

Retooling Sanctions: China's Challenge to the Liberal International Order

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Abstract

Professor Tom Ginsburg has produced yet another classic of transnational law, political science, and international relations. Democracies and International Law yields important insights into the democratic nature of international law but cautions that authoritarian states can apply these very legal technologies for repressive or antidemocratic purposes. Building on Ginsburg's theories of mimicry and repurposing, this contribution highlights the role of both techniques in the creation of China's economic sanctions program. On the one hand, China has developed a basic set of tools to impose economic sanctions—a key instrument in the liberal international toolkit—on foreign entities and persons. In so doing, China has adopted elements of American economic sanctions, as well as European directives, to blunt the force of foreign sanctions. On the other hand, China has deployed sanctions for anti-democratic purposes, including squelching free speech, freedom of thought, and academic inquiry. While a full discussion of China's sanctions regime (itself a project under construction) is still premature, the initial imposition of sanctions suggests China is trying to accomplish very different aims than the liberal states that pioneered economic sanctions in the twentieth century.

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I. INTRODUCTION

Tom Ginsburg's *Democracies and International Law* is an intellectual *tour de force*, emphasis on *tour*.¹ He begins in Gambia and ends in Fiji, surveying a broad sweep of developments on national, regional, and global scales. Few studies—at least those from a single author—cover Africa, the Americas, Asia, Australia, and Europe with the same nimbleness, richness, empirical basis, and theoretical sophistication.

Its geographical remit may be broad, but the book very much reflects the current moment. On the one hand, democracy is backsliding across the world. Brazil, India, and the United States (U.S.) have undergone sharp authoritarian turns under Jair Bolsonaro, Narendra Modi, and Donald Trump, respectively. Newer democracies—Indonesia, Hungary, Poland, Nicaragua, and Bangladesh—have opted for more authoritarian modes of governance, whether by a single person (Viktor Orbán, Sheikh Hasina), a single party (e.g., Poland's Law and Justice), or a combination of both. On the other hand, China, Russia, and other authoritarian states are extending their influence both regionally and globally. This can be profoundly destructive, as attested by Russia's invasion of Ukraine. But it is also potentially destabilizing. China is not just reshaping global geopolitics by creating the world's largest hub-and-spoke system—it is laying the foundations of a new legal, political, and regulatory framework to govern trade, investment, and diplomacy *outside* of the laws and norms that governed international relations for the past seven decades.

As tensions rise between authoritarian states and liberal democracies, the use of sanctions has assumed new prominence. This is nowhere more palpable than in the mountain of sanctions that the West has imposed on Russia for illegally invading another sovereign state. In this Essay, I use two concepts of Ginsburg's authoritarian legality—mimicry and repurposing—to explore the dynamics of this transnational cycle of sanctions and countersanctions. Ginsburg writes, with characteristic pith, "*democracies innovate and authoritarians mimic and repurpose.*"² He points to the examples of judges, elections, constitutions, and anti-corruption commissions as institutions developed in the West and later redefined and redeployed by authoritarian states. In this brief contribution, I show how another institution of transnational governance—economic sanctions—fits this pattern of investigation, translation, and repurposing.

Section II briefly traces the development of economic sanctions as an economic weapon by liberal democracies to pressure foreign, often authoritarian, states. Section III highlights China's rudimentary sanctions regime and describes the various models that China has mimicked in writing a new chapter of legal

¹ TOM GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW* (2021).

² *Id.* at 193.

development, international relations, and assertive diplomacy. Section IV explores how China has repurposed economic sanctions, forging a tool once used to punish government officials' unsavory conduct and the corporations abetting that conduct, into a weapon targeting anyone critical of China's domestic or foreign policy.

II. SANCTIONS

Economic sanctions emerged in the early twentieth century as an auxiliary to war. Early commentators referred to the “economic weapon” as an “incidental operation[] of war.”³ During the first world war, the United Kingdom (U.K.) and the U.S. both passed laws entitled “Trading with the Enemy Act” to sanction Germany⁴ and later expanded economic sanctions over the course of the subsequent century.⁵ Other Western states adopted similar measures to restrict economic relations during war or other periods of heightened tensions.

In time, economic sanctions decoupled from military conflict. Contemporary research shows that human rights and democracy constitute the primary aims of global sanctions, though war remains relevant.⁶ The emphasis on values matters. As Nicholas Mulder recently argued, sanctions are “one of liberal internationalism’s most enduring innovations of the twentieth century.”⁷ In light of these origins, it is no surprise that Western states have imposed the majority of economic sanctions and have targeted primarily African and Asian nations.⁸

The U.S. has imposed sanctions on the People’s Republic of China since its inception in 1949.⁹ The severity of these sanctions has varied, but the last several years (2018–2022) represent the peak of American sanctions against China. The broader U.S.-China relationship has also changed. Under the increasingly authoritarian grip of Chinese president Xi Jinping, the Trump administration took a more punitive approach to China, an approach broadly adopted by the Biden

³ Anton Bertram, *The Economic Weapon as a Form of Peaceful Pressure*, 17 TRANSACTIONS GROTIUS SOC’Y 139, 141 (1931).

