercion impedes development, negatively impacting human rights, and should qualify as a use of force under Article 2(4) of the United Nations Charter (which prohibits the "threat or use of force" in interstate relations).[10] States in the Global North, on the other hand, largely consider economic sanctions a positive tool that can be used to curb human rights abuses and force rogue states to comply with international law without resorting to all-out war.[11] State representatives from the Global North advocated for a narrow, instrument-based interpretation of Article 2(4),

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4 *See id.*

5 *See id.*

6 *See id.*

7 *See, e.g.*, Alexandra Hofer, *The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?*, 16 CHINESE J. INT'L L. 175 (2017).

8 *See id.*

9 *See id.* The Global North typically refers to the industrialized countries in Europe, the United States, Canada, Australia, and Israel. The Global South, previously called the "third world," refers to the regions of Latin America, Asia, Africa, and Oceania. These terms refer primarily to the difference in power relations between the previously colonized states (the Global South) and the wealthier, industrialized states (the Global North). Nour Ddos & Raewyn Connell, *The Global South*, 11 CONTEXTS 12, 12 (2012).

10 *See* Hofer, *supra* note 7.

11 *See, e.g.*, *id.* at 29 (as explained by Alexandra Hofer, the United States and European Union view sanctions as a useful way to "enforce particular values" and punish states that engaged in human rights violations).

while state representatives from the Global South preferred an expansive definition.[12] This interpretation has become the dominant interpretation, despite the Global South's insistence that it is too narrow.[13]

In recent years, the increasing threat of cyberattacks has caused many Global North states and scholars to rethink this traditional understanding and embrace an alternative interpretation of Article 2(4).[14] The Global North has begun to recognize that the conventional interpretation of force is insufficient in an era of digitized economies and advancing technology.[15] These scholars and states have proposed abandoning the traditional "instrument-based approach" in favor of an "effects-based" approach to understanding Article 2(4)'s prohibition on the use of force.[16] Under this framework, the "scale and effects" (meaning the consequences) of an action—rather than the instrument used—determine whether Article 2(4) has been violated.[17] When the scale and effects of nonmilitary action (like, for instance, a cyberattack that disables a national power grid) resembles the scale and effects of traditional use of force (like bombing a nation's primary power plant) the nonmilitary act can violate Article 2(4) just as a traditional use of force would.[18] This approach has gained adherents in recent years and now represents a dominant interpretation of Article 2(4).[19]

Prominent thinkers favoring this approach have suggested that under an effects-based framework, acts that are presumptively unlawful are more likely than acts widely understood as legal to qualify as uses of

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[12] Rep. of the S.C on Principles of International Law Concerning Friendly Relations and Co-operation Among States, ¶¶ 6, 9, U.N. Doc A/7326 (1968) [hereinafter Consideration of Principles]. *See also* James A. Delanis, *"Force" Under Article 2(4) of the United Nations Charter: The Question of Economic and Political Coercion*, 12 VAND. J. TRANSNAT'L L. 101 (1979).

[13] Oliver Dörr & Albrecht Randelzhofer, *Purposes and Principles, Article 2(4)*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200, 210 (Bruno Simma et al. eds., 3d ed. 2012).

[14] *See* Michael N. Schmitt, *The Law of Cyber Warfare: Quo Vadis?*, 25 STAN. L. POL'Y REV. 269, 279 (2014).

[15] Professor Oona Hathaway concluded that "because cyber-attacks have the potential to cause catastrophic harm without employing traditional military weapons, most scholars have rejected the instrument-based approach to defining armed attacks as dangerously outdated." Hathaway et al., *The Law of Cyber Attack*, 100 CALIF. L. REV. 817, 846 (2012).

[16] *Id.*

[17] INTERNATIONAL GROUPS OF EXPERTS, NATO COOPERATIVE CYBER DEFENCE CENTRE OF EXCELLENCE, TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 331–332 (Michael N. Schmitt ed., 2017) (hereinafter "TALLINN 2.0").

[18] *See id.*

[19] *See, e.g.,* Hathaway et al., s*upa* note 15, 846 ("because cyber-attacks have the potential to cause catastrophic harm without employing traditional military weapons, most scholars have rejected the instrument-based approach to defining armed attacks as dangerously outdated").

force.[20] In recent years, states in both the Global South and Global North have recognized that the United States' use of extraterritorial sanctions is likely unlawful.[21] In contrast to primary sanctions, which apply to the citizens and entities under the sanctioning state's jurisdiction, there is a growing international consensus that extraterritorial sanctions, which apply to neutral third-party individuals and states, violate the principles of nonintervention, sovereignty, and jurisdiction, and are therefore presumptively unlawful.[22]

In light of the evolution of Article 2(4) interpretation and in recognition of the presumptive illegality of extraterritorial sanctions, I will present a novel contribution to scholarship by applying the new scale-and-effects framework to the traditional debates around economic coercion, arguing that certain economic sanctions—those which are both extraterritorially applied and comprehensive in nature—may constitute a use of force when their scale and effects resemble acts universally recognized as violating Article 2(4). To this end, Part I of this Article offers an overview of Article 2(4) interpretation, highlighting historic and ongoing debates over the scope of Article 2(4) in relation to economic coercion. Part I begins by outlining the traditional narrow approach, which is accepted as customary international law, and then moves on to the alternative interpretation proposed by the Global South. This section then introduces the effects-based framework for Article 2(4) interpretation, outlining its acceptance among states and scholars.

Next, Part II presents the international legal framework regulating economic coercion. This section argues that primary sanctions are presumptively lawful, while states in both the Global North and Global South (except the United States) consider extraterritorial sanctions violative of the principles of sovereignty, nonintervention, and jurisdiction, thus presumptively unlawful. Crucially, presumptive illegality weighs in favor of categorizing a nonmilitary state act as a use of force under the effects-based framework.

Finally, Part III unites the legal frameworks from Parts I and II and applies the effects-based framework to economic coercion. This section argues that the scale and effects of some economic sanctions—namely, those which are both extraterritorial and comprehensive—can resemble the scale and effects of prohibited uses of force, such as blockades

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[20] TALLINN 2.0, *supra* note 17, at 136.

[21] *See* IRYNA BOGDANOVA, UNILATERAL SANCTIONS IN INTERNATIONAL LAW AND THE ENFORCEMENT OF HUMAN RIGHTS (Thomas Cottier ed., 2022).

[22] *See id.* at 74.

or cyberattacks. While there is no basis for arguing that all economic sanctions can violate Article 2(4), this section contends that sanctions which are both comprehensive and extraterritorial—and are therefore both presumptively unlawful and analogous to traditional uses of military force in effect—could plausibly qualify as an unlawful use of force under the emergent effects-based interpretation of Article 2(4).

I. ECONOMIC COERCION AND THE EVOLVING ARTICLE 2(4) FRAMEWORK

The following section discusses the tension between the differing Global North and Global South interpretations of Article 2(4), locating economic coercion within this disagreement. This section then introduces the emergent effects-based interpretation of Article 2(4), which is applied to economic coercion in Part III. For the purposes of this discussion, a preliminary distinction must be drawn between a "use of force" and an "armed attack" under international law. Article 2(4) of the United Nations Charter states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.[23]

Article 51 provides an exception to Article 2(4)'s prohibition on the use of force, allowing states to respond in "self-defense" to an "armed attack."[24] However, while all unlawful uses of force violate Article 2(4), not all qualify as armed attacks. In *Nicaragua v. United States,* the International Court of Justice held that it is necessary to "distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms."[25] An armed attack triggers the Article 51 right to self-defense,[26] whereas a use of force—while unlawful under Article 2(4) and potentially violative of the principle of nonintervention—does not trigger the right to self-defense under Article 51 unless it is grave enough

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[23] U.N. Charter art. 2(4).

[24] U.N. Charter art. 51.

[25] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 191 (June 27).

[26] Oliver Dörr & Albrecht Randelzhofer, *Purposes and Principles, Article 2(4)*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200, 210 (Bruno Simma et al. eds., 3d ed. 2012).

to warrant qualification as an "armed attack."[27] Therefore, every armed attack is definitionally a use of force, but not every use of force is an armed attack.[28]

A. THE PREVAILING VIEW

The traditional view in international law is that armed, military force is required for an act to violate the prohibition on the use of force under Article 2(4). Under this interpretation—considered the "correct and prevailing view" by the Oxford Commentary of the United Nations Charter—political and economic coercion cannot constitute a use of force.[29] This interpretation is primarily grounded in the historical development of customary international law as well as the travaux préparatoires of the charter, since "the actual wording of Art. 2 (4) does not provide a clear solution" to the definitional scope of "force."[30]

Advocates of Article 2(4)'s prevailing interpretation cite the *Declaration on Friendly Relations* as evidence confirming the narrow definition of force.[31] The declaration provided an authoritative interpretation of the UN Charter and was adopted by the UN General Assembly in 1970 without a vote, "signaling that it represented a consensus" among states.[32] According to the Oxford Commentary, when "interpreting the principle that States shall refrain in their international relations from the threat or use of force, the declaration deals solely with military force."[33] The declaration also declares that states must refrain from the "use of economic, political or any other type of measures to coerce another State," but not within the context of Article 2(4).[34] This distinction, according to the Oxford Commentary, "underlines the fact that the scope of Art. 2(4) is restricted to armed force."[35]

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[27] Tom Ruys, *The Meaning of 'Force' and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter 2(4)?*, 108 AM. J. INT'L L. 159, 162 (2014).

[28] *Id.*

[29] *See* Dörr & Randelzhofer, *supra* note 26, at 208.

[30] *Id.* at 209.

[31] *See* Daniel B. Silver, *Computer Network Attack as a Use of Force Under Article 2(4) of the United Nations Charter*, 76 INT'L L. STUD. 73, 80–81 (2002). *See also* Dörr & Randelzhofer, *supra* note 26, at 208–210.

[32] Helen Keller, *Friendly Relations Declaration (1970)*, *in* MAX PLANCK ENCYCLOPEDIAS PUB. INT'L. L. (2021).

[33] Dörr & Randelzhofer, *supra* note 26, at 209.

[34] G.A. Res. 2625 (XXV), at 123 (Oct. 24, 1970).

[35] Keller, *supra* note 32; Dörr & Randelzhofer, *supra* note 26, at 208–10.

Furthermore, the travaux préparatoires of the United Nations makes plain that "use of force," per the UN Charter drafting committee's original understanding, referred to an armed attack, not economic coercion.[36] In fact, the Brazilian delegation to the drafting committee proposed an amendment to include "economic measures" as a category of "force," but the amendment was "explicitly rejected."[37]

Thus, in this traditional understanding of Article 2(4), scholars and states determine the existence of an unlawful use of force under an instrument-based framework.[38] To implicate Article 2(4), "the weapon employed must be of a kinetic nature," such as conventional, nuclear, or chemical.[39] Under this interpretation, economic coercion is not deployed through a kinetic military instrument, and therefore it definitionally cannot implicate Article 2(4).[40]

Scholars are divided as to whether Article 2(4) includes a de minimis threshold: a minimum level of severity required for an action to qualify as a use of force.[41] Some scholars argue that all acts of armed force using kinetic military instruments, regardless of gravity, violate Article 2(4)'s prohibition on the use of force.[42] Other scholars argue that smaller uses of military force, such as "targeted killings, forced abductions, small-scale counterterrorism operations abroad, interceptions of a single aircraft, and localized hostile encounters between military units, produce such a minimal effect that they fall outside the scope of Article 2(4)."[43] Though scholars agree that an "armed attack" for the purposes of Article 51 must clear a gravity threshold, where that threshold lies remains in dispute.[44]

The Global North's instrument-based approach represents the dominant and customary interpretation of Article 2(4). Throughout the charter's history, however, many states and scholars in the Global South have challenged this narrow reading and have sought to include economic coercion within the meaning of force.

