

# ALL IS FAIR IN LAW AND WARFARE IN THE UKRAINIAN CRISIS: A LOOK AT THE GROWING INCREASE OF ECONOMIC SANCTIONS AS A WEAPON OF WAR AND THE EFFECTS ON THE INTERNATIONAL COMMUNITY

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## I. INTRODUCTION

On March 1, 2014, Russia's parliament approved the use of military force in Ukraine to protect "Russian interests."<sup>1</sup> Soon thereafter, Russia annexed the entire Crimean region from Ukraine and absorbed it into the Russian Federation.<sup>2</sup> In response, the United States and Europe have steadfastly refused any type of military intervention,<sup>3</sup> and instead have relied purely upon legal measures, or "lawfare," in an attempt to curtail Russia's actions.<sup>4</sup> Specifically, the United States has responded with numerous economic sanctions against both Russian nationals and Russian businesses, including Russian government entities.<sup>5</sup>

Economic sanctions and lawfare have undeniably been on the rise for the past few decades.<sup>6</sup> The use of sanctions has grown in prominence so much that it has become the United States' weapon of choice for implementing foreign policy objectives.<sup>7</sup> The purpose behind using these

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1. *Ukraine Crisis: Timeline*, BBC NEWS (Nov. 13, 2014), <http://www.bbc.com/news/world-middle-east-26248275>.

2. *Id.*

3. *See generally* Edward T. Hayes, *International Law*, 62 LA. B.J. 142 (2014), for a discussion on the numerous sanctions that have been taken against Russia by both the United States and Europe when no military action has occurred.

4. *See id.*

5. *See id.*; *see also infra* Parts II.2, II.3 and accompanying texts, for a discussion on specific sanctions that have been implemented against Russia by the United States during this crisis in Ukraine.

6. *See* Richard N. Haass, *Sanctioning Madness*, FOREIGN AFFAIRS (Nov. 1, 1997), <https://www.foreignaffairs.com/articles/1997-11-01/sanctioning-madness>.

7. *See id.*

alternatives is to prevent outright hostilities; however, it often has unintended consequences.

While Economic sanctions have some positives, this Comment will show and explain the frequent consequences that occur to the international community due to their use, and will lead to the conclusion that sanctions should not be the United States' go to choice to implement foreign policy. Section II of this Comment will provide background and a general overview of both lawfare and economic sanctions, and how they have reached their current level of usage. Furthermore, to better fully grasp this topic this section will use the crisis in Ukraine as a real world example of how lawfare and economic sanctions are implemented. Section III will explain that economic sanctions, while traditionally viewed differently, are indeed a form of legal warfare. Section IV will discuss the actual consequences that occur from the use of economic sanctions and lawfare again, using the crisis in Ukraine as a case study. Section V will briefly examine alternatives and changes that should be made to the process in which economic sanctions and lawfare are considered for use.

Finally, while this Comment will focus on Ukraine and Russia as a real world example, the reality is that both the United States and the rest of the world use lawfare and economic sanctions on a daily basis. Therefore, the Ukraine example is merely an attempt to make a complicated issue more comprehensible, and not meant as an all-encompassing example or a minority example.

## II. BACKGROUND

This section will lay the out the foundation of both lawfare and economic sanctions. This foundation is needed to fully grasp the analysis that will follow. Specifically, to grasp the real world effects that occur as a result of the implementation of lawfare and economic sanctions. Also, the process through which lawfare and economic sanctions are implemented is important to understand, as the process has its own negative effects.

### A. Lawfare's History, Legal Foundation, and Implementation

Lawfare, in the general sense, is defined as the use of law as a substitute for direct military action.<sup>8</sup> The term "lawfare" may be a recent creation, but the idea that it encompasses is by no means new.<sup>9</sup>

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8. Charles J. Dunlap, *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146, 146 (2008).

9. See Susan W. Tiefenbrun, *Semiotic Definition of "Lawfare,"* 43 CASE W. RES. J. INT'L L. 29 (2011), for an explanation of the history of law in warfare from ancient history to modern times.

Traditionally, the blend of law and warfare was a means to limit and control warfare; however, these ideas were more cultural in nature and informal.<sup>10</sup>

The symbiotic relationship between law and warfare continued into the nineteenth and twentieth centuries, where many countries came together to formally establish the rules of warfare.<sup>11</sup> This growth in international involvement arose as a direct result of the increase in worldwide globalization, which required a larger legal framework to ensure that the world continued to function.<sup>12</sup> Precisely, the Hague Conventions of 1899<sup>13</sup> and 1907<sup>14</sup> were the first to establish the official international laws on warfare. The tradition continued after the horrors that occurred during World War II with the Geneva Conventions that govern the actions of sovereign nations at war.<sup>15</sup> However, this mixture of law and warfare has increasingly come, in the modern era, to the point where it is hard to tell the difference between the two.

In the twenty-first century, law and warfare have indeed become one in the same and have combined to form the term “lawfare,” which has now grown to be defined as any use of law as a weapon to achieve a military objective.<sup>16</sup> It has also been described as “the [use] of the law and legal systems for strategic political or military ends.”<sup>17</sup> This attempt to achieve a military objective is often sought through and based in the international law governing the conflicts and wars between countries,<sup>18</sup> specifically those

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10. *Id.* at 49. For example, in ancient Greece they observed rules of battle prohibiting executions and attacks on noncombatants, but these were not world-wide formal systems that had been established. *Id.*
  11. *Id.* at 50–51 (discussing that following and preceding both World War I and World War II, many international nations gathered to formally discuss and codify laws that constrain and regulate warfare, as traditionally the laws had been informal in nature).
  12. Dunlap, *supra* note 8, at 146–47.
  13. *See generally* Convention with Respect to Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803; *see also* Laws of War: Laws and Customs of War on Land (Hague II), July 29, 1899, 32 Stat. 1803, THE AVALON PROJECT, [http://avalon.law.yale.edu/subject\\_menus/lawwar.asp](http://avalon.law.yale.edu/subject_menus/lawwar.asp).
  14. *See generally* Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.
  15. Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts* 2-3 (Carr Ctr. For Human Rights, John F. Kennedy Sch. Of Gov't, Harvard Univ., Working Paper, 2001), *available at* <http://people.duke.edu/~pfeaver/dunlap.pdf>; *see also* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 2.
  16. Dunlap, *supra* note 8; *see also* Wouter G. Werner, *The Curious Career of Lawfare*, 43 CASE W. RES. J. INT'L L. 61, 62 (2011).
  17. *What is Lawfare?*, LAWFARE PROJECT, <http://thelawfareproject.org/lawfare/what-is-lawfare-1/> (last visited Feb. 25, 2015).
  18. Tawia Ansach, *Lawfare: A Rhetorical Analysis*, 43 CASE W. RES. J. INT'L L. 87, 92–96 (2011) (discussing that generally the use of law in warfare centers around international humanitarian law especially those that govern conflicts, combatants, etc.).

mentioned above. Also, often these attacks will come under the guise of some legitimate legal measure.<sup>19</sup>

As an example consider that United States' enemies are well aware "that our society so respects the rule of law that it demands compliance with it [so our enemies] carefully attack our military plans as illegal and immoral and our execution of those plans as contrary to the law of war."<sup>20</sup> Most often these attacks come under the pretense of humanitarian work, the argument being that the military attacks are illegal under international laws.<sup>21</sup> These international humanitarian laws are, in essence, exploited to drum up popular support by using the legal system to paint their enemies as the villains.<sup>22</sup> These humanitarian laws may also be used as a basis to rationalize the actions of a foreign government.<sup>23</sup>

For example, Russia used the law to rationalize their actions in Ukraine following the Ukrainian government being ousted.<sup>24</sup> President Vladimir Putin argued that Russia's actions were justified, as the legitimate Ukrainian government had been illegally removed, and Russia had a duty to protect native Russians located within the lawless region of Crimea.<sup>25</sup> While many view this interjection of international law into war as negative, in many circumstances the law does have a positive impact on warfare.<sup>26</sup>

The proponents that encourage the use of international law to remedy conflicts point to the fact that substituting legal methods for military methods such as bombs and bullets will greatly reduce the destruction of warfare.<sup>27</sup> However, the law may be just as destructive, if not more so, than bombs and bullets could have ever been.<sup>28</sup> However, the use of international and humanitarian law is not the only method of substituting

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19. See generally William G. Eckhardt, *Lawyering for Uncle Same When He Draws His Sword*, 4 CHI. J. INT'L L. 431 (2003).

