Legal Strategies of Outlaw Actors Against Targeted Unilateral Sanctions

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Introduction

The decision by the United States Department of the Treasury to impose property sanctions against the former Prosecutor General of Georgia, Otar Partskhaladze,[2] has caused an anticipated panic effect within Georgia's ruling regime. Given the nature of the patronalistic regime, it has become necessary to protect the expectations of the regime's clients and its instruments and assure them of the credibility of the regime's domestic and foreign patrons.

In order to achieve its own goals, the regime once again faced the need to find strategies for the instrumentalization of the law. The spokesperson for the regime and simultaneously the leader of its judicial elite, Irakli Kobakhidze, who also leads the Parliamentary Majority, has once again assumed the role of the regime's chief actor in attempting to manipulate and twist the law.

Most of the legal arguments that Irakli Kobakhidze has put forth against the sanctions imposed on Otar Partskhaladze have been tried and tested by outlaw actors, including regimes, individuals, and legal entities, who employ a strategy of abusing legal instruments to counter sanctions and their consequences.

Below, we will examine both the legal nature of the sanctions imposed on Otar Partskhaladze and the strategies of legal defense that the targets of these sanctions seek to employ. This review will shed light on where and from whom Georgia's ruling regime borrows tactics and tools for the abuse of legal instruments.

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[2] https://www.state.gov/imposing-further-sanctions-in-response-to-russias-illegal-war-against-ukraine/ Last accessed on: 21.09.2023.

What are unilateral, targeted, individualized, the so called “smart” sanctions?

Chapter 6 of the United Nations Charter provides the central legal framework for sanctions in international relations and international law[3]. The type of sanctions regime adopted and implemented by the UN Security Council often has multiple flaws. General economic embargoes imposed by the UN against particular countries frequently have devastating direct and indirect effects, and due to their indiscriminate nature, they can also harm individuals who bear no individual responsibility for the transgressions that led to the sanctions.[4]

Within the UN system, as part of the fight against terrorism, a targeted and individualized sanctions mechanism was created, which is significantly more flexible, results-oriented, and compatible with human rights requirements. Due to these features, targeted and individualized sanctions are often referred to as "smart sanctions[5]."

"Smart sanctions" imposed within the UN system belong to the universal sanctions category since their enforcement is mandatory worldwide.[6] However, beyond the UN's universal system, major global actors such as the European Union and the USA also impose unilateral sanctions. Unilateral sanctions can be further divided into several categories, including travel and visa restrictions, as well as economic sanctions such as property blocking[7].

In the USA, there are several legal acts that provide the legislative basis for the imposition of economic sanctions. Among these acts, the central ones are the International Emergency Economic Powers Act (IEEPA) (1977) and the National Emergency Act (1976). Under the authority granted by these acts, the US President has substantial discretion to declare a national emergency and use sanctions, including targeted sanctions, to achieve foreign policy objectives[8].

[3] Marossi, Ali Z., Marisa R. Bassett, and Multilateralism Unilateralism. "Economic sanctions under international Law." Unilateralism, Multilateralism, Legitimacy, and Consequences, Den Haag (2015).
[4] Ilieva, Jana, Aleksandar Dashtevski, and Filip Kokotovic. "ECONOMIC SANCTIONS IN INTERNATIONAL LAW." UTMS Journal of Economics 9, no. 2 (2018).
[5] Drezner, Daniel W. "Sanctions sometimes smart: Targeted sanctions in theory and practice." International studies review 13, no. 1 (2011): 96-108.
[6] Biersteker, Thomas, and Zuzana Hudáková. "UN targeted sanctions: Historical development and current challenges." Research handbook on economic sanctions, Cheltenham Edward Elgar (2021): 107-124.
[7] Tzanakopoulos, Antonios. "State Responsibility for “Targeted Sanctions”." American Journal of International Law 113 (2019): 135-139.
[8] Chachko, Elena. "Due process is in the details: US targeted economic sanctions and international human rights law." American Journal of International Law 113 (2019): 157-162.

The sanctions against Otar Partskhaladze, imposed by the US Department of the Treasury, particularly by its Office of Foreign Assets Control (OFAC), are meticulously governed by normative acts (decrees) issued by the US President. These decrees were initially imposed by President Obama after Russia's annexation of Crimea, and President Biden expanded them following Russia's decision to resume large-scale military aggression against Ukraine[9].