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[36] Dörr & Randelzhofer, *supra* note 26, at 209.

[37] *Id.*

[38] *See* Ido Kilovaty, *Cyber Warfare and the Jus Ad Bellum Challenges: Evaluation in the Light of the Tallinn Manual on the International Law Applicable to Cyber Warfare*, 5 AM. U. NAT'L SEC. L. BRIEF 91, 110 (2014).

[39] *Id.* at 109.

[40] *Id.* at 110.

[41] Ruys, *supra* note 27, at 159.

[42] *See generally* Ruys, *supra* note 27.

[43] Gianfranco Smith, *Are Minimal Uses of Force Excluded from Article 2(4) and Should They Be Excluded?*, 3 IUSTITIA ET PULCHRITUDO 12, 13 (2022).

[44] *See id.* at 14–15; Ruys, *supra* note 27, at 162.

B. THE ALTERNATIVE VIEW

In the years following the adoption of the UN Charter, states in the Global South urged the United Nations to embrace an alternative interpretation of Article 2(4) to include economic coercion as a use of force. Starting in the early 1950s, "communist bloc, African, and Asian nations supported an expansive definition" of force, arguing that "political independence could just as easily be threatened by economic and political pressure as by armed force."[45]

In early United Nations debates regarding the definition of "aggression," states from the Global South argued that economic coercive measures should be considered an unlawful use of force, equivalent to an armed attack. At the 1952 special committee meeting on the "Question of Defining Aggression," the Bolivian delegate contended that it should be "considered as an act of aggression" when one state takes "unilateral action to deprive a[nother] State of the economic resources derived from the fair practice of international trade, or to endanger its basic economy."[46] Countries within the Soviet Bloc and nonaligned movement suggested similar definitions.[47] At the following committee meeting, the delegate from Dahomey stated:

> By adopting coercive economic measures and by using economic pressures, the industrialized countries could imperil the economic and hence the political independence of the developing countries. This form of aggression is contrary to certain principles of the United Nations.[48]

In 1963, the general assembly established a Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States consisting of thirty-one UN member states.[49] This committee was appointed to study four (eventually seven) principles of international law, including the prohibition on the use of force, and submit a report "for the purpose of the progressive development and codification of the four principles."[50] The committee presented several reports to the

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[45] Delanis, *supra* note 12, at 111.

[46] U.N. Secretary–General, *Question of Defining Aggression*, ¶ 441, U.N. Doc. A/2211 (Oct. 3, 1952).

[47] *Id.* ¶¶ 442–44.

[48] Comment, *The Use of Nonviolent Coercion: A Study in Legality Under Article 2(4) of the Charter of the United Nations*, 122 U. PA. L. REV. 983, 1002 (1974).

[49] Consideration of Principles, *supra* note 12. The committee initially consisted of 27 states, and then at the following sessions the general assembly added four more states.

[50] *Id.* ¶ 5.

general assembly over the next six years, but never could bridge the Global North–South divide on the scope of "force" for the purposes of Article 2(4).

At the committee meeting in 1964, state participants from the Global South pushed to include economic coercion within the codified definition of the use of force under international law. First, Czechoslovakia and Yugoslavia submitted proposals to include economic coercion as a prohibited use of force. In the definition proposed by Ghana, India, and Yugoslavia later that year, prohibited uses of force included not only "armed force," but "other forms of pressure."[51] Four years later, Algeria, Cameroon, China, India, Kenya, Madagascar, Nigeria, Syria, the United Arab Republic, and Yugoslavia jointly proposed to the committee that "the meaning of the term 'force' shall include . . . [a]ll forms of pressure, including those of a political and economic character, which have the effect of threatening the territorial integrity or political independence of any State."[52] Prominent member states of the nonaligned movement argued that "economic and political forms of pressure were sometimes even more dangerous than armed force, particularly for developing countries."[53] Egyptian President Gamal Abdel Nasser, a leader in the nonaligned movement, stated that it was "essential to include economic and political pressure as an illegal use of force because, in view of the present political and economic interdependence of States, powerful States could strangle weaker States with pressures of that kind to the point of threatening their political independence and territorial integrity."[54]

States in the Global North explicitly rejected these expansive definitions and sought to limit the notion of "force" to kinetic, military force. The United Kingdom's committee proposal, for example, stated that "the term 'force' [is] meant [as] armed force."[55] Referencing the travaux préparatoires of the charter, the United Kingdom further explained "that the expression 'force' means physical force or armed force and does not include economic or political pressure."[56]

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[51] Rep. of the S.C., Consideration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, ¶ 31 U.N. Doc A/5746 (Nov. 16, 1964) [hereinafter Friendly Relations and Cooperation Report].

[52] Consideration of Principles, *supra* note 12, ¶ 26.

[53] *Id.* ¶ 52.

[54] Richard B. Lillich, *Economic Coercion and the International Legal Order*, 51 INT'L AFFS. 358, 361 (1975).

[55] Friendly Relations and Cooperation Report, *supra* note 51, ¶ 42.

[56] *Id.* ¶ 29.

Though this broader interpretation is still prevalent in the Global South, "the majority view," adopted as customary international law, is that the instrument used determines whether a state's action constitutes a use of force, and therefore "article 2(4) force does not include economic coercion."[57]

C. THE EMERGING EFFECTS-BASED APPROACH

Beginning in the 1990s, a handful of Global North scholars argued that the threat of cyberattacks necessitated a reinterpretation of Article 2(4), since the instrument-based framework was obsolete in an era of digitalization.[58] For the next decade, these views remained marginal. In 2007, however, Estonia was hit with a large-scale cyberattack, sparking widespread reevaluation—and reinterpretation—of Article 2(4).

From 1947 to 2007, the Bronze Soldier, a Soviet-era statue and war memorial, resided in central Tallinn, the capital of Estonia. To Russia and the ethnic Russians of Estonia, the statue represented the Soviet expulsion of Nazi Germany, while non-Russian Estonians viewed the statue as a symbol of Soviet domination of the Baltics.[59] In early April 2007, the Estonian government decided to move the statue from central Tallinn to the outskirts of the city.[60] In response, the Russian government threatened to cut off diplomatic relations with Estonia, stating that any movement of the statue would be "disastrous for Estonians."[61] Despite these threats, on April 27, 2007, the Estonian government moved the statue.[62]

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[57] J. Curtis Henderson, *Legality of Economic Sanctions Under International Law: The Case of Nicaragua*, 43 WASH. & LEE L. REV. 167, 180 (1986).

[58] *See, e.g.*, Michael Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 886 (1999).

[59] Damien McGuinness, *How a Cyber Attack Transformed Estonia*, BBC NEWS (Apr. 27, 2017), https://www.bbc.com/news/39655415 [https://perma.cc/3KFB-L38E].

[60] Francis Tapon, *The Broze Soldier Explains Why Estonia Prepares for a Russian Cyberattack*, FORBES (July 7, 2018, 1:36 PM), https://www.forbes.com/sites/francistapon/2018/07/07/the-bronze-soldier-statue-in-tallinn-estonia-give-baltic-headaches/?sh=77b1d03a98c7 [https://perma.cc/8UPE-WT6E].

[61] Joshua Davis, *Hackers Take Down the Most Wired Country in Europe*, WIRED (Aug. 21, 2007, 12:00 PM), https://www.wired.com/2007/08/ff-estonia [https://perma.cc/GHY7-5RF5].

[62] Steven Lee Myers, *Russia Rebukes Estonia for Moving Soviet Statue*, N.Y. TIMES (Apr. 27, 2007), https://www.nytimes.com/2007/04/27/world/europe/27cnd-estonia.html [https://perma.cc/9R7K-FNPL].

The following day, Estonia was hit with a wave of cyberattacks lasting three weeks.[63] Hackers flooded Estonia's internet infrastructure with spam, overloading its bandwidth and rendering much of the internet unusable.[64] During this three-week period, Estonians couldn't access online newspapers or government websites, and bank accounts were rendered inaccessible.[65] Though never conclusively demonstrated, this cyberattack has been widely attributed to Russia, despite its denials of any involvement.[66]

In response to this attack, NATO commissioned a team of the world's foremost experts in international law and cyberwar to "identify the relevant legal norms governing cyber warfare," resulting in the *Tallinn Manual on the International Law Applicable to Cyber Warfare*.[67] The participants, known as the International Group of Experts, were commissioned to "confine themselves to the *lex lata*; *lex ferenda* was strictly off limits."[68] In other words, the experts determined only what the current international jurisprudence regarding cyber warfare *is*, not what it *ought* to be. In 2017, the experts released an updated manual that expanded the scope of the original study and modified some of its previous conclusions. This new *Tallinn Manual*, according to the experts, "supersedes the first *Tallinn Manual*," and therefore the following analysis relies on the principles and conclusions in *Tallinn 2.0*.[69]

The experts concluded that the dispositive factor qualifying a cyberattack as a "use of force" under Article 2(4) is the *effects* of the cyberattack, rather than the instruments used. According to the experts, "it is not the instrument used that determines whether the use of force threshold has been crossed, but rather . . . the consequences of the operation and its surrounding circumstances."[70] Unlike the traditional interpretation of Article 2(4) detailed in Part I(A), the experts affirmed that the "use of force

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[63] *Estonian Denial of Service Incident*, COUNCIL ON FOREIGN RELATIONS (May 2007), https://www.cfr.org/cyber-operations/estonian-denial-service-incident [https://perma.cc/MY35-DUUT].

[64] Emily Tamkin, *10 Years After the Landmark Attack on Estonia, Is the World Better Prepared for Cyber Threats?*, FOREIGN POL'Y (Apr. 27, 2017, 8:30 AM), https://foreignpolicy.com/2017/04/27/10-years-after-the-landmark-attack-on-estonia-is-the-world-better-prepared-for-cyber-threats/ [https://perma.cc/JHF4-NNT5].

[65] *Id.*; Rain Ottis, *Analysis of the 2007 Cyber Attacks Against Estonia from the Information Warfare Perspective*, NATO COOPERATIVE CYBER DEFENCE CENTRE OF EXCELLENCE (2018).

[66] Ottis, *supra* note 65.

[67] TALLINN 2.0, *supra* note 17, at 22.

[68] Schmitt*, supra* note 14, at 270.

[69] TALLINN 2.0, *supra* note 17, at 1–2.