20. *Id.* at 441.

21. See Scott Horton, *The Dangers of Lawfare*, 43 CASE W. RES. J. INT'L L. 163, 170 (2011).

22. Dunlap, *supra* note 8 at 148; see also David Luban, *Carl Schmitt and the Critique of Lawfare*, 43 CASE W. RES. J. INT'L L. 457 (2010); see, e.g., Benjamin Wittes, *Thoughts on the Human Rights Watch and Amnesty International*, LAWFAREBLOG (April 17, 2016, 1:00 PM) <http://www.lawfareblog.com/2013/10/thoughts-on-the-human-rights-watch-and-amnesty-international-reports/> (discussing attacks by humanitarian groups on the use of U.S. military drone strikes in the war on terror claiming that their use is a war crime).

23. See Luban, *supra* note 22.

24. Kathy Lally & Will Englund, *Putin Says He Reserves Right to Protect Russians in Ukraine*, THE WASH. POST (Mar. 4, 2014), [http://www.washingtonpost.com/world/putin-reserves-the-right-to-use-force-in-ukraine/2014/03/04/92d4ca70-a389-11e3-a5fa-55f0c77bf39c\\_story.html](http://www.washingtonpost.com/world/putin-reserves-the-right-to-use-force-in-ukraine/2014/03/04/92d4ca70-a389-11e3-a5fa-55f0c77bf39c_story.html) (last visited Aug. 29, 2015).

25. *Id.*

26. Jamie A. Williamson, *The Knight's Code, Not His Lance*, 43 CASE W. RES. J. INT'L L. 447, 448 (2010) (discussing that when attempting to justifying their military actions governments will look to the Geneva Conventions and international humanitarian laws in general).

27. Dunlap, *supra* note 8, at 147.

28. See *infra* Part II.B and accompanying text.

the law for military action. Governments regularly resort to the use of economic sanctions to impose their policy objectives.

## B. Economic Sanctions History, Legal Foundation, and Implementation

Economic sanctions are the use of non-traditional alternatives to achieve foreign diplomacy goals instead of overt military action.<sup>29</sup> Specifically, it is the use of economic measures by a government to affect the policies or actions of a foreign government.<sup>30</sup> Economic sanctions will achieve their intended goal through the manipulation of “taxation, imports, exports, foreign aid, access to markets, or access to financial intuitions.”<sup>31</sup>

Moreover, economic sanctions have been a large part of United States’ foreign policy, but until recently it was only used during wartime.<sup>32</sup> However, this has begun to change drastically in the last couple of decades.<sup>33</sup> In fact, even in times of peace, the United States’ go to tool in implement its foreign policy objectives are economic sanctions.<sup>34</sup> This increase has occurred for a variety of reasons, from a desire to limit violent conflict,<sup>35</sup> to respect for human rights.<sup>36</sup> Furthermore, economic sanctions, in the modern era, are well founded in international law and most, if not all, sovereign nations permit them, if not encourage, their use.<sup>37</sup>

### 1. Statutory Foundation of Economic Sanctions

This concept was codified in 1977 when Congress enacted the International Emergency Economic Powers Act (IEEPA), which gave the President the express authority to implement economic sanctions against either nations or individuals.<sup>38</sup> The Congressional intent in enacting the IEEPA was focused on limiting Presidential power to impose economic sanctions in times of peace.<sup>39</sup> Additionally, the passage of the IEEPA was

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29. Justin D. Stalls, *Economic Sanctions*, 11 U. MIAMI INT’L AND COMP. L. REV. 115, 116 (2003).

30. *Id.* at 119.

31. *Id.* at 120.

32. Arthur B. Culvahouse, Jr., *A Practical Guide to International Sanctions Law and Lore: Mamas, Don’t Let Your Children Grow Up To Be Sanctions Lawyers*, 32 HOU. J. INT’L L. 587, 588 (2010).

33. Haass, *supra* note 6.

34. *Id.*

35. Stalls, *supra* note 29.

36. Haass, *supra* note 6.

37. Stalls, *supra* note 29, at 121.

38. See Barbara J. Van Arsdale, Annotation, *Validity, Construction, and Operation of International Emergency Economic Powers Act*, 50 U.S.C.A. §§ 1701 to 1707, 183 A.L.R. FED. 57 (2003); see generally International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1707 (2012).

39. Van Arsdale, *supra* note 38, § 2 (discussing that originally the President had broad powers under the Trading with the Enemy Act (TWEA) and with the passage of the IEEPA the TWEA only applies to times of war).

Congress showing its belief that the President should be seeking support from either Congress or the courts before implementing any sort of economic sanctions.<sup>40</sup>

However, the IEEPA still authorizes the President to “deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”<sup>41</sup> To deal with these threats the IEEPA permits a wide range of powers that give the President a wide berth in dealing with any perceived threat.<sup>42</sup> These powers are then implemented by the President through executive orders, which designate who or what will be subjected to the current round of sanctions.<sup>43</sup>

## 2. Procedure for Initial Implementation of Economic Sanctions

The system for implementation of economic sanctions must always begin with the President declaring a state of national emergency.<sup>44</sup> After a declaration of national emergency, the President is meant to consult with Congress before taking any action under the IEEPA.<sup>45</sup> Once consultation has been completed and a decision has been reached, the President is then permitted to issue the economic sanction.<sup>46</sup> The economic sanction is then issued in the form of an executive order.<sup>47</sup>

To better understand this portion of the procedure, it is important to look at a real world example of Ukraine. On March 6, 2014, President Barack Obama issued the first executive order in response to the crisis in Ukraine.<sup>48</sup> In this initial order President Obama declared a national

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40. James J. Savage, *Executive Use of the International Emergency Economic Powers Act—Evolution Through the Terrorist and Taliban Sanctions*, 10 CURRENTS: INT’L TRADE L.J. 28, 29 (2001).

41. 50 U.S.C. § 1701.

42. 50 U.S.C. § 1702(a)(1)(B) (explaining that the president has the authority to “investigate, regulate, nullify, void, prevent or prohibit, any acquisition, transfer, importation, or exportation of, or dealing in, or exercising any right, power, or privilege with respect to any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States”); see also Jason Luong, *Forcing Constraint: The Case for Amending the International Emergency Economic Powers Act*, 78 TEX. L. REV. 1181, 1189 (2000) (discussing an example to show the broad powers the IEEPA grants).

43. Van Arsdale, *supra* note 38, at § 2; see also Proclamation No. 13660, 79 Fed. Reg. 13493 (Mar. 6, 2014) [hereinafter March 6th Executive Order].

44. Luong, *supra* note 42, at 1192 (explaining that the requirement to consult with Congress was that if action was not warranted Congress could simply end the national emergency which would prohibit any further action under the IEEPA by the President).

45. *Id.*

46. 50 U.S.C. § 1704 (2012).