Practice of Unilateral Sanctions Are Compatible with the International Law, Including International Law of Human Rights

The first strategy employed by Georgia's ruling regime's judicial elites regarding the sanctions imposed on Otar Partskhaladze mirrors the initial tactics used by the targets of those sanctions: arguing that the sanctions are in violation of international law, especially international human rights law.

These strategies have been thoroughly tested by other targets of sanctions, and there is a consensus both within the jurisprudence of international law and academic doctrine that unilateral individualized sanctions, including those imposed by the USA, are consistent with international law and international human rights standards[10].

In this context, Irakli Kobakhidze's initial argument that the so-called "smart sanctions" are equivalent to general criminal sanctions and subject to the same standards as criminal sanctions is patently false. On the contrary, in the Al Dulimi case, the European Court of Human Rights examined the "smart sanctions" imposed by the UN Security Council within the context of the guarantees under the civil limb of Article 6 of the Convention (the right to a fair trial)[11].

Jurisprudence related to targeted sanctions, whether within the European Court of Human Rights, the Court of Justice of the European Union, or US courts, typically does not advance such an argument and does not delve into the general compatibility of "smart sanctions" with human rights.

Furthermore, a closer examination of this jurisprudence reveals that these courts often refrain from reviewing complaints concerning fundamental rights (such as the right to property or the right to freedom

[9] https://ofac.treasury.gov/sanctions-programs-and-country-information/ukraine-russia-related-sanctions - newspage of the US Department of the Treasury's Office of Foreign Assets Control. Last accessed on: 21.09.23.
[10] Chachko, "Due Process in the Details".
[11] CASE OF AL-DULIMI AND MONTANA MANAGEMENT INC. v. SWITZERLAND (Application no. 5809/08) 21 June 2016

of movement) related to these sanctions, unless unique circumstances in a specific case necessitate such review (for example, the right to respect for private and family life as in the Nada case). Instead, they primarily focus on verification of the proper exercise of procedural rights.[12]

As a result, "smart sanctions" regimes take into consideration the requisite procedural safeguards, including the oversight of the courts, making them compatible with international human rights standards. The "smart sanctions" imposed by the US, including property blocks enforced by the Treasury, incorporate all necessary procedural defenses in line with human rights requirements.

Decisions regarding sanctions are reached through an interagency review process involving various relevant branches of the executive authorities. These involved bodies exchange and evaluate the evidence at their disposal, engage in discussions on the substantiation and appropriateness of imposing sanctions, and only then make a decision.

The procedural approach to decision-making and substantiation enhances the quality of justification and reduces the likelihood of decisions being overturned through court oversight. Before court oversight comes into play, individuals targeted by sanctions have the opportunity to engage with the executive authorities directly. From these authorities, they can receive detailed justifications for their case, which will also be submitted to the court in case of an appeal. In matters involving the implementation of foreign and national security policies, US courts largely tend to defer to the executive authorities.

Under the standards of the Administrative Process Act (APA), decisions regarding sanctions are subject to a less demanding standard of review. Specifically, these decisions can only be overturned if they are deemed "arbitrary and capricious." As previously mentioned, all sanctions undergo a thorough interagency review and are supported by appropriate justifications, which effectively eliminates the possibility of courts deeming them "arbitrary and capricious[13]."

Another unsuccessful legal strategy adhered to by Georgia's ruling regime has also been refuted by well-established and robust legal arguments in both the European Union and the USA. In particular, the

[12] CASE OF NADA v. SWITZERLAND, (Application no. 10593/08) 12 September 2012, CASE OF AL-DULIMI AND MONTANA MANAGEMENT INC. v. SWITZERLAND (Application no. 5809/08) 21 June 2016, Sayadi v. Belgium., Comm.No.1472/2006, at para.10.8, CCPR/C/94/D/1472/2006(2008).

[13] Holy land found. For relief &dev. V. Ashcroft, 333f.3d156(d. C. Cir.2003), cert. Denied,540u. S.1218(2004); Islamic am. Relief agency v. Gonzales,477f.3d728(d. C. Cir.2007), cert. Denied 552u. S.816; al-Aqeel v. Paulson, 568f. Supp.2d64(d. D. C.2008); kadi v. Geithner, 42f. Supp.3d1(d. D. C.2012); global relief found. V. Oneill, 315f.3d748(7thcir.2002), cert. Denied, 540u. S.1003 (2003); fares v. Smith,901f.3d315 (d. C. Cir.2018).

regime requests that the US provide evidence, including intelligence and other classified information, that led to the imposition of sanctions.