[70] *Id.* at 328.

need not involve the employment of military or other armed forces by the State in question."[71] Adopting the language from the International Court of Justice's decision in the *Nicaragua* case, the experts stated that "cyber operation constitutes a use of force when its *scale and effects* are comparable to non-cyber operations rising to the level of a use of force."[72] If a state action would qualify as violating the prohibition on the use of force under traditional understandings of Article 2(4), "so too would cyber operations of the same scale and effects."[73]

The experts further distinguished between cyberattacks that rise to the level of a use of force under Article 2(4) and cyberattacks that qualify as both a use of force and an armed attack—the "most grave" form of the use of force.[74] The experts "unanimously concluded that some cyber operations may be sufficiently grave to warrant classifying them as an 'armed attack' within the meaning of the Charter."[75] The experts stated that the "scale and effects required for an act to be characterised as an armed attack necessarily exceed those qualifying the act as a use of force,"[76] and therefore every cyberattack that is an armed attack is also a use of force, but not every use of force is necessarily "sufficiently grave"[77] enough to constitute an armed attack.[78] This distinction is necessary to analyze the right to self-defense after a cyberattack under Article 51; if the scale and effects of a cyberattack are comparable to an armed attack, self-defense under Article 51 is legitimate, but if the scale and effects are comparable to an unlawful use of force short of an armed attack, self-defense is impermissible.[79]

The precise criteria to determine when a cyberattack becomes an unlawful use of force and/or an armed attack was left "unresolved" by *Tallinn 2.0*. However, using the scale-and-effects framework, the experts gave two examples of cyberattacks that fit one or both definitions: 1) "Acts

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71 *Id.* at 331.

72 *Id.* at 330.

73 *Id.* at 333.

74 *Id.* at 341.

75 *Id.* at 340.

76 *Id.* at 341.

77 *Id.* at 340.

78 *Id.* at 333.

79 *Id.* at 337 ("Finally, it must be understood that 'use of force' and 'armed attack' (Rule 71) are standards that serve different normative purposes. The 'use of force' standard is employed to determine whether a State has violated Article 2(4) of the UN Charter and its related customary international law prohibition. By contrast, the notion of 'armed attack' has to do with whether the target State may respond to an act with a use of force without itself violating the prohibition of using force. This distinction is critical in that the mere fact that a use of force has occurred does not alone justify a use of force in response . . . .").

that injure or kill persons or physically damage or destroy objects are uses of force"; and 2) "A cyber operation that seriously injures or kills a number of persons or that causes significant damage to, or destruction of, property" would be considered an unlawful use of force that is grave enough to warrant classification as an armed attack.[80]

Furthermore, the experts concluded that the target of the attack and the intention of the attacker were not relevant factors for the purposes of Article 2(4). The experts "rejected any suggestion that the nature of targeted cyber infrastructure is determinative of whether a cyber operation qualifies as a use of force."[81] Looking instead to the scale and effects of the attack, something like the targeting of noncritical infrastructure "may constitute uses of force . . . while those directed at critical infrastructure may not."[82] Finally, while not unanimous, the "majority of the International Group of Experts was of the view that intention is irrelevant" when determining whether a cyberattack constitutes a use of force or an armed attack; rather, "only the scale and effects matter."[83]

The experts' conclusions seem to reflect an emerging reinterpretation of Article 2(4) among international law scholars and policymakers. A study by the National Research Council, commissioned in the wake of the cyberattack on Estonia, also adopted an effects-based approach to Article 2(4) interpretation:

> The essential framework for our legal analysis of cyberattack is based on the principle that notions related to "use of force" and "armed attack" (terms of special relevance to the Charter of the United Nations) should be judged primarily by the effects of an action rather than its modality. That is, the fact that an attack is carried out through the use of cyberweapons rather than kinetic weapons is far less significant than the effects that result from such use.[84]

Furthermore, while several prominent scholars have insisted for several decades[85] that cyberattacks should qualify as unlawful uses of force, the effects-based approach has gained significant attention in post-Estonia scholarship.[86] According to Columbia Law School professor

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[80] *Id.* at 333, 341.

[81] *Id.* at 328.

[82] *Id.*

[83] *Id.* at 343–44.

[84] NAT'L RSCH. COUNCIL, TECH., POL'Y, LAW, & ETHICS REGARDING U.S. ACQUISITION & USE OF CYBERATTACK CAPABILITIES 3 (William A. Owens et al. eds., 2009).

[85] *See, e.g.*, Schmitt, *supra* note 58.

[86] *See* Matthew C. Waxman, *Cyber Attacks as "Force" Under UN Charter Article 2(4),* 87 INT'L L. STUD. 43 (2011).

Matthew Waxman, there is "considerable momentum among American scholars and experts toward finding that some cyber-attacks ought to fall within Article 2(4)'s prohibition on 'force' . . . [which] should be interpreted to cover attacks with features and consequences closely resembling conventional military attacks or kinetic force."[87]

The primary cause for this shift seems to be that the traditional instrument-based approach to Article 2(4) is inadequate in an era of increasingly digitized and therefore vulnerable economies.[88] According to scholar Oona Hathaway, since "cyber-attacks have the potential to cause catastrophic harm without employing traditional military weapons, most

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[87] Waxman, *supra* note 86, at 47. Hathaway and her co-authors concluded that "because cyber-attacks have the potential to cause catastrophic harm without employing traditional military weapons, most scholars have rejected the instrument-based approach to defining armed attacks as dangerously outdated." Hathaway, *supra* note 15, at 846. Schmitt is considered the founder of the original proponent of the effects-based framework. Schmitt states that "traditional applications of the use of force prohibition fail to adequately safeguard shared community values threatened by CNA, [he] proposes an alternative normative framework based on scrutiny of the consequences caused by such operations." Schmitt, *supra* note 58, at 886. Silver argues that "CNA that directly and foreseeably produces physical injury or property damage similar to that resulting from the use of traditional forms of weaponry is likely to be viewed as a use of force under Article 2(4), especially if that CNA is carried out by a State's armed forces." Silver, *supra* note 31, at 85. Graham is less firm on his commitment to the effects-based doctrine, but still states that "the proponents of all three approaches agree on the singularly important conclusion that cyber attacks can constitute armed attacks." David E. Graham, *Cyber Threats and the Law of War*, 4 J. NAT'L SEC. L. & POL'Y 87, 91–92 (2010). Dinniss states that "[t]he present author considers that where a computer network attack, directly or indirectly, results in a physical consequence, namely destruction of physical property, injury or loss of lives, it will constitute a use of force under Article 2(4)." HEATHER HARRISON DINNISS, *Computer Network Attacks as a Use of Force in International Law*, *in* CYBER WARFARE AND THE LAWS OF WAR 37, 74 (2012). Skerlov argues that "[o]f these three approaches, the effects-based approach is the best analytical model for dealing with cyberattacks." Matthew J. Sklerov, *Solving the Dilemma of State Responses to Cyberattacks: A Justification for the Use of Active Defenses Against States Who Neglect Their Duty to Prevent*, 201 MIL. L. REV. 1, 56 (2009). Condron writes that "[t]he jus ad bellum paradigm must permit active self-defense of critical infrastructure and allow a self-defense response to an attack on critical infrastructure in cyberspace without first requiring attribution or characterization of the attack." Sean M. Condron, *Getting It Right: Protecting American Critical Infrastructure in Cyberspace*, 20 HARV. J. L. & TECH. 403, 421 (2007). Waxman advocates for "[a]n approach to overcoming translation problems of Charter rules (which were designed to deal primarily with conventional warfare) that focuses on effects tantamount to a military attack and holds that cyber-attacks could constitute force or armed attack …." Matthew C. Waxman, *Cyber Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT'L L. 421, 437 (2011). Ziolkowski states that there is a "nearly uniform opinion among scholars (to which the author of the present survey subscribes), [that] a CNO - similarly to the effects caused by BC weapons - should be considered as 'use of armed force' if it results in death, physical injury or the destruction of property." Katharina Ziolkowski, *Computer Network Operations and the Law of Armed Conflict*, 49 MIL. L. & L. WAR REV. 47, 70 (2010).

[88] *See, e.g.*, Sklerov, *supra* note 87, at 1 ("As warfare changes, so must the law; and warfare is changing fast."); Graham, *supra* note 87, at 90 ("the international framework for analyzing whether certain state actions constitute armed attacks has evolved over time, and these are the legal principles that must be applied in assessing the nature of cyber attacks").

scholars have rejected the instrument-based approach to defining armed attacks as dangerously outdated."[89]

As the effects-based framework has evolved and gained prominence, scholars have debated the proper scope and practical application of this interpretation of Article 2(4). Professor Michael Schmitt, the most prominent[90] early advocate of the effects-based approach, reasoned that the International Court of Justice's holding in *Nicaragua v. United States*[91] implies that the use of force threshold for the purpose of cyberattacks is somewhere between coercion and military attack. Supplying and training the Contras alone, according to the International Court of Justice, amounted to an "unlawful use of force" by the United States, but did not rise to the level of an armed attack.[92] Thus, according to Schmitt, "the question becomes how to locate the point of demarcation [for the use of force], at least with regard to this new genre of coercion," namely cyberattacks.[93]

Schmitt proposed weighing six factors to determine whether a nonmilitary action implicates Article 2(4). The first five factors—severity, immediacy, directness, invasiveness, and measurability—are methods of analyzing the scale and effects of cyberattacks as compared to traditional armed force.[94] The final factor Schmitt proposed weighs the "presumptive legality" of an act.[95] When a state action results in the scale and effects comparable to a traditional use of force, the presumptive unlawfulness of the action weighs in favor of violating Article 2(4), while the presumptive lawfulness weighs against. For Schmitt, since cyberattacks in general are presumptively unlawful, a cyberattack should qualify as a violation of Article 2(4) when its scale and effects are comparable to traditional armed force.

Several UN members—especially states from the Global North[96]—have also embraced the effects-based framework. In 2020, the US Department of Defense stated that cyberattacks "may constitute a use

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89 Hathaway et al., *supra* note 15, at 846.

90 *Id.* at 847.

91 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27).

92 *Id.* ¶ 251.

93 Schmitt, *supra* note 58, at 914.

94 *Id.* at 914–15; Hathaway et al., *supra* note 15, at 847.

95 Schmitt, *supra* note 14, at 280. *See also* Schmitt, *supra* note 58, at 915.

96 As Hathaway discusses, this shift in state positions is attributed to the power dynamics of cyberattacks, which are relatively cheap methods of warfare, and states with advanced technological infrastructure are particularly vulnerable. Hathaway et al., *supra* note 15, at 842.

of force within the meaning of Article 2(4) of the UN Charter," if "the operation causes physical injury or damage that would be considered a use of force if caused solely by traditional means."[97]

Furthermore, the German Foreign Ministry released a position paper in 2021 explicitly adopting the scale-and-effects test laid out by the *Tallinn Manual*:

> Germany shares the view expressed in the Tallinn Manual 2.0: the threshold of use of force in cyber operations is defined, in analogy to the ICJ's Nicaragua judgement, by the scale and effects of such a cyber operation. Whenever [the] scale and effects of a cyber operation are comparable to those of a traditional kinetic use of force, it would constitute a breach of art. 2 para. 4 UN Charter.[98]

The Australian,[99] Finnish,[100] Norwegian,[101] Romanian,[102] Swedish,[103] Italian,[104] Canadian,[105] Estonian,[106] New Zealand,[107] and Dutch[108] governments have similarly officially adopted the scale-and-effects interpretation of Article 2(4) in the context of cyberattacks. Aside from Australia and the Netherlands, all of these states have adopted this position within the last three years.

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[97] Hon. Paul C. Ney, Jr., Dep't of Def., DOD General Counsel Remarks at U.S. Cyber Command Legal Conference (Mar. 2, 2020) (transcript available at: https://www.defense.gov/News/Speeches/Speech/Article/2099378/dod-general-counsel-remarks-at-us-cyber-command-legal-conference/ [https://perma.cc/SR6S-EE5C]). The Obama Administration's Department of Defense and State Department Legal Advisor Harold Koh made similar statements: "Cyber activities that proximately result in death, injury, or significant destruction would likely be viewed as a use of force." Harold Hongju Koh, U.S. Dep't of State, Remarks on International Law in Cyberspace at Inter-Agency Legal Conference at Fort Mead (Sept. 18, 2012) (transcription available at: https://2009-2017.state.gov/s/l/releases/remarks/197924.htm [https://perma.cc/29G4-XKE4]).