47. Tara J. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day American*, 28 J. LEGIS. 1, 7 (2002).

48. March 6th Executive Order, *supra* note 43.

emergency, as the crisis in Ukraine posed “an usual and extraordinary threat to the national security and foreign policy of the United States.”<sup>49</sup> President Obama may also be deemed to have consulted with Congress, as Congress passed a bill authorizing the use of sanctions against those who were involved in the Ukraine crisis.<sup>50</sup>

Within the executive order, President Obama provided the frame-work for the initial sanctions in which he stated that any individual or entity that is involved in the crisis in Ukraine will face sanctions.<sup>51</sup> On March 17, 2014, President Obama then issued a second executive order expanding the scope of the sanctions to include individuals and entities directly related to the Government of the Russian Federation.<sup>52</sup> However, the issuing of economic sanctions through executive orders is not the end of the process. After the President has issued the initial sanctions the process will now move on to the Office of Foreign Assets Control (OFAC).

### 3. Interpretation and Enforcement of Economic Sanctions

OFAC, a section within the United States Treasury Department, is the only agency responsible for administration and enforcement of economic and trade sanctions that have been implemented by the United States government.<sup>53</sup> OFAC’s job is to “interpret” the executive orders, and then

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49. *Id.*

50. See generally Deb Riechmann, *Congress Approves \$1 billion Ukraine aid, sanctions against Russia*, PBS NEWSHOUR (Mar. 27, 2014.), <http://www.pbs.org/newshour/rundown/congress-rushes-pass-1-billion-ukraine-aid-bill/>. While Congress has technically given their support in the use of sanctions through the passage of this bill it is still not what was intended. In the original passage of the IEEPA the President was meant to deeply interact and consult Congress before any action was to be taken under the IEEPA.

51. March 6th Executive Order, *supra* note 43 (discussing that the prohibited actions include “actions or policies that undermines democratic processes or institutions in Ukraine; actions or policies that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine; misappropriates assets of the Ukrainian state or any economically significant entity located in Ukraine; to have asserted unauthorized governmental authority over any part of Ukraine; or is a leader of, provides material assistance to, or is owned or controlled by, any individual or entity that meets the criteria described above”).

52. Proclamation No. 13661, 79 Fed. Reg. 15535 (Mar. 17, 2014); see also Debevoise & Plimpton, *Sanctions Alert Issue 15*, [http://www.debevoise.com/~media/files/insights/publications/2014/03/sanctions%20alert/files/view%20sanctions%20alert%20%20issue%2015%20pdf/fileattachment/debevoise\\_sanctions\\_alert\\_issue\\_15.pdf](http://www.debevoise.com/~media/files/insights/publications/2014/03/sanctions%20alert/files/view%20sanctions%20alert%20%20issue%2015%20pdf/fileattachment/debevoise_sanctions_alert_issue_15.pdf) (last visited Mar. 24, 2015) (discussing the expansion of the sanctions by the President).

53. U.S. DEPARTMENT OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL (OFAC), MISSION STATEMENT OF OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T TREAS., <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx>. Also, OFAC is also responsible for execution of any penalties for violations of sanctions, which can result in fines up to and including \$1,000,000 and/or imprisonment. See generally, 50 U.S.C. § 1705.

enforce their interpretation of the issued sanctions.<sup>54</sup> OFAC will issue their interpretations of the President's executive order through regulations that collectively are known as the Foreign Asset Control Regulations (Regulations).<sup>55</sup>

Fundamentally, once a country or group has been designated for sanctions, OFAC will then interpret the purpose behind the sanctions and set about listing those who are now prohibited from doing business with United States businesses and citizens.<sup>56</sup> OFAC will base its interpretation on the foreign policy objective behind the sanctions.<sup>57</sup> It is for this reason that each set of regulations will have its own definitions and persons subject to its prohibitions.<sup>58</sup>

The individual or entities designated by OFAC are then placed upon the Specially Designated Nationals (SDN) list, which means that United States nationals and entities are now barred from doing business with these individuals.<sup>59</sup> The list is constantly being updated by OFAC through adding or removing individuals or entities.<sup>60</sup> Specifically, in the present case of Ukraine, OFAC has constantly updated the SDN list by adding over one hundred individuals and twenty different entities to those prohibited from conducting business with United States nationals.<sup>61</sup> Furthermore,

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54. See Daniel C.K. Chow, *How China uses International Trade to Promote its View of Human Rights*, 45 GEO. WASH. INT'L L. REV. 681, 704-5 (2013); see also *United States v. Ahangaran*, 998 F.2d 521 (7th Cir. 1993), for a discussion on the implementation of a sanction by the OFAC where OFAC seized illegal imported rugs from Iran.
  55. Alan F. Enslin et al., *Balancing Free Trade with International Security: What Every Alabama Attorney Should Know About International Trade Controls*, 74 ALA. LAW. 96, 100 (2013).
  56. MARK R. SANDSTORM & DAVID N. GOLDSWEIG, *NEGOTIATING AND STRUCTURING INTERNATIONAL COMMERCIAL TRANSACTIONS* 206 (2d ed., A.B.A. 2003).
  57. Enslin, *supra* note 54; see generally also *Office of Foreign Assets Control, Specially Designated Nationals and Blocked Persons List*, <http://www.treasury.gov/ofac/downloads/t11sdn.pdf> (last visited Apr. 8, 2015) (providing the complete list for all persons and entities that are prohibited from conducting business with any United States national). This creates a problem in that there is an ever-shifting platform on which businesses attempting to conduct business must try to base their decision on. Enslin, *supra* note 54. For a full discussion on this topic see *infra* Sec.IV.A.1.
  58. See SANDSTORM & GOLDSWEIG, *supra* note 56; see generally also 31 C.F.R. §§ 589.101-589.901 (providing the entirety of the actions taken by OFAC in the current crisis in Ukraine).
  59. *Id.* (explaining that all business transactions are prohibited between those under United States jurisdiction and those who are targeted including "import and export, trade, investment, financing, technology transfers, and others, including assisting, participating in, approving, or facilitating any transactions that would be prohibited as to [United States] persons").
  60. See generally *Specially Designated Nationals List (SDN)*, <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> (last visited Mar. 23, 2015).
  61. See generally *U.S. Department of the Treasury, 2014 OFAC Recent Actions*, <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/ofac-actions-2014.aspx> (last visited Apr. 7, 2015) (providing all actions taken by OFAC during the 2014 calendar year including those taken against Russia over the crisis in Ukraine); U.S. DEPARTMENT OF THE TREASURY, *2015 OFAC RECENT ACTIONS*, <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/OFAC-Recent-Actions.aspx> (last visited Apr. 7, 2015) (providing all actions taken OFAC so far during the 2015 calendar year); see generally also



OFAC has a broad jurisdictional reach, where it is capable of enforcing its interpretation.

Effectively, OFAC's jurisdictional reach includes all United States citizens, residents, and businesses.<sup>62</sup> Even where a business is not located directly within the United States it will be within the jurisdictional reach of OFAC.<sup>63</sup> Specifically, under the current enforcement methods OFAC is able to enforce violations of sanctions against entities that are only under partial control of U.S. companies.<sup>64</sup>

Also, it is important to note the difference between unilateral sanctions and multilateral sanctions because depending on which is used will usually determine the effectiveness of the sanction in question.<sup>65</sup> For example, an in-depth analysis proved that in only thirty-six percent of cases did economic sanctions actually have their intended effect.<sup>66</sup>

#### 4. *Unilateral Sanctions from the United States*

Even though unilateral sanctions are often ineffective, the United States continues their use based upon the faulty logic that when inducing economic loss, there would be a change on the part of the recipient state.<sup>67</sup> In turn, this only leads to difficulty, as economic sanctions, while intended to cause as little damage as possible, often have a massive effect on the population of the targeted country.<sup>68</sup> This type of sanction has the ability to “devastate a civilian population, to rock the economic and political stability

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Debevoise & Plimpton, *supra* note 52 (discussing in broad terms actions that have been taken related to OFAC and economic sanctions including those relating to Ukraine).