Previously, the targets of these sanctions argued that intelligence or other classified information should not serve as the basis for sanctions. And If the use of such evidence were permitted, it should be made publicly available.

The courts of the European Union[14] and the USA[15] have provided clear legal responses to these questions. Firstly, the imposition of sanctions based on classified evidence does not violate human rights. Regarding access to such information, when using classified evidence, there is an obligation to characterize it only in general terms without disclosing specific details, including intelligence methods and sources, as doing so could jeopardize national security. The courts of the European Union have established procedures to ensure that during judicial oversight, the courts are acquainted with classified evidence in a manner that does not compromise national security.

The sanctions imposed against Otar Partskhaladze adhere to these standards. They reveal the general content of the classified evidence, indicating that Mr. Partskhaladze collaborates with the Russian Federal Security Service. The information also includes details about his handler and supervising officer in this capacity, Onishchenko, as well as a general description of the services Otar Partskhaladze provides for the FSB: influencing Georgian society and politics for the benefit of Russia.

Therefore, the sanctions against Otar Partskhaladze are in line with all procedural standards of human rights. Furthermore, he can make additional use of these procedural rights if he decides to appeal these sanctions in a US court.

As for the Georgian regime's demand for classified evidence that led to Otar Partskhaladze being sanctioned, it is such a legal absurdity from the perspective of both international human rights law and international public law that it no longer merits further commentary.

[14] European Commission and Others v Yassin Abdullah Kadi, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Judgment of the Court (Grand Chamber), 18 July 2013.
[15] People's Mojahedin Organization v. United States Department of State, 613 F.3d 220 (D.C. Cir. 2010).

Against Extra-territoriality – Outlaw Regimes' Last Line of Defense

As mentioned earlier, "smart sanctions" imposed outside the UN system do not possess a universal character. Nevertheless, it is still possible to universalize them through the granting of extra-territorial effects.[16] For example, U.S.-imposed sanctions apply not only to U.S. citizens but also to foreign nationals. Theoretically, this could be seen as an encroachment on the jurisdiction of other countries, a favorite argument of regimes like the Islamic Republic of Iran. However, in practice, the enforcement of unilateral sanctions is confined to U.S. jurisdiction, and there is no actual conflict between different jurisdictions.

The extra-territorial effect, meaning other countries voluntarily joining and enforcing these sanctions, is achieved through indirect mechanisms. Specifically, given the roles of the U.S. and the EU, their ability to grant or deny access to institutions and actors operating under their jurisdiction in the global economic and financial system can inflict significant harm on third countries and their nationals. Consequently, these third countries choose to voluntarily enforce these unilateral sanctions.

Therefore, both unilateral sanctions and the practice of their voluntary enforcement are fully in accordance with international law.

Nevertheless, some of the countries targeted by these sanctions choose a path to limit the extra-territorial effects of unilateral sanctions within their territory or concerning their citizens by invoking "sovereignty-first" arguments. With the order issued by the acting President of the National Bank,[17] Georgia's political regime opted for precisely that path. However, as mentioned earlier, such measures do not exert significant influence over the effectiveness of unilateral sanctions, and they are more symbolic acts than they are delivering tangible results.

[16] Schmidt, Julia. "The legality of unilateral extra-territorial sanctions under international law." Journal of Conflict and Security Law 27, no. 1 (2022): 53-81.

[17] Order of the President of the National Bank of Georgia №253/04 issued on 19 September 2023 on amending the Order of the President of the National Bank of Georgia №208/04 issued on 4 August 2023 on "Approval of Rules for the implementation of sanctions regimes by accountable persons under the supervision of the National Bank of Georgia".

Conclusion

Georgia's ruling regime has employed every available legal strategy used by targets of similar sanctions in international practice to counter those imposed on Otar Partskhaladze. The regime has clearly instrumentalized these strategies as a mean to maintain its power. This is further evident in the fact that the quality of legal arguments adopted by the ruling regime often falls short under critical scrutiny in the context of international law and may appear as absurd on the surface.