[98] GERMAN FED. FOREIGN OFF. & GERMAN FED. MINISTRY OF DEF., ON THE APPLICATION OF INTERNATIONAL LAW IN CYBERSPACE: POSITION PAPER (Mar. 2021).

[99] COMMONWEALTH OF AUSTL. DEP'T OF FOREIGN AFFS. & TRADE, AUSTRALIA'S INTERNATIONAL CYBER ENGAGEMENT STRATEGY 48 (2017).

[100] FINNISH GOV'T, INTERNATIONAL LAW AND CYBERSPACE: FINLAND'S NATIONAL POSITIONS (2020).

[101] U.N. GAOR, 76th Sess., U.N. Doc. A/76/136 (July 13, 2021).

[102] *Id.*

[103] GOV'T OFFS. OF SWED., POSITION PAPER ON THE APPLICATION OF INTERNATIONAL LAW IN CYBERSPACE (2022).

[104] ITALIAN MINISTRY OF FOREIGN AFFS. AND INT'L COOP., ITALIAN POSITION PAPER ON "INTERNATIONAL LAW AND CYBERSPACE" (2021).

[105] GOV'T OF CAN., INTERNATIONAL LAW APPLICABLE IN CYBERSPACE.

[106] U.N. GAOR, *supra* note 101.

[107] N.Z. MINISTRY OF FOREIGN AFFS. & TRADE, THE APPLICATION OF INTERNATIONAL LAW TO STATE ACTIVITY IN CYBERSPACE (2020).

[108] GOV'T OF THE KINGDOM OF THE NETH., APPENDIX: INTERNATIONAL LAW IN CYBERSPACE (2019).

While the effects-based framework has likely not yet reached the status of customary international law, there is a growing shift in Article 2(4) interpretation among both states and scholars.

II. SANCTIONS AND THE LAW

In light of the emergent effects-based interpretation of Article 2(4) in the Global North and traditional interpretation of Article 2(4) by the Global South, the current understanding of economic sanctions under international law should be revisited. The following section details the international legal framework regulating economic sanctions, finding that while primary sanctions are certainly lawful, there is now widespread recognition that extraterritorial sanctions are presumptively unlawful. When applying the effects-based framework to economic sanctions (detailed in Part III), this presumptive illegality weighs in favor of deeming the practice violative of Article 2(4).

The term "sanctions" has been used to describe a wide variety of governmental actions in international relations. This Article will adopt the narrow definition provided by scholars Gary Clyde Hufbauer, Jeffrey J. Schott, Kimberly Ann Elliott, and Barbara Oegg: "the deliberate, government inspired withdrawal, or threat of withdrawal, of customary trade or financial relations."[109] Though actions such as the expulsion of diplomats, for example, are considered sanctions in the broader usage of the term, I will not include such actions in the definition of sanctions for the purposes of this discussion.

A. PRIMARY SANCTIONS

Primary sanctions bar individuals and entities in the sanctioning state from conducting economic relations with individuals and entities in the sanctioned state.[110] These sanctions "apply to persons, transactions, and goods over which the sanctioning country can assert its jurisdiction."[111] When levied on behalf of one country, these actions are considered "unilateral" economic sanctions, and when states agree to participate in these actions jointly, the sanctions are considered "multilateral." Primary sanctions are generally voluntarily imposed by the sanctioning state,

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[109] GARY CLYDE HUFBAUER, ET AL., ECONOMIC SANCTIONS RECONSIDERED 3 (3d ed. 2009).

[110] *See* Daniel Meagher, *Caught in the Economic Crosshairs: Secondary Sanctions and the American Sanctions Regime*, 89 FORDHAM L. REV. 999, 1004 (2020).

[111] *Id.*

although the United Nations Security Council can impose mandatory sanctions that are binding on all UN Member States (though not all Security Council-imposed sanctions are mandatory).

For example, if the United States imposed primary sanctions on Banque Du Liban (the Lebanese Central Bank), American citizens, corporations, and other entities under American jurisdiction would be barred from engaging in financial transactions with the bank. But French citizens, corporations, and entities would be free to engage in economic activities with Banque Du Liban, since they do not fall under American jurisdiction. However, if France decided to impose sanctions on the bank in cooperation with the United States, these sanctions would be considered multilateral, and any individual, corporation, or entity within the jurisdiction of either France or the United States would be prohibited from establishing or continuing economic relations with Banque Du Liban.

Primary sanctions may be comprehensive or targeted. Comprehensive sanctions generally "prohibit transactions with a country's government and virtually all other transactions, including exports/imports, involving the sanctioned country."[112] Like primary sanctions, comprehensive sanctions can be either unilateral or multilateral, and they generally have resulted in worse humanitarian consequences than primary sanctions. In the 1990s, for example, the United Nations imposed comprehensive multilateral sanctions on Iraq, Yugoslavia, and Haiti. The morality and utility of these comprehensive sanctions—notably those imposed on Iraq—quickly became the subject of intense debate at the United Nations, as "their detrimental effect on the civilian population of the targeted states became evident by the mid-1990s."[113] According to political scientists John Mueller and Karl Mueller:

> No one knows with any precision how many Iraqi civilians have died as a result, but various agencies of the United Nations, which oversees the sanctions, have estimated that they have contributed to hundreds of thousands of deaths.[114]

High-ranking UN officials harshly criticized the negative humanitarian effect of the comprehensive sanctions. In 1997, UN Secretary General Kofi Annan appointed career diplomat Denis Halliday as Assistant United Nations Secretary-General and Humanitarian Coordinator for Iraq.

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[112] *Economic Sanctions and Restricted Parties*, COLUM. RSCH., https://research.columbia.edu/economic-sanctions-and-restricted-parties [https://perma.cc/R3BV-PYB9].

[113] BOGDANOVA, *supra* note 21, at 31.

[114] John Mueller & Karl Mueller, *Sanctions of Mass Destruction*, 78 FOREIGN AFFS. 43, 49 (1999).

One year later, Halliday resigned from his post in protest, stating that the comprehensive sanctions amounted to "genocide."[115] His successor, Hans von Sponeck, also resigned from his post in protest eighteen months after his appointment, citing the humanitarian consequences of the comprehensive sanctions. He later stated, "I have not in the past wanted to use the word genocide, but now it is unavoidable."[116] One day after von Sponeck's resignation, Jutta Purghart, the head of the World Food Programme in Iraq, resigned from her post for the same reason.[117]

In response to these humanitarian crises, global powers increasingly moved away from comprehensive sanctions and began embracing targeted (or "smart") sanctions. Like the Banque Du Liban example, targeted sanctions prohibit economic relations with specific individuals or entities within foreign states, rather than the entire states themselves. While most states (including the United States) have moved away from comprehensive sanctions in favor of targeted sanctions, the United States still effectively levies comprehensive sanctions on Cuba, Iran, and Syria.[118]

B. EXTRATERRITORIAL SANCTIONS

Scholar Iryna Bogdanova defines the imposition of extraterritorial sanctions, also known as secondary sanctions, as "economic restriction imposed by a sanctioning or sending state . . . that is intended to deter a third-party country or its citizens and companies . . . from transacting with a sanctions target."[119] When a state applies extraterritorial sanctions, the sanctioning state imposes obligations on third-party states, individuals, and entities to cut off economic relations with the sanctioned state, individual, or entity. If a third party (not under the jurisdiction of the sanctioning state) violates extraterritorial sanctions by engaging with a sanctioned

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[115] Mark Siegal, *Former UN Official Says Sanctions Against Iraq Amount to 'Genocide,'* CORNELL CHRON. (Sept. 30, 1999), https://news.cornell.edu/stories/1999/09/former-un-official-says-sanctions-against-iraq-amount-genocide [https://perma.cc/2G4D-QSN9].

[116] JOHN PILGER, THE NEW RULERS OF THE WORLD 62 (2003).

[117] Ewen MacAskill, *Second Official Quits UN Iraq Team*, THE GUARDIAN (Feb. 15, 2000, 8:44 PM), https://www.theguardian.com/world/2000/feb/16/iraq.unitednations [https://perma.cc/H9SD-WFWQ].

[118] *See OFAC SANCTIONED COUNTRIES*, PRINCETON UNIV. (Mar. 10, 2022) https://orpa.princeton.edu/export-controls/sanctioned-countries [https://perma.cc/CSB2-NA7E].

[119] BOGDANOVA, *supra* note 21, at 89.

entity, the third party could be subject to significant fines and criminal penalties, and it could become the target of sanctions itself.[120]

To return to an earlier example, if the United States applied extraterritorial sanctions on the Banque Du Liban, both American and foreign states, individuals, and entities would be prohibited from engaging in economic relations with the bank. If a French citizen, for instance, conducted economic relations with the Banque Du Liban, the United States could impose fines, sanctions, or even criminal penalties against that person.[121]

Extraterritorial sanctions, like primary sanctions, can be either comprehensive or targeted. The United States' Global Magnitsky Act grants the president the authority to impose sanctions on foreign individuals involved in grave human rights abuses abroad.[122] These sanctions are targeted and apply extraterritorially to third parties not under US jurisdiction. The Helms-Burton Act and Iran Sanctions Act, on the other hand, are examples of sanctions that are both (largely) comprehensive and extraterritorial.[123] These sanctions, for the most part, apply to third parties and bar economic relations with most sectors of the Iranian and Cuban states.[124]

C. PRESUMPTIVE LEGALITY

1. Primary Sanctions: Presumptively Lawful

Primary sanctions are generally understood to be presumptively legal, though this is not without dispute. Two members of the United Nations Security Council, China and Russia, have expressed "fierce opposition to unilateral economic sanctions"[125] and released a joint policy statement in 2016 opposing such measures:

> The People's Republic of China and the Russian Federation share the view that good faith implementation of generally recognized principles and rules of international law excludes the practice of double standards or imposition by some States of their will on other States, and consider that imposition of unilateral coercive measures not based on

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[120] Meagher, *supra* note 110, at 1004–06.

[121] BOGDANOVA, *supra* note 21, at 59, 89.

[122] *Id.* at 38–39.

[123] *See* Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 UNIV. PA. J. INT'L L. 905, 906–07 (2009).

[124] *Id.* at 928–29.

[125] BOGDANOVA, *supra* note 21, at 68.

> international law, also known as "unilateral sanctions," is an example of such practice.[126]

As scholars like Mergen Doraev have pointed out, however, both states "frequently rely" on coercive economic measures that fall squarely within the definition of unilateral economic sanctions.[127] Indeed, all great powers, including the United States, the European Union, Russia, and China, utilize economic sanctions as a tool of foreign policy.[128]

Idriss Jazairy, the former Special Rapporteur on unilateral coercive measures, similarly contends that there is an "emerging consensus" among states that primary sanctions—or unilateral coercive measures—are presumptively unlawful.[129] According to Jazairy, the United Nations Charter gives the security council the "exclusive power to adopt economic sanctions," and therefore any sanctions imposed "outside this framework are 'unilateral' and unlawful."[130] Furthermore, Jazairy references annual general assembly resolutions condemning unilateral coercive measures to conclude that the unlawful nature of economic sanctions is now the "dominant view of the international community."[131]

In response, scholar Alexandra Hofer studied these resolutions in order to determine if they "constitute an emerging prohibition of [unilateral coercive measures], as suggested by Special Rapporteur Idriss Jazairy."[132] The general assembly has passed twenty-one measures on "human rights and unilateral coercive measures" since 1996, and nineteen measures on "unilateral economic measures as a means of political and economic coercion against developing countries" since 1993.[133] Both resolutions condemn economic sanctions as violative of international law; the former resolutions focus on their deleterious effect on human rights, while the latter[134] emphasize sanctions' interference with the right to development.