62. SANDSTORM & GOLDSWEIG, *supra* note 56, at 208.

63. *Id.*

64. *Id.* (discussing that all United States citizens, even those working or living overseas, must abide by OFAC sanctions and also even foreign subsidiaries of United States businesses are within the jurisdiction reach of OFAC)

65. *See* Stalls, *supra* note 29, at 126. This Comment will be only discussing unilateral sanctions, and will not discuss multilateral sanctions. However, so that the reader is not confused unilateral sanctions are where only one state, the sending state, develops and sends sanctions against the targeted state. *Id.* While multilateral sanctions are where several sending states will determine what sanctions are appropriate through negotiation and compromise. *Id.*

66. *Id.* at 149.

67. Thihan Myo Nyun, *Feeling Good or Doing Good: Inefficacy of the U.S. Unilateral Sanctions against the Military Government of Burma/Myanmar*, 7 WASH. U. GLOBAL STUD. L. REV. 455, 467 (2008) (explaining that the sole purpose of unilateral sanctions is to inflict economic loss, which will then cause the population to rise up in revolution against their governmental leaders).

68. *See* Cassandra LaRae-Perez, *Economic Sanctions as a Use of Force: Re-Evaluating the Legality of Sanctions from an Effects-Based Perspective*, 20 B.U. INT'L L.J. 161, 162 (2002).

of a developing state [, and] what appears . . . to be an exercise in diplomatic relations is often in reality a wholesale assault.”<sup>69</sup>

Again, in the present case, the sanctions against those who have perpetuated the crisis in Ukraine are primarily being implemented by the United States.<sup>70</sup> While the United States has been the primary proponent of sanctions against those involved in the Ukrainian crisis, other countries and entities have been involved, as well. Specifically, the European Union,<sup>71</sup> Canada,<sup>72</sup> Japan,<sup>73</sup> Australia,<sup>74</sup> Norway,<sup>75</sup> and Switzerland<sup>76</sup> have all issued their own form of sanctions in one way or another. However, in comparing the numerous sanctions issued by these many nations, there seems to be no communication or cooperation. Thus, while multiple nations have issued sanctions, many are all still unilateral in nature, including the United States’ sanctions, as they have been implemented without compromise and discussion.<sup>77</sup> These types of sanctions often have a strong negative impact upon not only the citizens of the targeted country, but also upon the entire international community.<sup>78</sup>

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69. *See id.* at 162–63. However, in the case of multilateral sanctions, there is discussion and compromise between parties to ensure the sanctions are warranted and what the best course of action should be. Stalls, *supra* note 31, at 126.

70. *See generally* Debevoise & Plimpton, *supra* note 52, for a discussion on the major developments in sanctions against Russia and Ukrainian former government officials by both the UK, EU, Canada, and the United States.

71. *See generally* Council of the European Union, Council Decision 2014/145/CFSP of 17 Mar. 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:078:0016:0021:EN:PDF> (last visited Mar. 25, 2015).

72. *See generally* Prime Minister of Canada Stephen Harper, *Sanctions List*, <http://www.pm.gc.ca/eng/news/2014/03/17/sanctions-list> (last visited Mar. 25, 2015).

73. *See generally* Associated Press, *Japan Imposes Sanction Against Russia over Crimea Independence*, FOX NEWS (Mar. 18, 2014), <http://www.foxnews.com/world/2014/03/18/japan-imposes-sanctions-against-russia-over-crimea-independence/>.

74. *See generally* *Australia Imposes Sanctions on Russians After Annexation of Crimea from Ukraine*, AUSTRALIAN BROADCASTING COMPANY (Mar. 19, 2014), <http://www.abc.net.au/news/2014-03-19/australia-sanctions-russia-ukraine/5331826>.

75. *See* Saleha Moshin, *Norway ‘Ready to Act’ as Putin Sanctions Spark Fallout Probe*, BLOOMBERG BUSINESS (Aug. 12, 2014), <http://www.bloomberg.com/news/articles/2014-08-12/norway-ready-to-act-as-russian-sanctions-trigger-fallout-probe>.

76. *See generally* State Secretariat for Economic Affairs, *Situation in Ukraine: Federal Council Decides on Further Measures to Prevent Circumvention of International Sanctions* (Aug. 27, 2014), <http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=en&msg-id=54221>.

77. *See* Stalls, *supra* note 29, at 149–52 (explaining that multilateral sanctions occur when states come together and develop sanctions as a group through discussion and compromise to reach a preferred set of sanctions that best fits the situation at hand).

78. Also, this background only focuses on the actual actions taken by both President Obama and OFAC, and the resulting sanctions against Russia. For more information on the factual timeline for the events leading up to the implementation of sanctions please review the following source. UKRAINE CRISIS: TIMELINE, *supra* note 1.

### III. ECONOMIC SANCTIONS ARE A FORM OF LAWFARE AND SHOULD BE CONSIDERED A WEAPON OF WAR

While the historical use of both lawfare and economic sanctions were kept separate both in the past and in this Comment's provided background, the truth is that the two concepts are deeply intertwined. This idea, that economic sanctions and lawfare are one and the same, appears to be a novel idea because these two concepts are treated so differently. Economic sanctions have become well known and accepted in today's society,<sup>79</sup> but lawfare is often viewed negatively and as a misuse of law for nefarious purposes.<sup>80</sup> While societal views of economic sanctions and lawfare may be on opposite ends of the spectrum, at their core, they are the same concept.

As discussed above, lawfare is the use of international law and international humanitarian law to achieve an objective, which often would have been achieved through military means.<sup>81</sup> Thus, academics, when discussing lawfare, only use a very narrow interpretation of lawfare.<sup>82</sup> They fail to see the bigger picture that lawfare is the use of any law or legal means to achieve an objective that would have normally been achieved through military means. Too often, lawfare has been limited in its scope to only those instances in which international laws and international humanitarian laws are used to achieve the intended objection. Yet in reality, it should be expanded to include the use of any law whether foreign or domestic to achieve an objective.

Likewise, economic sanctions have also been described as the use of trade laws to achieve a foreign policy objective instead of overt military action.<sup>83</sup> The only difference between economic sanctions and lawfare would be that sanctions are limited to the use of trade laws in achieving the objective,<sup>84</sup> while lawfare is defined as the use of international humanitarian laws to achieve the objective sought.<sup>85</sup> In the end, economic sanctions and lawfare are the same concept. They are both defined as legal alternatives in situations where traditionally overt military action would have occurred. Thus, it would be illogical to treat the two as different concepts when it is the same idea, just differing in what laws may be used to achieve the objective in question.

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79. Stalls, *supra* note 29, at 121.

80. Williamson, *supra* note 25.

81. Dunlap, *supra* note 8.

82. *See generally* Ansach, *supra* note 17; *see* Williamson, *supra* note 25, at 447.

83. *See* Stalls, *supra* note 29, at 116.

84. *Id.* at 120–21.

85. Dunlap, *supra* note 8.

Therefore, lawfare and economic sanctions are the use of law as an alternative to military action. In attempting to define lawfare, a good place to start would be a broader definition. For example, Charles Dunlap put forth a good example when he described lawfare, as “the [use] of the law and legal systems for strategic political or military ends.”<sup>86</sup> This definition would embrace any and all uses of the law or other legal remedies, and would not be limited to international humanitarian laws. It would be a more workable definition for lawfare, as it would incorporate economic sanctions along with already defined uses of lawfare.

This broader definition would also be of great benefit to this area of law, because it would help to legitimize lawfare. Part of the problem currently is that the lawfare is novel because it has only been around for two or so decades.<sup>87</sup> Thus, lawfare is still viewed by many academics as an adolescent attempting to infringe upon the world of grown up law. However, as already noted above, the two ideas are indeed deeply connected because economic sanctions should be considered a subcategory of lawfare. Therefore, lawfare should not be treated differently by the academic community than economic sanctions.