⁴ Trading with the Enemy Act 1914 c.89 (UK) (repealed 1939), <https://perma.cc/EQ9T-V63C>; Trading with the Enemy Act, Pub. L. No. 65-91, 40 Stat. 411 (1917).

⁵ See, e.g., Jackson-Vanik Act, 19 U.S.C. § 2432 (1975); Iran-Libya Sanctions Act, Pub. L. No. 104-172, 110 Stat. 1541 (1996); United Nations Act 1946 c.45 (UK), <https://perma.cc/B99A-LQX9>; Terrorist Asset Freezing Act 2010 c.38 (UK), <https://perma.cc/NLS9-P4NB>; Sanctions and Anti-Money Laundering Act 2018 c.13 (UK), <https://perma.cc/A36C-NCV5>.

⁶ See Gabriel Felbermayr, Aleksandra Kirilakha, Constantinos Syropoulos, Erdal Yalcin & Yoto V. Yotov, *The Global Sanctions Data Base 45* (Drexel Univ., Working Paper No. 2, 2020).

⁷ NICHOLAS MULDER, *THE ECONOMIC WEAPON* 3 (2021).

⁸ See Felbermayr, *supra* note 6, at 60–61.

⁹ See Xin-zhu J. Chen, *China and the US Trade Embargo, 1950-1972*, 13 AM. J. CHINESE STUD. 169, 169 (2006) (noting U.S. export restrictions of strategic materials to China and a total trade embargo after China entered the Korean War in 1950).

administration.¹⁰ Indeed, specific laws targeting China have also piled up, attested by the Hong Kong Human Rights and Democracy Act (2019),¹¹ the Hong Kong Autonomy Act (2020),¹² and the Xinjiang Forced Labor Act (2021).¹³ Under these and other laws, the U.S. has sanctioned dozens of Chinese and Hong Kong officials such as Carrie Lam (Hong Kong's chief executive) and Wang Chen (Chinese Communist Party politburo member).¹⁴ To date, however, the U.S. has not targeted anybody within the top leadership of China.

III. CHINA'S SANCTIONS REGIME: AN OVERVIEW

At present, China's sanctions regime is rudimentary and primarily defensive in nature. While a more offensive deployment of sanctions is already visible, China began its sanctions program in response to proliferating American sanctions, bans, and other trade tensions. This Section highlights the main elements of China's inchoate sanctions program, paying particular attention to the American and European models on which China based its program.

China's erection of a sanctions regime is not mere mimicry, however. As with any legal transplant, China deploys sanctions in ways that both mirror Western practices and deviate from them. China has imposed sanctions on

¹⁰ The Trump administration deployed a variety of tactics in its trade war against China, including blocking popular Chinese internet companies like TikTok and WeChat, and arranging for the house detention of Huawei CFO Meng Wanzhou in Canada. The trade war, of course, resulted from the imposition of tariffs on various theories. *See generally* Thomas J. Schoenbaum & Daniel C.K. Chow, *The Perils of Economic Nationalism and a Proposed Pathway to Trade Harmony*, 30 STAN. L. & POL'Y REV. 115 (2019).

¹¹ Pub. L. No. 116-76, 113 Stat. 1161 (2019).

¹² Pub. L. No. 116-141, 134 Stat. 663 (2020).

¹³ Pub. L. No. 117-78, 135 Stat. 1525 (2021).

¹⁴ In August 2020, the U.S. "Treasury imposed sanctions on eleven individuals for undermining Hong Kong's autonomy and restricting the freedom of expression or assembly of the citizens of Hong Kong." *See Press Release: Treasury Sanctions Individuals for Undermining Hong Kong's Autonomy*, U.S. DEP'T TREASURY (Aug. 7, 2020), <https://perma.cc/4JC9-KJZM> (noting sanctions imposed *inter alia* on Carrie Lam, pursuant to the Hong Kong Human Rights Act of 2019, and Hong Kong Autonomy Act of 2020). In October 2020, the U.S. sanctioned twenty-four additional persons, pursuant to the Hong Kong Accountability Act, including politburo member, Wang Chen. *See Update to Report on Identification of Foreign Persons Involved in the Erosion of the Obligations of China Under the Joint Declaration or the Basic Law*, U.S. DEP'T STATE (Mar. 16, 2021), <https://perma.cc/U3D4-2F5Z>.

high-level political figures in the U.S.,¹⁵ Canada,¹⁶ and the European Union (E.U.)¹⁷ in tit-for-tat exchanges. But China has also repurposed sanctions to attack scholars, experts, and critics of China. In this way, the economic weapon of liberal internationalism has been repurposed to blunt criticism of China, often by well-informed and exhaustively sourced reporting. To put the matter plainly, China is using its sanctions regime for authoritarian purposes: to deflect charges of China's human rights abuses against its own citizens, to cast doubt on foreign critics of China, and to chill inquiry into topics that portray China in a negative light.