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[126] Press Release, Ministry of Foreign Affs. of the People's Republic of China, The Declaration of the People's Republic of China and the Russian Federation on the Promotion of International Law (June 26, 2016).

[127] BOGDANOVA, *supra* note 21, at 5, 68–69.

[128] *ID.* at 37, 69.

[129] Idriss Jazairy, *Unilateral Economic Sanctions, International Law, and Human Rights*, 33 ETHICS & INT'L AFFS. 291, 292 (2019).

[130] *Id.* at 293.

[131] *Id.*

[132] Hofer, *supra* note 7, at 186.

[133] *Id.*

[134] G.A. Res. 2625 (XXV), at 2 (Feb. 4, 2016) ("[*U]rge*[] the international community to adopt urgent and effective measures to eliminate the use of unilateral coercive economic measures against developing countries that are not authorized by relevant organs of the United Nations or are

Both resolutions are generally supported by developing countries and opposed by wealthier countries. The European Union member states and the United States generally vote against the "human rights and unilateral coercive measures," while states in the European Union typically abstain from the "political and economic coercion" resolution; in recent years, only the United States and Israel have cast negative votes. Justifying its opposition, the United States has explained that the resolutions interfere with the "sovereign right of States to conduct their economic relations freely and to protect legitimate national interests."[135] In sum, around two-thirds of the general assembly regularly votes in favor of both resolutions, while one-third of the general assembly either votes against or abstains.[136]

General assembly resolutions can "provide evidence for determining the existence and content of a rule of customary international law,"[137] according to the International Law Commission, and can give "evidence of a rule or the emergence of an *opinio juris*," according to the International Court of Justice.[138] Still, Hofer argues that these resolutions have not established a prohibition on the use of economic coercive measures under customary international law (CIL). Even though these resolutions pass with a majority vote, their adoption is both quantitatively lacking and "insufficiently representative of a [wide] variety of States" as required for the emergence of CIL.[139] Most importantly, the International Court of Justice held in *Legality of the Threat or Use of Nuclear Weapons* that state practice is necessary for international norms to emerge. The fact that a large bloc of states routinely use economic sanctions weighs strongly against a finding of CIL.

According to Hofer, these resolutions "do not satisfy the required criteria for establishing the formation of an autonomous customary norm prohibiting economic coercion, or even an emerging prohibition."[140] The International Court of Justice's holding in *Nicaragua* provides further evidence that economic sanctions are presumptively lawful. The Nicaraguan

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inconsistent with the principles of international law as set forth in the Charter of the United Nations and that contravene the basic principles of the multilateral trading system."); G.A. Res. 48/168, at 1 (Feb. 22, 1994) (containing the removed provisions "by some developed countries," "economic coercive," and "as a means of forcibly imposing the will of one State on another").

[135] U.N. GAOR, 70th Sess., 52d mtg. para. 32, U.N. Doc. A/C.3/70/SR.52 (Jan. 15, 2016) (statement made by the US before the UNGA Third Committee).

[136] Hofer, *supra* note 7, at 188, 195.

[137] *Id.* at 193.

[138] *Id.* at 194.

[139] *Id.* at 195.

[140] *Id.* at 195.

government "complained [to the ICJ] of substantial measures of economic pressure."[141] In response, the court held that it was "unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention."[142] Therefore, under CIL, there is a general consensus that primary sanctions do not violate international law.[143]

2. Extraterritorial Sanctions: Presumptively Unlawful

Unlike primary sanctions, the regular use of extraterritorial sanctions is relatively new. In 1996, Congress passed the Helms-Burton Act, imposing extraterritorial sanctions on third parties who engage in economic relations with the Cuban state.[144] Though the United States had maintained an embargo against Cuba since 1962, Congress passed the Helms-Burton Act due to its "frustration with both the failure of past sanctions to destabilize Castro and the international community's unwillingness to cooperate with the US sanctions program."[145] The Helms-Burton Act "withholds foreign assistance, not simply from [Cuba], but from countries that provide economic assistance, debt relief, or trade benefits to Cuba, and withholds entry visas and allows suits for damages against foreign entities doing business with Cuba."[146] Later that year, the United States passed the Iran and Libya Sanctions Act (ILSA), levying extraterritorial sanctions on any individual—foreign or domestic—who "directly contributes to Iran's or Libya's ability to develop its petroleum

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[141] Silver, *supra* note 31, at 81.

[142] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 245 (June 27).

[143] *See* Antonios Tzanakopoulous, *The Right to Be Free from Economic Coercion*, 4 CAMBRIDGE J. INT'L & COMPAR. L. 616, 616, 630 (2015); Andreas F. Lowenfeld, *Agora: The Cuban Liberty and Democratic Solidarity (Libertad) Act*, 90 AM. J. INT'L L. 419, 429 (1996); Charlotte Beaucillon, *An Introduction to Unilateral and Extraterritorial Sanctions: Definitions, State of Practice and Contemporary Challenge*, *in* RESEARCH HANDBOOK ON UNILATERAL AND EXTRATERRITORIAL SANCTIONS 1, 7 (Charlotte Beaucillon ed., 2021) ("If they do not violate any existing international obligation, these unilateral sanctions will be considered as acts of retorsion, which are intrinsically lawful."); Cristian DeFrancia, *Enforcing the Nuclear Nonproliferation Regime: The Legality of Preventive Measures*, 45 VAND. J. TRANSNAT'L L. 705, 749–50 (2012) ("Unilateral economic sanctions fall within the purview of sovereign authority and thus do not generally require specific justification under international law. The authority to regulate economic conduct within a state's jurisdiction is incident to its sovereign powers and is not subject to review under international law.").

[144] Cuban Liberty and Democratic Solidarity Act of 1996 § 102, 22 U.S.C. § 6032.

[145] Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 58 (2001).

[146] *Id.* at 57.

resources."[147] Violators of the ILSA could be subject to import and export restrictions, prohibitions against dealings with American financial institutions, and termination of government procurement contracts, among other penalties.[148]

The Helms-Burton Act and ILSA are considered the first[149] major extraterritorial sanctions levied by the United States. Since 1996, the United States has increasingly relied on extraterritorial sanctions, making them a primary tool of American foreign policy.[150] The United States currently imposes sanctions that are both comprehensive and extraterritorial on Cuba, Iran, and Syria, and it maintains targeted extraterritorial sanctions on hundreds of individuals and corporations throughout the world.[151] States and scholars alike condemn extraterritorial sanctions as violative of international law (World Trade Institute scholar Iryna Bogdanva observes that "the literature abounds in claims that secondary sanctions are illegal").[152] Though still unsettled, there appears to be an emerging norm that extraterritorial sanctions are unlawful.

First, extraterritorial sanctions are an unlawful exercise of jurisdiction under international law. The preceding jurisdictional framework, the "prohibitive approach," allowed states to exercise jurisdiction freely over other states absent an express prohibition.[153] This approach is now obsolete, and today's jurisdictional framework is far narrower and more restrictive.[154] Under modern CIL, states may only exercise jurisdiction as expressly authorized by established principles of international law.[155] A state can exercise extraterritorial jurisdiction under customary international law in the following ways:

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147 Iran and Libya Sanctions Act of 1996 § 5, 50 U.S.C. § 1701 (amended 2016).

148 *See id.* § 6.

149 There are a handful of notable exceptions. Sarah Cleveland identifies the US embargo on the Soviet Pipeline following the repression of the Polish Solidarity Movement as extraterritorial in nature. These sanctions "bar[red] the sale of petroleum goods to the Soviets, including any goods sold by foreign entities that contained U.S. products or that were produced under licensing arrangements with U.S. companies. The European Community opposed the controls as violating international law." Cleveland, *supra* note 145, at 57 n.327. Scholar Jeffrey Meyer shows that these sanctions, though indeed extraterritorial, applied only to US subsidiaries and equipment using American parts. Meyer, *supra* note 123, at 927.

150 *See* Patrick C.R. Terry, *Enforcing U.S. Foreign Policy by Imposing Unilateral Secondary Sanctions: Is Might Right in Public International Law?*, 30 WASH. INT'L L. J. 1, 4, 10 (2020).

151 Meyer, *supra* note 123, at 912.

152 BOGDANOVA, *supra* note 21, at 90.

153 *See id.* at 86–87.

154 *See id.* at 86–87.

155 *See generally* Susan Emmenegger, *Extraterritorial Economic Sanctions and Their Foundation in International Law*, 33 ARIZ. J. INT'L & COMPAR. L. 631 (2016).

> States have jurisdiction over their own nationals, even if they are abroad; their jurisdiction extends to foreign nationals abroad if these nationals commit serious crimes against international law, if their conduct threatens the state's vital interests, or if it has direct, substantial, and foreseeable effects in the domestic territory.[156]

There is widespread recognition that the United States' use of extraterritorial sanctions does not fall into one of these categories and is therefore an unlawful exercise of jurisdiction. According to scholar Patrick Terry, the "United States' assertion of extraterritorial jurisdiction is not justified under any principle of jurisdiction[157] recognized in customary international law."[158] In fact, even "if the more generous grounds justifying extraterritorial jurisdiction were invoked," the United States' broad extraterritorial sanctions are "not justified."[159] Scholar J. Brett Busby agrees, stating that extraterritorial sanctions "go well beyond previous assertions of extraterritorial jurisdiction by the United States, [and] they have no firm international jurisdictional basis."[160] Emmenegger also argues that "US sanctions law show a troubling tendency to overstretch the traditional jurisdictional principles and even to assert new jurisdictional heads such as the correspondent account jurisdiction."[161] Following the Helms-Burton Act and ILSA, Andreas Lowenfeld, "one of the leading authorities in the field on international jurisdiction,"[162] argued:

> The exercise of jurisdiction by the United States for these purposes, to impose a secondary boycott on Cuba . . . is contrary to international law, because it seeks unreasonably to coerce conduct that takes place wholly outside of the state purporting to exercise its jurisdiction to prescribe.[163]

Furthermore, the exercise of extraterritorial sanctions violates the principle of nonintervention—the right of sovereign states to conduct their domestic affairs without external interference.[164] The principle of nonintervention is a fundamental tenet of CIL, recognized in at least three

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[156] *Id.* at 659.

[157] Terry, *supra* note 150, at 1. Patrick Terry analyzes extraterritorial sanctions through the framework of these jurisdictions and finds secondary sanctions to be unlawful.

[158] *Id.* at 6.

[159] *Id.* at 16.

[160] Meyer, *supra* note 123, at 934 n.92.

[161] Emmenegger, *supra* note 155, at 659.

[162] Lord Collins of Mapesbury, *In Memoriam: Andreas (Andy) Lowenfeld (1930–2014)*, 109 AM. J. INT'L L. 58, 58 (2015) (internal quotation marks omitted).

[163] Lowenfeld, *supra* note 143, at 430.