Accordingly, in our real world situation of the Ukrainian crisis, not only would the use of economic sanctions by the United States be a legitimate use of law, but also the use of humanitarian law by Russia would be legitimate, as well. Specifically, Russia has used humanitarian law to back up each of their actions for choosing to intervene in the present crisis.<sup>88</sup> Hence, in this present case the use of economic sanctions against a targeted state is a legitimate use of the law in this situation, but not the use of humanitarian law as a basis for a nation’s actions.<sup>89</sup>

However, while this section has argued that lawfare and economic sanctions should be viewed as the same legal concept, both lawfare and economic sanctions should be given a certain level of respect. This respect should be granted; there are often horrendous negative consequences from their use that are often completely ignored.

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86. Dunlap, *supra* note 17.

87. See generally Dunlap, *supra* note 8.

88. See *Russians Warned not to Use Humanitarian Crisis as ‘Pretext’ to Invade Ukraine*, TELEGRAPH (Aug. 9, 2014), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11023183/Russians-warned-not-to-use-humanitarian-crisis-as-pretext-to-invade-Ukraine.html>.

89. This comment is by no way supporting Russia argument that their involvement in Ukraine is fully based upon humanitarian efforts. By the contrary, most evidence points to the fact that it was merely a pretense enabling the Russian government to send troops into Ukraine. However, this only strengthens the point of the argument of this section. Russia should well be within their right to use humanitarian law to achieve their goals. But when they attempt to do so, if they do not have a legitimate basis for their arguments it will be found out in today’s modern world. Thus, by allowing lawfare to occur will allow true claims to come to the light while those claims that are less than truthful will fall apart under the scrutiny of the modern world.

#### IV. ECONOMIC SANCTIONS HAVE TREMENDOUS NEGATIVE AFFECTS UPON THE INTERNATIONAL COMMUNITY

While the intended purpose behind the use of economic sanctions is that legal action will have less effect on the populace of the recipient country, this is often not the case. In reality, while sanctions are often just as dangerous as overt military conflict in many situations, and to both businesses and individuals.

##### A. Sanctions' Negative Consequences on International Business

The effect of United States sanctions is widespread and tremendous to both business located domestically and abroad.<sup>90</sup> Specifically, any business that has a subsidiary located within the jurisdiction of the United States, or is under the control of a United States business will have to comply with the economic sanctions.<sup>91</sup> Moreover, even businesses that are not clearly subjected to jurisdiction of the United States will be affected by their attempt to comply with sanctions out of fear of possible ramifications.<sup>92</sup>

Due to the tremendous amount of businesses that have to comply with United States' sanctions, the effect upon international business is considerable anytime economic sanctions are implemented. Often, those hurt are not always those who the sanctions actually intended to target in the first place. But the cause of damage may occur for a variety of reasons.

##### 1. *The Creation of Impossible Business Upkeep*

Often times, it is not clear whom or what the sanctions are really being implemented against. Thus, a business will have difficulty attempting to comply with sanctions because it has no idea who it is prohibited from actually doing business with. Regularly businesses will conduct a due diligence investigation, and will be aware of who it is forbidden from doing business with. However, often OFAC will have already changed the SDN list by adding or removing individuals from the list. This presents a significant issue for businesses, as OFAC has free reign to update the SDN list as it chooses, and it is the duty of the businesses to try and keep up.

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90. See Elena Servettaz, *A Sanctions Primer: What Happens to the Targeted?*, 177 WORLD AFFAIRS 82, 83 (2014).

91. SANDSTORM & GOLDSWEIG, *supra* note 56, at 208 (discussing that any company that is organized under U.S. law or is a foreign branch or subsidiary of a company organized under U.S. law is subject to jurisdiction of U.S. sanctions).

92. Servettaz, *supra* note 90.

Effectively, OFAC's interpretation of whom or what should be facing sanctions is subject to governmental foreign policy objectives.<sup>93</sup> Accordingly, as foreign policy is subject to constant change based upon who may be in power presents an issue. Even if there has not been a change in power outside influences may have an effect on those in power, which in turn changes the objectives of the sanctions. Furthermore, each set of sanctions is based upon an initial executive order from the president authorizing OFAC to begin their enforcement of sanctions, and each executive order is different from the proceeding and subsequent order.<sup>94</sup>

Therefore, a business may not rely upon past sanctions as a source of guidance, as each and every set of sanctions is independent of each other. Consequently, a business seeking to comply cannot attempt to look at past sanction programs and the actions of OFAC, as it will have no effect upon the current batch of sanctions. If businesses cannot rely on past decisions, they will have difficulty knowing how OFAC will rule on new sanctions.

Additionally, the regulations present a difficult issue for businesses in attempting to comply. Specifically, the SDN list currently takes up 227 pages with thousands of names and is constantly being updated.<sup>95</sup> This creates a real issue because businesses must effectively make a proactive effort to determine who and what has been designated for sanctions.

For example, consider the sanctions that have resulted from the crisis in Ukraine. As discussed above, the original executive order that set the framework for sanctions was issued on March 6, 2014.<sup>96</sup> Since then, OFAC has constantly been changing the scope of the sanctions twice a month.<sup>97</sup> The sheer number of changes just goes to reinforce the effort that businesses will have to go to in an attempt to comply with these sanctions.

Accordingly, a business attempting to operate while still avoiding violating economic sanctions is now required to perform extensive due diligence procedures before it is ever capable of conducting business. A business must perform several steps to determine whether the individuals or entities it seeks to conduct business with have any connection with those who have been placed upon the SDN list.<sup>98</sup> The business, at a bare minimum, must first conduct a list-based search to determine whether the

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93. Enslin, *supra* note 55.

94. *See id.* (discussing that each set of sanctions is based upon differing foreign policy objectives and international events that led to their implementation so no two groups of sanctions are really ever the same completely).

95. Charles A Rarick, *Economic Sanctions: Failed Foreign Tool and A Cost to American Business*, 27 *ECONOMIC AFFAIRS* 65, 66 (2007); *see generally*, *SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST*, *supra* note 56.

96. *See generally* 79 Fed. Reg. 13493.

97. *See* U.S. DEPARTMENT OF THE TREASURY, *supra* note 60.

98. Enslin, *supra* note 55.

individual has been placed prohibition list.<sup>99</sup> Then, it must conduct destination based screening to determine whether the individual or entity it is seeking to do business with may be based within an area that has been deemed off limits.<sup>100</sup> As a last resort, it must keep an eye for any “red flag” alerts that come up after it has started conducting their business, and then research diligently such “red flags.”<sup>101</sup>

Here on paper, these requirements do not seem like much to ask of a business. However, it is a steep price to pay for those companies. Indeed, for a company who has subsidiaries spread throughout the world, this is a massive endeavor for them to conduct a company-wide search. The company must endeavor to conclude whether any portion of its business is transacting with any individual or entity facing sanctions currently or has any connection to an entity facing sanctions. The cost of such an endeavor can add up quickly, which must be borne by the business or it may face steep penalties or any small infraction.

Furthermore, this lack of consistency and ability to adhere to the sanctions is important, as the penalty for failure to abide by the sanctions is steep. The civil penalty for violation of sanctions may result in a fine of \$250,000, or a fine that is twice the amount of the transaction that is the basis for the violation.<sup>102</sup> Additionally, if the violation of sanctions was willfully committed, attempted to commit, conspired to commit, or even aids or abets, a violation may result in a fine up to \$1 million or twenty years imprisonment.<sup>103</sup>

This current system creates a situation where businesses are set up to fail. Furthermore, it is not only how the system is implemented that poses the greatest threat, instead it is the actual purpose that poses the greatest threat. In essence, sanctions not only hurt those of the targeted state but the international community as a whole.

## *2. Trade Restrictions Harm International Businesses Inside and Outside the Targeted Country*

The theory behind the use of economic sanctions is that it will cause enough economic damage to the targeted country that it will force the country to change their objectionable behavior.<sup>104</sup> Therefore, by implication, the very use of economic sanctions will cause great harm.

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99. *Id.*

100. *Id.*

101. *Id.*

102. 50 U.S.C. § 1705 (2012).