[164] Maziar Jamnejad & Michael Wood, *The Principle of Non-intervention*, 22 LEIDEN J. INT'L L. 345, 380–81 (2009).

authoritative United Nations declarations: the *Declaration on the Inadmissibility of Intervention and Interference*, the *Friendly Relations Declaration,* and the *Declaration on the Inadmissibility of Intervention*.[165] The International Court of Justice has similarly affirmed the principle of nonintervention in *Nicaragua*, holding:

> The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference . . . One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.[166]

Extraterritorial sanctions coerce states into modifying or severing their trade relations in violation of the fundamental sovereignty rights outlined by the International Court of Justice.[167] A state's right to formulate its own international policy and economic relations is undermined when a foreign power threatens fines, sanctions, and even criminal penalties[168] for violating the foreign state's domestic laws.[169] Primary sanctions alone do not classify as intervention.[170] However, "the exercise of jurisdiction must rest on a sufficient link with the State," and "in the absence of a legitimizing link, the exercise of jurisdiction with respect to actions taking place in the territory of other States or with respect to activities of foreign nationals would violate the principle of non-intervention in the internal affairs of other States."[171] Though primary sanctions cannot violate the principle of nonintervention, applying the *Nicaragua* holding to "the United States' practice of extraterritorial application of unilateral secondary sanctions reveals this [practice] to be unlawful intervention."[172]

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[165] G.A. Res. 36/103, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, at 79 (Dec. 9, 1981); G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, at 123 (Oct. 24, 1970); G.A. Res. 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, at 12 (Dec. 21, 1965).

[166] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 202, 205 (June 27).

[167] *See id.* ¶ 241.

[168] *See* Peter L. Fitzgerald, *Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy*, 31 VAND. J. TRANSNAT'L L. 1, 5 (1998).

[169] Terry, *supra* note 150, at 6.

[170] *See* Matthias Herdegen, PRINCIPLES OF INTERNATIONAL ECONOMIC LAW 80 (2d ed. 2016).

[171] *Id.* at 101.

[172] Terry, *supra* note 150, at 22.

Crucially, it is not only scholars who recognize that extraterritorial sanctions are unlawful; there seems to be a firm consensus among states—both in the Global North and Global South—that extraterritorial sanctions are unlawful. The passage of the Helms-Burton Act and the ILSA "spurred formal protests from the international community," which denounced the acts as violating international law.[173] The European Union passed a blocking statute in response to the Helms-Burton Act, prohibiting European corporations from severing relations with Cuba and allowing countersuits against the United States for economic harm caused by the act.[174] Canada and Mexico passed similar legislation.[175] The Organization of American States Judicial Committee passed a unanimous resolution stating that the "exercise of jurisdiction" by the United States "does not conform with international law."[176] The European Union lodged a formal complaint with the World Trade Organization[177] while Canada and Mexico initiated "dispute resolution" proceedings through NAFTA.[178]

Since 1992, the general assembly has voted annually on a resolution calling on the United States to lift the embargo.[179] The resolution explicitly mentions the extraterritorial nature of the United States' sanctions, expressing concern that "the extraterritorial effects of [the Helms-Burton Act] affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation."[180] Unlike the resolutions condemning unilateral coercive measures—where the United States and Europe consistently abstain or vote no—this resolution passes nearly unanimously. This annual resolution has passed every year since 1992, and it has passed with overwhelming support—including from the European Union—since 2000.[181] In 2021,

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[173] Cleveland, *supra* note 145, at 60.

[174] *Id.*

[175] *Id.*

[176] *Id.* at 60, 60 n.353.

[177] Fitzgerald, *supra* note 168, at 84.

[178] Cleveland, *supra* note 145, at 60.

[179] Edith M. Lederer, *UN Votes Overwhelmingly to Condemn US Embargo of Cuba*, AP (Nov. 3, 2022, 12:42 PM), https://apnews.com/article/middle-east-business-cuba-israel-europe-bf38ea2b62324cbd9ed3ce10905883d8 [https://perma.cc/JBB3-3SB4] (the committee did not vote in 2020 due to COVID).

[180] U.N. GAOR, 74th Sess., 28th plen. mtg., U.N. Doc. A/RES/74/7 (Nov. 12, 2019).

[181] *See UN General Assembly Resolution Tables*, U.N., https://research.un.org/en/docs/ga/quick/regular/73 [https://perma.cc/A6AK-EX55].

the vote was 184 in favor and 3 abstentions—only the United States and Israel voted against the resolution.[182]

At the latest general assembly meeting, the European Union referenced the extraterritorial nature of the Helms-Burton Act and explained its vote as follows:

> Beyond the damaging impact of the embargo on ordinary Cubans, unilateral US sanctions and other unilateral administrative and judicial measures are also negatively affecting EU economic interests. We have firmly and continuously opposed any such measures, due to their extraterritorial application and impact on the EU, in violation of commonly accepted rules of international trade. We cannot accept that unilaterally-imposed measures impede our economic and commercial relations with Cuba.[183]

Alongside the European Union, state representatives speaking on behalf of several blocs explained their votes through reference to the illegitimacy of the Helms-Burton Act's extraterritoriality and violation of sovereignty. These blocs include the Non-Aligned Movement, China and the G77, the Association of Southeast Asian Nations, the Caribbean Community, and the African Group.[184]

State parties have similarly criticized the unlawful extraterritorial reach of the United States' sanctions on Iran. Just as states passed blocking statutes after the Helm-Burton Act was passed, the EU passed similar legislation that bars European corporations from complying with American sanctions (though these statutes were ultimately unsuccessful).[185] The European Parliament's Committee on International Trade produced a study in 2020 addressing American extraterritorial sanctions. The study conducted an in-depth analysis of jurisdiction under CIL and found that the United States is unlawfully exercising its jurisdiction.[186] The study further concluded that extraterritorial sanctions "put into question the political independence and ultimately the sovereignty of the EU and its Member

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[182] Meetings Coverage, General Assembly, Adopting Annual Resolution, Delegates in General Assembly Urge Immediate Repeal of Embargo on Cuba, Especially amid Global Efforts to Combat COVID–19 Pandemic, GA/12341 (June 23, 2021).

[183] U.N. GAOR, 77th Sess., 28th plen. mtg. at 19–20, U.N. Doc. A/RES/77/PV.28 (Nov. 3, 2022).

[184] *See id.*

[185] One study found that "imports from Iran to the EU dropped 92.8% in 2019, while exports to Iran dropped nearly 50%" even after the blocking mechanisms took effect. Directorate-General for External Policies, Tobias Stoll et al., *Study: Extraterritorial Sanctions on Trade and Inv. and Eur. Responses*, at 31, EUR. PARL. (PE653.618) (Nov. 2020).

[186] *Id.* at 51.

States," and they "may amount to a violation of the prohibition of intervention under customary international law."[187]

a. The Oil Embargo

Moreover, when targeted with these sanctions, the United States, too, condemned extraterritoriality as contrary to international law. While the United States has insisted on the legality of extraterritorial sanctions, the oil crisis of 1973-74 led to a stark, though temporary, reversal of this perspective. Following the Arab armies' defeat at the hands of Israel in the Yom Kippur War in 1973, the Organization of Arab Petroleum Exporting Countries (OAPEC) imposed an oil embargo on Western states who supported Israel.[188] Scholars have classified this embargo as a paradigmatic example of extraterritorial sanctions, since OAPEC initiated an embargo on third-party states that had economic relations with Israel. The US government and American scholars not only conceptualized the OAPEC embargo as a violation of the principle of nonintervention, but they also argued that it implicated Article 2(4). After OAPEC imposed the embargo, "scholars started to vigorously argue that economic coercion is tantamount to the use of force prohibited under the UN Charter."[189]

In a widely cited article in the *American Journal of International Law*, scholars Jordan Paust and Albert Blaustein maintain that this extraterritorial application of an embargo (or the "Arab Oil Weapon") constituted an act of "economic aggression" prohibited by Article 2(4).[190] Paust and Blaustein criticize scholars who favor limiting the concept of force to encompass only armed attacks as "myopic and restrictive .".[191] Paust and Blaustein further argue that the resolutions passed in recent years represent an "authoritative expression of the General Assembly" that economic coercion can indeed violate Article 2(4).[192] Economic coercion, in their view, "can be of such significant intensity and impact that it is comparable to an armed attack upon another state."[193]

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[187] *Id.* at 9.

[188] *See* Frank A. Verrastro & Guy Caruso, *The Arab Oil Embargo–40 Years Later*, CTR. FOR STRATEGIC & INT'L STUD. (Oct. 16, 2013), https://www.csis.org/analysis/arab-oil-embargo-40-years-later [https://perma.cc/3HDV-HQJY].

[189] BOGDANOVA, *supra* note 21, at 72.

[190] Jordan J. Paust & Albert P. Blaustein, *The Arab Oil Weapon–A Threat to International Peace*, 68 AM. J. INT'L L. 410, 416 (1974).

[191] *Id.* at 416.

[192] *Id.* at 419.

[193] *Id.* at 416.

Scholar Paul Stephen Dempsey agreed with Paust and Blaustein's conclusions but clarified that restrictions on trade are permitted only "so long as the stakes remain commercial."[194] Dempsey asserted that "it is only when a nation undertakes to utilize its economic power 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations' that Article 2(4) is violated."[195] While not contending that the embargo implicated Article 2(4), scholar Lowenfeld argued that the Arab Oil Embargo was, like the Helms-Burton Act, "contrary to international law" due to its extraterritorial application.[196]

This abrupt shift in the conception of extraterritorial economic coercion was not limited to a handful of unorthodox scholars, but rather represented a fleeting—but significant—turn among international legal experts. Arguing that the Arab Oil Embargo constituted an unlawful use of force under Article 2(4), one scholar remarked that he was "pleased to find recognition of several prohibitions of certain forms of economic coercion by nearly all of the contributors to a recent Symposium to the Virginia Journal [of International Law]."[197] Scholar Hartmut Brosche wrote in 1974—in the immediate wake of the embargo—that "the Western view still confines Article 2(4) to armed force, excluding types of non-military coercion. But current trends are clearly on the side of those who opt for a broader interpretation."[198]

Though not expressing this position with reference to Article 2(4), several officials in the Nixon Administration contemplated the use of military force in response to the embargo. In a memo to the Shah of Iran, Secretary of State Henry Kissinger wrote that "if there were a prolonged embargo by oil exporting countries, constituting a grave act of economic warfare," he could "not rule out military action."[199] Defense Secretary

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[194] Paul Stephen Dempsey, *Economic Aggression & Self-Defense in International Law: The Arab Oil Weapon and Alternative American Responses Thereto*, 9 CASE W. RSRV. J. INT'L L. 253, 270 (1977).

[195] *Id.*

[196] *See* Lowenfeld, *supra* note 143, at 430.

[197] Editorial Comment, *International Law and Economic Coercion: "Force," the Oil Weapon and Effects Upon Prices*, 3 YALE STUD. WORLD PUB. ORD. 213, 217–18 (1976).

[198] Hartmut Brosche, *The Arab Oil Embargo and United States Pressure Against Chile: Economic and Political Coercion and the Charter of the United Nations*, 7 CASE W. RSRV. J. INT'L L. 3, 30 (1974).

[199] Henry A. Kissinger, Telegram from the Department of State to the Embassy in Jordan (Jan. 7, 1957), *in* 27 FOREIGN RELATIONS OF THE UNITED STATES, 1969–1976, IRAN; IRAQ, 1973–1976, 289, 289–90 (Monica Belmonte & Edward C. Keefer eds., 2012).