103. *Id.*

104. *See* Nyun, *supra* note 67.

Indeed, enough harm that would be sufficient to cause an entire foreign government to change their behavior.

The reality is that when you cut off an entire country, this will harm the citizens of the country. However, it also harms the companies that were conducting business with those within the country, as well.<sup>105</sup> Thus, when implementing sanctions an entire source of clients has been cut off from United States companies who used to do business within the targeted state. Moreover, often times those potential customers who have now been placed upon the SDN list will simply take their business elsewhere, and the only ones in the end who are still being harmed are United States businesses.<sup>106</sup>

Again, looking at the crisis in Ukraine, many businesses both domestically and abroad have been adversely affected by the implementation sanctions.<sup>107</sup> Within the European Union, Germany had several businesses within the sectors hampered in business to the amount of over \$65 billion.<sup>108</sup> Likewise, Holland's businesses in the sectors of agriculture and technology will be extremely affected in excess of \$55 billion.<sup>109</sup> Moreover, businesses in Britain, France, and Italy will also be affected for a total amount in excess of \$59 billion in total between them.<sup>110</sup>

Many businesses in the United States viewed Russia as a growing market, and actively invested there.<sup>111</sup> In total, United States businesses conduct \$40 billion worth of business annually within Russia.<sup>112</sup> For example, John Deere had two factories in Russia producing heavy farm equipment, with a large portion of sales in Ukraine, Russia, and other ex-soviet countries;<sup>113</sup> however, due to recent sanctions, John Deere will lose this business, and believes overall its total yearly sales will take a significant fall, due to the recent sanctions.<sup>114</sup>

Likewise, McDonald's closed over 400 stores throughout Russia and Ukraine, which accounts for roughly nine percent of its revenue

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105. See Rarick, *supra* note 95.

106. See *id.*

107. Harriet Alexander, *MH17: How Would EU Sanctions on Russia Affect Europe?*, THE TELEGRAPH (July 22, 2014), <http://www.telegraph.co.uk/news/worldnews/europe/russia/10981818/MH17-how-would-EU-sanctions-on-Russia-affect-Europe.html>; see also Mary Clare Jalonick and Juergen Baetz, *Western Farmers Take Hit From Russia Food Ban*, AP ENGLISH WORLDSTREAM (Aug. 9, 2014, 3:10 PM), <http://www.dailyworld.com/story/news/2014/08/09/us-eu-farmers-feel-hit-russia-food-ban/13830999/>.

108. Alexander, *supra* note 107.

109. *Id.*

110. *Id.*

111. See Adam Shell, *US Companies Get Hurt by Sanctions Targeting Russia*, CNBC (May 15, 2014), <http://www.cnbc.com/id/101675707>.

112. *Id.*

113. *Id.*

114. *Id.*



worldwide.<sup>115</sup> Also, MasterCard and Visa have been severely hampered in conducting business within Russia and surrounding areas, as major banks in Russia have been targeted by sanctions.<sup>116</sup> Therefore, Russia's major banks completely prohibit customers from using MasterCard or Visa, which is lost revenue for both MasterCard and Visa.<sup>117</sup>

Yet these are only a few instances that are present in current use of sanctions, as a result of Russia's actions in Ukraine. And this negative effect of sanctions on United States companies is not limited to events arising from the crisis in Ukraine. In reality, whenever sanctions are implemented, it is almost a certainty that in some fashion United States businesses and businesses abroad will be hurt as a result.<sup>118</sup>

### 3. OFAC's Broad Jurisdictional Powers Leave No Room to Maneuver

Additionally, there is no way to circumvent the prohibitions under the sanctions, as the IEEPA and OFAC have broad jurisdictional powers that apply to a wide spread number of individuals and entities.<sup>119</sup> Therefore, even if a United States company wanted to attempt to sidestep sanctions, it would be nearly impossible to do so. Specifically, one way that businesses could attempt to get around sanctions would be to use a subsidiary to conduct their business. However, under the IEEPA, OFAC is able to prohibit this as well.<sup>120</sup> Essentially, as long as the subsidiary is under any type of control by the parent United States business, then its actions will be subject to prohibition under sanctions too.<sup>121</sup>

Furthermore, even if the subsidiary is not directly owned by the United States' business, it may not be used to get around the prohibition of

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115. *Id.*

116. Servettaz, *supra* note 90, at 84.

117. Shell, *supra* note 111.

118. *See generally* Rarick, *supra* note 95, for a discussion of the effects of the use of sanctions during and after the cold war; *see also* Yitan Li, *US Economic Sanctions Against China: A Cultural Explanation of Sanction Effectiveness*, 38 *ASIAN PERSPECTIVE* 311, 326 (2014), for an explanation of why President Clinton lifted sanctions against China following human rights violations, including facing stiff opposition from the business community within the United States. Businesses argue they suffered from declining markets due to sanctions imposed against China.

119. SANDSTORM & GOLDSWEIG, *supra* note 56 (explaining that all business transactions are prohibited between those under United States jurisdiction and those who are targeted including "import and export, trade, investment, financing, technology transfers, and others, including assisting, participating in, approving, or facilitating any transactions that would be prohibited as to [United States] persons"); *see generally*, 50 U.S.C. § 1702.

120. Mark K. Neville, Jr., *General Operation of U.S. Sanctions*, *INTERNATIONAL TRADE LAWS OF THE UNITED STATES* § 17.04 (2013).

121. *Id.*

sanctions.<sup>122</sup> If a United States' business knows it is selling goods to a third party, and that those same goods will be then sold to an individual or entity-facing sanctions, then this is a violation.<sup>123</sup> For example, in an attempt to sidestep sanctions a United States business could sell its products to a company located within a state that has yet to file sanctions against Russia. Thus, if a current United States business first sold products to a company in Greece, as it has yet to file sanctions against Russia, then attempted to sell the goods to a business within Russia that is facing sanctions, this would be a violation. However, the United States business would have to be fully aware of the intended destination for it to be a violation under the IEEPA.<sup>124</sup>

Therefore, even if a United States business was suffering under the burden of sanctions, and even if it wanted to attempt to do something about the sanctions, it would be stuck in their situation. In essence, there really is no escape for business from the wrath that is economic sanctions. It is clearly evident that economic sanctions have a strong negative impact upon the businesses of not only the targeted country, but also of the sending country as well. The reality is that sanctions have a wide path of destruction, and it does not stop with the targeted country. Furthermore, it is not only the business that are hurt but individuals, too.

#### B. Sanctions' Impact Upon Individuals of the Targeted Country

Again, the principal of economic sanctions is that it is meant to have a negative impact upon the populace of the targeted country.<sup>125</sup> The logic is that by inducing hardship upon the populace through the use of economic sanctions, they will then rise up and force change upon the current government of the targeted country.<sup>126</sup> Thus, the very idea behind sanctions denotes that there will be negative impact and hardships placed upon the entire population.

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122. See Meredith Rathbone, *Sanctions, Sanctions Everywhere: Forging Through Complex Transnational Sanctions*, 44 GEO J. INT'L L. 1055, 1097-98 (2013).

123. *Id.*

124. See 50 U.S.C. § 1705 (discussing that an individual may be found guilty under the statute if they conspire or attempt to conspire to violate the sanction this implies that there must be knowledge or willful behavior before a violation may occur).

125. Nyun, *supra* note 67, at 467.

126. *Id.*

*1. Sanctions Often Harm Those Who Are the Poorest and the Weakest of the Targeted Country*

While sanctions are meant to influence those who are in power of a target country, the reality is that it is the poor and destitute that are often hit the hardest.<sup>127</sup> For example, after the first rounds of sanctions against Russia, food prices have skyrocketed.<sup>128</sup> Specifically, the price of buckwheat has gone up seventy percent, and other basic foodstuff has increased dramatically.<sup>129</sup> This is a prime example of the tremendous negative effects that sanctions have on the general population of the targeted country. This increase in basic food prices only hurts the everyday citizen and will have no dramatic effect upon those who are actually in charge.

Additionally, the financial situation of Russia has dramatically gone downhill, which is having a negative impact upon the Russian populace.<sup>130</sup> The exchange rate for the Russian ruble has been in a state of constant shifting, and has been fluctuating on average of five percent a day.<sup>131</sup> However, the greatest shift in the exchange that has occurred is a ten percent decrease in a single day.<sup>132</sup> Additionally, the financial instability within Russia has caused one medium sized bank to collapse, and several other large state-owned banks have needed recapitalization in an attempt to stave off collapse.<sup>133</sup>

This financial instability has also lead to an overall negative credit rating for Russia, which in turn has also lead to decline in the Gross Domestic Product (GDP) for the general populace.<sup>134</sup> This is a destructive impact upon the population of Russia. Not only have food prices risen steeply since the implementation of sanctions, but also the GDP has taken a dive.<sup>135</sup> This combination means that Russian citizens will be facing incredibly high prices for food while their GDP and household incomes are declining. However, this is not the only negative affect that occurs as a result of sanctions.

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127. Seung-Whan Choi and Shali Luo, *Economic Sanctions, Poverty, and International Terrorism: An Empirical Analysis*, 39 INT'L INTERACTIONS 217, 219 (2013).

128. Priyanka Boghani, *What's Been the Effect of Western Sanctions on Russia?*, PBS FRONTLINE (Jan. 13, 2015), <http://www.pbs.org/wgbh/pages/frontline/foreign-affairs-defense/putins-way/whats-been-the-effect-of-western-sanctions-on-russia/>.

129. *Id.*

130. *See id.*

131. *Id.*

132. *Id.*

133. *See id.*; *see also* AM. JUR. 2D FEDERAL TAXATION § 5168, for a discussion that recapitalization attempt change the capital structure of a corporation.

134. *See* Boghani, *supra* note 128.

135. *Id.*

## 2. *Sanctions Create an Environment Ripe for Corruption*

Furthermore, while the intention is that the economic sanctions will turn the populace against their own government, often times these sanctions simply force corruption to flourish within the governmental ranks.<sup>136</sup> The government of the targeted country will basically turn to corruption to keep their own status quo in check, while sacrificing their general population to the burden of the sanctions.<sup>137</sup> Many of the Russian individuals and entities that have been directly targeted with sanctions have found ways to get around the sanctions through less than legal means.

For example, Russian oligarchs who have been targeted by sanctions have reorganized their companies by reducing their stakes below thresholds that would otherwise activate alerts and trigger violations of sanctions.<sup>138</sup> A clear example of this is the Russian company Sogaz that was originally established by the Russian state owned energy company Gazprom.<sup>139</sup> Until March 2014, Sogaz was owned through a wholly owned subsidiary of Bank Rossiya, which is a Russian state-owned bank.<sup>140</sup> Thus, as previously discussed, as Sogaz was owned through a wholly owned subsidiary of Bank Rossiya, it is deemed subjected to sanctions just as if it were Bank Rossiya.<sup>141</sup>

However, only a week before the sanctions went into effect, Bank Rossiya transferred two percent of its subsidiary's stock in Sogaz to a new and different subsidiary.<sup>142</sup> Thus, Bank Rossiya through its wholly owned subsidiary no longer had majority control of Sogaz.<sup>143</sup> This, therefore, means that Sogaz was no longer subject to United States sanctions.<sup>144</sup> Furthermore, corruption was also clearly evident in this circumstance, as the paperwork was not actually filed with Russian authorities until after

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136. Ioan Radu et. al, *Coercive Economic Diplomacy-Corruption Trigger or Deterrent*, 49 ECONOMIC COMPUTATION & ECONOMIC CYBERNETICS STUDIES & RESEARCH 53, 65 (2015).

137. *See generally id.*

138. *Sanctions Against Russia: Fancy Footwork*, ECONOMIST, Feb. 14, 2015, available at <http://www.economist.com/news/business/21643122-how-businesses-linked-blacklisted-oligarchs-avoid-western-sanctions-fancy-footwork>.

139. *Id.*

140. *Id.* Bank Rossiya was, also, one of the first entities added to the SDN list by OFAC following the initial round of sanctions. *See generally*, UKRAINE-RELATED DESIGNATIONS, available at [http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20140320\\_33.aspx](http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20140320_33.aspx) (last visited Mar. 16, 2015).

141. *See generally* Neville, *supra* note 120.

142. *Sanctions Against Russia: Fancy Footwork*, *supra* note 138.

143. *Id.*

144. This example is highly beneficial to demonstrate the corruption and ineffectiveness of the sanctions currently imposed against Russia by the west. Therefore, if it is unclear from the current description it is highly recommended that the source be looked at, as it provides a detailed flowchart demonstrating how the change in ownership took place.

sanctions had already taken effect.<sup>145</sup> Yet, somehow such paperwork was deemed to be sufficient by the authorities to have circumvented the sanctions filed by both the United States and the European Union.

The truth of the matter is when sanctions are implemented it is almost an assurance that sanctions will have negative affects upon the citizens of the targeted country. Thus, while sanctions are meant to affect and influence those in power, it is actually hurting those who it was meant to aid. Furthermore, those in power will always find a way to corruptly avoid the sanctions and simply leave those less fortunate alone to deal with the blunt harshness that follows the use of sanctions.<sup>146</sup> However, in some cases while sanctions are meant to turn the populace against their government, it often has the exact opposite effect.

### *3. Sanctions Often Turn the Populace of the Targeted Country Against the Sending Country*

As noted above, while sanctions often have the intended affect to influence the general population of the targeted country to rise up in rebellion against their government, frequently, sanctions have the exact opposite effect upon the population. When the general population starts to realize that their plight is due to the outside influence of the sending country they often will blame the sending country and not their own government.<sup>147</sup> This then leads to a mobilization of the populace to support of their own government against the sending country, which is exactly the completely opposite of the intended effect of sanctions.<sup>148</sup>

This has occurred presently within Russia, as the populace has begun to rally around President Putin.<sup>149</sup> Specifically, a recent poll found that seventy percent of Russian citizens say that the current unstable condition of Russia is the fault of Western powers and not their own government.<sup>150</sup> The truth is that the sanctions may have actually increased President Putin's approval rating to new record highs of eighty-four percent approval.<sup>151</sup>

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145. *Sanctions Against Russia: Fancy Footwork*, *supra* note 138.

146. *See generally* Radu, *supra* note 136, for a discussion that from a statistical analysis standpoint it is apparent that after the issuing of economic sanctions wide spread corruption is present in most circumstances and creates a sense of isolation throughout the populace.

147. *See* Choi and Luo, *supra* note 127, at 220.

148. *Id.*

149. J.M. Laats, *ERR in Moscow: Sanctions Mobilizing the Population Behind Putin*, ESTONIAN PUBLIC BROADCASTING (Feb. 2, 2015), <http://news.err.ee/v/International/3c7c788a-e4eb-4192-85e8-4cc6c1d8e58d>.

150. *Id.*

151. Alberto Nardelli, *Have Sanctions Against Russia Really Made Putin More Popular?*, GUARDIAN (Sept. 4, 2014), <http://www.theguardian.com/news/datablog/2014/sep/04/have-sanctions-against-russia-really-made-putin-more-popular>.

Particularly, Putin's approval rating has increased almost twenty points since the beginning of the conflict in Ukraine and the initial onset of sanctions by the west.<sup>152</sup>

While this opposite effect has occurred in the present example, it is unclear whether it has regularly occurred in other examples. However, there is a high probability that sanctions often have this opposite effect upon the target country's populace. It is likely, as several factors that influence the populace often are not accounted for when the sending country makes the decision to implement sanctions. Precisely, oftentimes the countries that are on the receiving end of sanctions have a dictatorship type government. Therefore, under this type of government those in power have massive influence over much of the populace's life.<sup>153</sup> The populace can then be manipulated into believing that it is not actually the government that is fault, but sending country for implementing the sanctions in the first place.