James Schlesinger similarly told the British Ambassador that "it was no longer obvious to him that the US could not use force."[200]

Today, as described in Part II, the Global South generally considers acts of economic coercion to be presumptively unlawful, while both the Global South and the European Union consider the extraterritorial sanctions to be presumptively unlawful. Therefore, we can conclude that a general norm has emerged under international law that extraterritorial sanctions are presumptively unlawful.

III. APPLICATION

It is premature to argue that economic coercion could be considered a use of force under current Article 2(4) scholarship and state practice. However, in light of the emergent effects-based framework and presumptive illegality of extraterritorial sanctions, a narrower claim could be made: sanctions that are simultaneously comprehensive *and* extraterritorial—like the Helms-Burton Act or current US sanctions on Iran—could qualify as a use of force under Article 2(4). Since comprehensive, extraterritorial sanctions can have the same scale and effects as traditional uses of force, these effects—combined with the presumptive illegality of extraterritorial sanctions—should warrant reconsideration of economic coercion under the emergent interpretation of Article 2(4). For the purposes of this analysis, I will refer to economic coercive measures that are both comprehensive and extraterritorial as "CE sanctions."

To apply the scale-and-effects framework, it is helpful to analogize CE sanctions to blockades. A blockade is traditionally defined as a:

> belligerent operation to prevent vessels and/or aircraft of all nations, enemy and neutral, from entering or exiting specified ports, airports, or coastal areas belonging to, occupied by, or under the control of an enemy nation. The purpose of establishing a blockade is to deny the enemy the use of enemy and neutral vessels or aircraft to transport personnel and goods to or from enemy territory.[201]

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[200] Owen Bowcott, *UK Feared Americans Would Invade Gulf during 1973 Oil Crisis*, THE GUARDIAN (Dec. 31, 2003, 4:28 PM), https://www.theguardian.com/politics/2004/jan/01/uk.past3 [https://perma.cc/4F4J-HRGX].

[201] Wolff Heintschel von Heinegg, *Blockade*, *in* MAX PLANCK ENCYCLOPEDIA PUB. INT'L L. (Oct. 2015).

In the post-UN-Charter system, blockades are considered an act of war in violation of Article 2(4).[202] States may only impose blockades when other uses of armed force would be lawful; namely, when necessary to mount immediate self-defense or by authorization of the security council.[203] Prior to the adoption of the United Nations Charter, however, states engaged in both "belligerent blockades"[204]—considered an act of war—and "pacific blockades"[205]—a coercive peacetime economic measure.[206] These now-unlawful pacific blockades bear striking resemblance to contemporary CE sanctions.

In the pre-charter period, Western states "sought to institutionalise pacific blockades as a means of diplomatic coercion" short of war.[207] Notably, the League of Nations conceptualized the pacific blockade as a kind of comprehensive, extraterritorial sanction.[208] The pacific blockade was considered a tool providing "immediate, absolute and universal economic sanctions, the so-called economic weapon . . . conceived not as an instrument of war but as a means of peaceful pressure, and it was hailed as a great innovation and the most formidable weapon in the League's arsenal."[209] The league employed pacific blockades to economically coerce rogue states without needing to resort to war.[210] A League of Nations study from 1927 noted that "the old system of pacific blockades would perhaps be one of the most effective sanctions which the community of nations could institute under Article 16 of the Covenant, against a covenant-breaking State."[211]

As Nicholas Mulder details in *The Economic Weapon*, the Allies' wartime blockades, which led to grave food and medicine shortages in the

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[202] BeomChul Shin, An Inquiry on the Interpretation of Article 2(4) of the UN Charter and Its Implications for the *Jus Ad Bellum*, at 183 (May, 2007) (S.J.D. Dissertation, Georgetown University Law Center) (available at: https://repository.library.georgetown.edu/bitstream/handle/10822/1060419/shin_beomchul_sjd.pdf?sequence=1&isAllowed=y [https://perma.cc/M4L7-BTEL]).

[203] *Id.* at 170–71.

[204] *See* George P. Politakis, *Un-Mandated Naval Operations and the Notion of Pacific Blockade: Comments on Some Recent Developments*, 6 AFR. J. INT'L & COMPR. L. 173, 174 (1994).

[205] Shin, *supra* note 202, at 185.

[206] *See id.* at 185.

[207] Politakis, *supra* note 204, at 200.

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.*

Axis states, were "the chief man-made cause of civilian death."[212] Following the First World War, the use of belligerent blockades was "repurposed and refined for use outside a formally declared state of war."[213] In the pre-charter period, the League of Nations implemented a series of pacific blockades on Germany, Greece, and Yugoslavia, leading to significant civilian harm—all while conceptualizing this tool as a peaceful economic coercive measure short of war.[214] Both financial blockades—cutting off the targeted state from international financial markets—and pacific blockades became primary tools of peacetime economic coercion; Mulder traces the rise of modern economic sanctions directly to the legacy of these blockades.[215]

In purpose, function, and scale and effects, modern CE sanctions resemble pacific blockades more closely than they do traditional primary sanctions. A core shared feature between pacific blockades and CE sanctions is their interference in economic relations of third parties with the target country. While it is true that the methods of interference are different (the threat of physical force as opposed to economic and criminal penalties), the ultimate effect is similar: neutral states are coerced into severing relations with the targeted state. Furthermore, the means of coercion and effects on the targeted state are also comparable; states imposing pacific blockades or CE sanctions inhibit the target state's ability to import basic goods, depriving the state's population of necessary resources. States implemented pacific blockades pre-charter and implement CE sanctions today for the same purpose—as a coercive, peaceful economic measure.

The National Research Council's 2009 study on cyberwar and international law further illustrates the resemblance between blockades and CE sanctions. The council, like the experts at *Tallinn*, adopted an effects-based approach, stating that the use of force under Article 2(4) "should be judged primarily by the effects of an action rather than its modality."[216] For the authors, this raised an issue under an effects-based framework: blockades constitute a use of force under Article 2(4) while economic sanctions do not, even though "economic sanctions and blockades could

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[212] Nick Serpe, *The History of Sanctions*, DISSENT (Mar. 4, 2022), https://www.dissentmagazine.org/online_articles/t he-history-of-sanctions [https://perma.cc/8FP5-4WYC]. *See* NICHOLAS MULDER, THE ECONOMIC WEAPON: THE RISE OF SANCTIONS AS A TOOL OF MODERN WAR 5 (2022).

[213] MULDER, *supra* note 212, at 3.

[214] *Id.*

[215] *Id.*

[216] NAT'L RSCH. COUNCIL, *supra* note 84, at 3.

easily result in similar outcomes."[217] The authors solved this issue by pointing to two major distinctions:

> First, sanctions are, by definition, a refusal of participating nations to trade with the targeted party, either unilaterally (by virtue of a national choice) or collectively (by virtue of agreement to adhere to UN mandates regarding sanctions). That is, sanctions involve refraining from engaging in a trading relationship that is not obligatory. By contrast, blockades interfere with trade involving any and all parties, willing and unwilling . . . . Second, effective economic sanctions generally require coordinated multilateral actions, whereas blockades can be conducted unilaterally.[218]

While these distinctions certainly hold for primary sanctions, they do not similarly apply to extraterritorial sanctions. CE sanctions, like blockades, "interfere with trade involving any and all parties, willing and unwilling."[219] Moreover, unlike primary sanctions, CE sanctions are virtually always conducted unilaterally.[220] By conceding that sanctions and blockades could "easily result in similar outcomes," and by implicitly defining extraterritorial sanctions as more analogous to blockades than to primary sanctions, the authors of the study made a strong argument that there is seemingly no way to distinguish between blockades and CE sanctions when using an effects-based approach.[221]

Indeed, the scale and effects of the two coercive mechanisms are comparable—both pacific blockades and CE sanctions have directly collapsed the economies of the targeted state,[222] generated food shortages and threatened famine,[223] led to severe scarcities of medicine,[224] and caused disproportionate suffering and death of civilian populations.[225] In this

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[217] *Id.* at 257.

[218] *Id.* at 257–58.

[219] *See id.*

[220] *See id.* at 258.

[221] *Id.* at 258–59.

[222] Abigail Ng, *These 6 Charts Show How Sanctions Are Crushing Iran's Economy*, CNBC (Mar. 22, 2021, 8:49 PM), https://www.cnbc.com/2021/03/23/these-6-charts-show-how-sanctions-are-crushing-irans-economy.html [https://perma.cc/2FEC-E28J].

[223] Haroutione Selimian et al., *Conflict, Sanctions and the Struggles of Syrians for Food Security in the Shadow of the UN Food Systems Summit 2021*, 7 BMJ GLOB. HEALTH 1, 2 (2022); *Syria Faces Severe Bread Shortages as US Sanctions Worsen Economy*, AL JAZEERA (July 10, 2020), https://www.aljazeera.com/economy/2020/7/10/syria-faces-severe-bread-shortages-as-us-sanctions-worsen-economy [https://perma.cc/PH2L-QG2D].

[224] Peter Ford, *Sanctions on Syria*, 8 LANCET GLOB. HEALTH e1370 (2020).

[225] Hasan Ismaik, *U.S. Sanctions Are Killing Innocent Syrians*, FOREIGN POL'Y (Apr. 1, 2021, 7:59 AM), https://foreignpolicy.com/2021/04/01/caesar-sanctions-killing-innocent-syrians/ [https://perma.cc/SA93-BG53]; *"Maximum Pressure" US Economic Sanctions Harm Iranians' Right to Health*, HUM. RTS. WATCH (Oct. 29, 2019),

sense, CE sanctions and blockades can neither be distinguished by their modality of coercion (except for the instrument used) nor their scale and effects.

After states adopted the UN Charter, pacific blockades became anachronistic. In the post-charter world, a peacetime blockade is a contradiction, "since the establishment of a 'pacific blockade' involves the use of military force by one State against another State," namely, through the use of naval warships.[226] Under the traditional approach to Article 2(4), warships are military instruments, and thus their hostile use against a foreign state is definitionally a use of force. However, under the emergent effects-based approach, a use of force is determined by the scale and effects of a state action—the instrument used is not relevant.

Yet, today, blockades are considered an unlawful use of force and an armed attack while CE sanctions do not implicate Article 2(4), much less Article 51, at all. Under an instrument-based framework, this understanding is coherent; blockades are enforced through warships while CE sanctions are enforced through coercive economic practice. But under an effects-based framework, this distinction does not make logical sense. The scale, effects, and even type of harm caused by blockades and CE are functionally indistinguishable, and the modality of operations—interference with neutral third parties to deprive the target of resources or access—is remarkably similar as well.

Furthermore, the scale and effects of CE sanctions not only resemble pacific blockades, but are also comparable to certain cyberattacks, which scholars now qualify as a use of force. Scholars argue that cyberattacks could qualify as an unlawful use of force under an effects-based framework when they result in (1) an economic crash in the targeted state, (2) interference with vital infrastructure, or (3) death or significant property destruction. The case of Iran, for example, demonstrates how the imposition of CE sanctions can directly lead to all three of these effects.

Though the United States imposed CE sanctions on Iran in 2011, much of Europe also followed suit; therefore, isolating the effects of American sanctions alone is difficult.[227] However, when the Trump administration pulled out of the Joint Comprehensive Plan of Action (JCPOA) and reimposed the Obama-era CE sanctions, the European

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https://www.hrw.org/report/2019/10/29/maximum-pressure/us-economic-sanctions-harm-iranians-right-health [https://perma.cc/N7M6-V3PF].