Again, looking at Russia, the government has the ability to influence the populace through the state run media.<sup>154</sup> Thus, a vast majority of the Russian populace believes that the Russian government had legitimate reasons for their annexation of Crimea, and Russia's general involvement in the crisis.<sup>155</sup> Therefore, if the general population is one of mind and believes that there was no fault at play, why would they support their country being cut off from the rest of the world through sanctions?

This is the central problem with sanctions that the sending country fails to consider: that the general population of the targeted country will never actually know the real reason why the sanctions were implemented by the sending country. In the end, the average citizen will only know that because of the sanctions, there are fewer resources. They will then blame those who implemented the sanctions, not their own government, as was originally intended.<sup>156</sup>

Thus, sanctions at their very core are deeply harmful to the general population of the targeted country. However, the truth is that often the population will not rise up, but instead come closer in support of their

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152. *Id.*

153. *See* Nyun, *supra* note 67, at 467–68.

154. *See* Nardelli, *supra* note 151.

155. *Id.*

156. Michael Birnbaum, *A Year Into a Conflict with Russia, Are Sanctions Working?*, WASH. POST, (Mar. 27, 2015), available at [http://www.washingtonpost.com/world/europe/a-year-into-a-conflict-with-russia-are-sanctions-working/2015/03/26/45ec04b2-c73c-11e4-bea5-b893e7ac3fb3\\_story.html](http://www.washingtonpost.com/world/europe/a-year-into-a-conflict-with-russia-are-sanctions-working/2015/03/26/45ec04b2-c73c-11e4-bea5-b893e7ac3fb3_story.html) (discussing that it has been suggested that the current economic downfall in Russia would have occurred even without the economic sanctions and that actually the recent sanctions have given political cover to those in power in Russia so that they can point the finger against the west for the cause of the economic collapse).

leaders. They do this because they know no better and only know that because of the sanctions they are without basic necessities.

#### V. CHANGES THAT MUST BE MADE IN THE CURRENT FRAMEWORK OF ECONOMIC SANCTIONS

While it may seem that sanctions are no longer a viable option to overt military action it may still be redeemable; however, many changes must be made to the current framework. Explicitly, a more thorough thought process must be used before sanctions are ever implemented, and those in power must consider their actual effect upon the international community. Currently when economic sanctions are considered no thought goes into the unintended consequences. Therefore, a more deliberate process must be established for the enactment of economic sanctions.

What must occur before sanctions are ever used is a thorough and methodical process by the sending country, to determine whether sanctions are a viable option. All the contingences and possibilities must also be considered before sanctions are ever actually implemented. Even though sanctions may seem less harsh than overt military action, their use should be considered upon the same level. Thus, extreme care and attention must be used in determining sanctions scope and enactment.

A suggestion would be to have congressional leaders more involved in the deliberating process for the proper sanctions. At present, Congress' sole role in implementing sanctions is that the President must *consult* Congress.<sup>157</sup> Having Congress more involved in this process, arguably making the process more time consuming, would prevent rash sanctions by the executive branch. This way a more thorough process could take place and a proper course of action could be determined. This could easily be done through amendments to the IEEPA requiring congressional oversight of the implementation of sanctions.

Furthermore, unilateral sanctions must be halted, as it is clear that one-sided sanctions generally do more harm than good. Considering the present situation with Russia, both the United States and European Union should have been in constant discussion and negotiations on the proper sanctions that should have been implemented. This again could have easily been rectified in the current crisis. Conferences between nation leaders or delegates from the United Nations could have been consulted in a joint effort to implement sanctions against Russia.<sup>158</sup>

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157. Luong, *supra* note 42.

158. See Nyun, *supra* note 67 at 477, for a discussion on examples of economic sanctions from multilateral sources including the United Nations.

Additionally, OFAC needs to be reined in and not granted as much power and leeway. As discussed above, once the President issues the initial executive order declaring the national emergency and need for sanctions, OFAC is free to add whoever and whatever it chooses to SDN list.<sup>159</sup> This power is too great and some oversight is needed. This is not only needed to curtail the scope of sanctions, but also as a benefit to businesses attempting to do business in the international market. The constant ability to change and modify the sanctions poses only a constant dark cloud over businesses that only want to abide by the law.

Furthermore, the overall use of sanctions needs to be limited. When the IEEPA was passed it was the Congressional intent that the executive branch would have limited power. Specifically, the president is meant to be consulting with Congress or the judicial branch before sanctions are ever fully considered.<sup>160</sup> However, in most instances this consultation never occurs, and the executive branch is given free rein to do as it wishes. Furthermore, those currently in power are misusing the general purpose of the IEEPA.

Under the IEEPA, sanctions are only warranted in times where an emergency threatens the very national security of the United States.<sup>161</sup> However, today what constitutes an emergency threatening the national security of the United States seems to have a lower burden of proof as time goes on. Essentially, an “emergency” has become any event that those in power deem unsatisfactory. Since the use of sanctions has become so common place, the general public and those in power have become accustomed to and do not question their use. But the truth is that these “emergencies” do not actually threaten the national security of the United States.

For example, Russia’s annexation of Crimea would not appear on its face to constitute an emergency that threatens the national security of the United States. It does, on the other hand, threaten the national security of Ukraine, but this is not the burden that is required by the IEEPA. In essence, either clarification is needed from Congress or the judicial branch on what exactly constitutes a threat to national security, or the IEEPA needs to be amended, as the current use is actually a violation.

Therefore, many problems arising from the overuse and misuse of economic sanctions could be curtailed or eliminated by amending the IEEPA. In this instance, amending the language to provide stricter guidelines on the exact nature of what constitutes a “national emergency” would be greatly warranted. While express language would be best, this

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159. See *supra* Parts II.B.3 and accompanying texts.

160. Van Arsdale, *supra* note 38; see also Savage, *supra* note 40.

161. 50 U.S.C. § 1702.



would perhaps be unworkable. Thus, general guidelines from Congress on how the executive branch could determine a “national emergency” would go a long way.

Moreover, guidelines would provide courts the ability to regulate decisions made by the executive branch. For example, currently under the language of the IEEPA the executive branch is given a wide berth in declaring the need for economic sanctions. However, if express guidelines were in place guiding the executive branch in determining whether a “national emergency” exists, going beyond this limited scope would be more easily determined by the judicial branch if suits are brought by individuals. In the end, there are many issues with the current overuse of economic sanctions, and much work is needed before it could become a useful tool for the United States’ government.

## VI. CONCLUSION

In brief, economic sanctions and lawfare should be considered one and the same. Both carry the same underlining purpose. They are legal alternatives to achieving an objective that in the past was achieved through overt military action. In the end the only difference between these two concepts is that sanctions are limited to the use of trade law, and lawfare refers to any use of law. Furthermore, economic sanctions, and lawfare, clearly have a damaging and destructive impact on both the international business community and the general population of the targeted country. Businesses throughout the world are hurt by the use of sanctions, as it is an ever-changing system that basically sets up those who try to abide by the law to fail. Moreover, businesses are bound to the prohibitions due to the excessive jurisdictional authority granted to OFAC and other agencies that implement the sanctions.

Also, it is not just businesses that are harmed, but the population of the targeted country is harmed as well. It is the everyday citizen who bears the burden of the destruction that is a result of the use of sanctions. Whereas those in power of the targeted country, who the sanctions are actually meant to influence, are able to escape the destruction that is caused by sanctions. They resort to corruption and illegal means to bypass the sanctions and to avoid all negative aspects. Finally, while this Comment wholly supports this alternative to outright military action, change is needed for the current system to be of any real use. If change does not occur, the system will only go on hurting those who it was meant to help and protect.