[226] Wolff Heintschel von Heinegg, *Naval Blockade*, 75 INT'L L. STUD. 203, 204 (2000).

[227] Meagher, *supra* note 110, at 1013.

Union did not reimpose its sanctions.[228] For this reason, human rights organizations and scholars have attributed Iran's 2018 economic collapse to American secondary sanctions.[229] According to a Congressional Research Service report, the reimposition of secondary sanctions "caused Iran's economy to fall into recession as its sales of oil declined and Iran was again largely cut off from the international financial system."[230] Though Iran's economy steadily grew following the signing of the JCPOA, the World Bank reported that, due to the reimposition of CE sanctions, Iran's GDP declined by 4.9 percent in 2018 and 8.7 percent in 2019 for a two-year total decline of 13.6 percent, the sharpest drop in the world[231] (a decline of 10 percent in GDP is typically considered a depression)[232]. Similarly, the International Monetary Fund reported that Iran's inflation skyrocketed from 9 percent to 35 percent following the reimposition of sanctions,[233] and poverty rates in Iran have consequently drastically increased. This economic collapse is comparable—or even more severe—than the economic impact of the cyberattack on Estonia described in Part I.

As human rights reports, United Nations communications, and studies in medical journals have shown, the reimposition of CE sanctions significantly disrupted Iran's vital infrastructure. According to Human Rights Watch, Iran depends on imports for at least 240 of the 433 medicines listed by the World Health Organization as "essential medicines."[234] The United States' CE sanctions have either totally blocked or significantly impeded Iran's ability to import these medications. For example, CE sanctions have generated a scarcity of life-saving pharmaceuticals for common ailments such as cancer, multiple sclerosis, HIV/AIDS, epilepsy, hypertension, and diabetes.[235] Furthermore, Iran depends on imports for over 70 percent of crucial medical technologies.[236] As such, CE sanctions

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[228] *Id.* at 1015.

[229] KENNETH KATZMAN, CONG. RSCH. SERV., RS20871, IRAN SANCTIONS (2020).

[230] *Id.* at pmbl.

[231] *Islamic Republic of Iran*, THE WORLD BANK, https://www.worldbank.org/en/country/iran [https://perma.cc/ER84-DET2].

[232] Wayne Duggan, *Economic Depression Definition*, U.S. NEWS & WORLD REP. (Apr. 7, 2022), https://money.usnews.com/investing/term/economic-depression [https://perma.cc/5V35-NF8H].

[233] *Six Charts That Show How Hard US Sanctions Have Hit Iran*, BBC NEWS (Dec. 9, 2019), https://www.bbc.com/news/world-middle-east-48119109 [https://perma.cc/J2AW-GRE4].

[234] *"Maximum Pressure" US Economic Sanctions Harm Iranians' Right to Health*, *supra* note 225.

[235] *See* Hossein Akbarialiabad & Asghar Rastegar, *How Sanctions Have Impacted Iranian Healthcare Sector: A Brief Review*, 24 ARCHIVES IRAN MED. 58, 58 (2021).

[236] *"Maximum Pressure" US Economic Sanctions Harm Iranians' Right to Health*, *supra* note 225.

have also deprived Iran of access to MRIs, x-ray machines, and even basic instruments like hospital beds.[237]

Furthermore, CE sanctions on Iran have also directly resulted in "death or significant property destruction" on a scale certainly comparable to the effects of a hypothetical cyberattack considered by scholars to violate Article 2(4). Putting aside the hard-to-quantify deaths resulting from Iran's significant increase in poverty, experts have estimated that the reimposition of American secondary sanctions have caused tens of thousands of Iranian deaths.[238] For example, US sanctions force Iranians to prolong the use of older vehicles that burn fuel less efficiently, while making it impossible for Iran to obtain equipment and technology to reduce vehicle emissions. This sanctions-induced environmental degradation (combined with Iran's crippling healthcare infrastructure) contributes to forty thousand premature deaths annually across the country.[239] Furthermore, the effects of American sanctions on Iran's healthcare infrastructure during the start of the COVID-19 pandemic resulted in an excess death rate of between thirteen thousand and twenty-five thousand people in the first half of 2020 alone.[240] Sanctions are also estimated to have contributed to the deaths of sixteen thousand people from the H1N1 virus in fall 2019.[241]

The comprehensive and extraterritorial sanctions imposed on Cuba and Syria have resulted in economic collapse,[242] destruction of

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[237] *Id.*

[238] *Iran: US Sanctions Violating Human Rights of All Living There, Say UN Experts*, U.N. (Dec. 20, 2022), https://news.un.org/en/story/2022/12/1131887 [https://perma.cc/RKD9-Y4FR]; U.N. Special Rapporteurs, Mandates of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights (Sept. 27, 2022), https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=2757 1 [https://perma.cc/8LAN-X947].

[239] *Iran: US sanctions violating human rights of all living there, say UN experts*, *supra* note 238; Mandates of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, *supra* note 238.

[240] Djavad Salehi Isfahani, *Iran: The Double Jeopardy of Sanctions and COVID–19*, BROOKINGS (Sept. 23, 2020), https://www.brookings.edu/opinions/iran-the-double-jeopardy-of-sanctions-and-covid-19/ [https://perma.cc/6N6U-MTVC].

[241] Richard Hanania, *Ineffective, Immoral, Politically Convenient: America's Overreliance on Economic Sanctions and What to Do About It*, CATO INST. (Feb. 18, 2020), https://www.cato.org/policy-analysis/ineffective-immoral-politically-convenient-americas-overreliance-economic-sanctions#humanitarian-costs-sanctions [https://perma.cc/A7Z3-TE8C].

[242] Press Release, U.N. Human Rights Office of the High Commissioner, UN Expert Calls for Lifting of Long-Lasting Unilateral Sanctions "Suffocating" Syrian People, U.N. Press Release OHCHR/104160 (Nov. 10, 2022); Anchal Vohra, *The Pointlessness of America's Syria Sanctions*, FOREIGN POL'Y (Jan. 11, 2022, 4:54 AM), https://foreignpolicy.com/2022/01/11/syria-sanctions-america-biden-europe-economy/ [https://perma.cc/KVE9-EZCQ]; Robert Kennedy, *'El Bloqueo':*

infrastructure,[243] and staggering civilian death tolls.[244] The scale and effects of CE sanctions is therefore comparable to traditional uses of force, such as a blockade, as well as the cyberattacks that violate Article 2(4). Crucially, despite the claimed legality by the United States, it is now generally agreed by the international community that extraterritorial sanctions are presumptively unlawful. This presumptive unlawfulness, as described in the previous section, weighs in favor of classifying CE sanctions a use of force when the scale-and-effects test is met. Since CE sanctions can meet the scale-and-effects test and are presumptively unlawful, it is plausible to argue that sanctions that are both comprehensive and extraterritorial could implicate Article 2(4).

IV. CONCLUSION

The United Nations Charter is a "living instrument" that evolves over time to meet the changing circumstances of the world.[245] The modern understanding and interpretation of the charter is radically different than it was in 1945.[246] Article 2(4) is currently evolving in light of the increasing threat of cyberattacks in the twenty-first century, and this emergent interpretation is gaining prominence among states and scholars alike. But this new interpretation should provide an opportunity to reevaluate not only the scope of Article 2(4) with regard to the threat of cyberattacks, but also certain forms of economic coercion.

A broader interpretation of Article 2(4) to include some forms of economic coercion—as advocated for by the Global South since the charter's adoption—is sensible under an effects-based framework. Indeed, in

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55 Years of Obstructing the Cuban People, ALJAZEERA (June 17, 2015), https://www.aljazeera.com/features/2015/6/17/el-bloqueo-55-years-of-obstructing-the-cuban-people [https://perma.cc/GQ7V-85PR].

[243] *Statement by WHO Regional Director on Health Needs in Syria*, WORLD HEALTH ORG. (Sept. 21, 2022), https://www.emro.who.int/media/news/regional-directors-statement-on-visit-to-syria.html [https://perma.cc/H45U-JZRH]; Ford, *supra* note 224; Richard Garfield & Sarah Santana, *The Impact of the Economic Crisis and the US Embargo on Health in Cuba*, 87 AM. J. PUB. HEALTH 15, 15 (1997).

[244] Jack Nelson, *Embargo of Cuba Exacts a 'Tragic Human Toll,' Health Report Charges*, L.A. TIMES (Mar. 3, 1997, 12:00 AM), https://www.latimes.com/archives/la-xpm-1997-03-03-mn-34339-story.html [https://perma.cc/92NT-BYLV]. *See* Paul K. Drain & Michele Barry, *Fifty Years of U.S. Embargo: Cuba's Health Outcomes and Lessons*, 328 SCI. MAG. 572 (2010); Ismaik, *supra* note 225.

[245] Ian Johnstone, *UN Treaty-Making in Practice and in Theory: The Charter and Its Evolution*, *in* THE OXFORD HANDBOOK OF UNITED NATIONS TREATIES 23, 27 (Simon Chesterman et al. eds., 2019).

[246] *Id.* at 31.

an article for *Just Security*, scholar Claus Kress noted that the evolving doctrine of force in relation to cyberattacks could have significant implications for how we understand the scope of Article 2(4). According to Kress:

> [Adopting an effects-based approach] would mean shaking up a delicate limit to the prohibition of the use of force that has been consistently maintained since 1945 – especially by western States against the opposing demands of developing countries: the exclusion of economic coercion from the prohibition of the use of force. On the horizon of the current discussion, the question has therefore arisen as to whether new vulnerabilities, especially in cyberspace, may lead to change in this long-known basic political pattern in the discussion about the prohibition of the use of force.[247]

Economic coercion is virtually unregulated by any legal framework, despite the fact that certain sanctions result in disastrous humanitarian consequences that mirror the effects of traditional uses of force. This is not to say that every act of economic coercion can—or should—implicate Article 2(4). Rather, it is worth considering whether the acts of economic coercion that result in war-like consequences should be regulated as a use of force.

States in the Global South have long favored this position. And when the United States was the target of sanctions—namely, the Arab Oil Embargo—American scholars also temporarily adopted this position.[248] This fleeting moment in American charter-interpretational history should not be minimized as a relic of a bygone era, but rather should encourage a greater consideration of the Global South's Article 2(4) interpretations.

Furthermore, the emergence of the effects-based interpretation has coincided with the recognition among states and scholars—both in the Global North and Global South—that extraterritorial sanctions are presumptively unlawful, which weighs in favor of implicating Article 2(4) when the scale and effects are comparable to armed force. Since extraterritorial sanctions are presumptively unlawful, and comprehensively-applied extraterritorial sanctions can have the same scale and effects as both cyberattacks—now recognized as implicating Article 2(4)—and pacific blockades—recognized as implicating Article 2(4) since the adoption of the UN Charter—there is no reason to exclude these economic measures

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[247] Claus Kress, *On the Principle of Non-Use of Force in Current International Law*, JUST SEC. (Sept. 30, 2019), https://www.justsecurity.org/66372/on-the-principle-of-non-use-of-force-in-current-international-law/ [https://perma.cc/9S6P-WL4Q].

[248] *See generally* BOGDANOVA, *supra* note 21.

from a modern use of force analysis. The emergence of the effects-based framework gives us an opportunity to rethink our understanding of force more broadly and take the grievances of the Global South more seriously.