A. Unreliable Entity List

To date, China's sanctions program has three planks. China first announced its foreign sanctions policy in May 2019. Citing an international environment of "economic uncertainty, increased instability, unilateralism, rising protectionism, and severe challenges facing the multilateral trading system," the Ministry of Commerce revealed its hand.¹⁸ The ministry would henceforth compile an "Unreliable Entity List"¹⁹ (UEL) of foreign persons, corporations, and legal persons that acted against China's national interests. In an ironic twist, given the Trump administration's naked attempts to squelch the World Trade Organization (WTO) and strangle other multilateral institutions, China became a loud proponent, though not necessarily a firm adherent, to the market-based

¹⁵ On the day that Biden was sworn in as U.S. President, China announced sanctions on twenty-eight officials and advisors from the Trump administration, including Mike Pompeo, Steven Bannon, John Bolton, Peter Navarro, Matthew Pottinger, and Alex Azar. See Amanda Macais, *China Sanctions Pompeo, O'Brien, Azar and Other Trump Administration Officials after Biden Inauguration*, CNBC (Jan. 20, 2021), <https://perma.cc/ZU9N-KKG8>. China later sanctioned Gayle Manchin (chair of U.S. Commission on International Religious Freedom), and Tony Perkins (vice-chair of U.S. Commission on International Religious Freedom), for the commission's criticism of Xinjiang. Associated Press, *Blinken Condemns China Sanctions on U.S. Officials*, POLITICO (Mar. 27, 2021), <https://perma.cc/C6MY-SRJT>.

¹⁶ China sanctioned Michael Chong, a conservative member of parliament (MP). See *China Announces Sanctions on Canadians, Including MP Michael Chong*, CBC (Mar. 27, 2021), <https://perma.cc/62K2-QD9Z>.

¹⁷ China placed sanctions on ten European citizens, including five members of the European Parliament, and legislators from Belgium, Lithuania, and the Netherlands. China also sanctioned two scholars critical of concentration camps in Xinjiang: Adrian Zenz (Germany) and Bjorn Jerden (Sweden). See *China Hits Back at EU with Sanctions on 10 People, Four Entities Over Xinjiang*, REUTERS (Mar. 22, 2021), <https://perma.cc/G8M8-UDEJ>.

¹⁸ *Shangyubub: Zhongguo jiang jianli bukekao shiti qingdan zhidu* [Ministry of Commerce: China Will Establish a System of Unreliable Entities], MINISTRY COM. PEOPLE'S REPUBLIC CHINA (May 31, 2019), <https://perma.cc/2VTP-T6KU> [hereinafter *China Establishes System*].

¹⁹ Ministry of Commerce, Order No. 4: Provisions on the Unreliable Entity List (Sept. 19, 2020) (hereinafter Unreliable Entity List). An English translation is available at <https://perma.cc/G5PK-KXW7>.

multilateral trading system. The ministry would henceforth list entities that “do not comply with market regulations, deviate from the spirit of contract, or blockade or sever supplies to Chinese entities for non-commercial purposes.”²⁰

China issued the UEL in September 2020. As a result, China can now designate a person, legal entity, or company as “unreliable” in one of two situations: the entity (a) endangers “national sovereignty, security or development interests of China;” or (b) suspends “normal transactions with,” or “appl[ies] discriminatory measures against, a [Chinese entity]” in violation of “normal market transaction principles.”²¹ The remit of the first prong is potentially boundless, reaching a broad sweep of conduct that might well be tolerated in liberal democracies, such as state criticism by educational institutions, social media, journalists, non-governmental organizations, or other sectors.²² But the second prong better explains the system’s *raison d’être*: to prevent foreign companies from severing trade with Chinese entities in order to further Western sanctions.²³

Punishments for unreliable entities include restrictions on trading and investing in China, visa denials, revocation of work permits or residency rights in China, fines, and “other necessary measures.”²⁴ But the regulation also envisions a soft touch, providing a grace period during which foreign entities can “rectify” their conduct to avoid the list,²⁵ a special license by which Chinese entities can seek items from sanctioned foreign entities,²⁶ and a process to remove one’s name from the list.²⁷

The UEL will seem familiar to anyone acquainted with U.S. sanctions. In the U.S., the sprawling sanctions regime spans decades, government departments (Commerce, Treasury, State), target countries, and sectors (nuclear, technology, etc.). The two features most germane to the present discussion involve sanctions on foreign individuals (travel bans, asset freezes), and export controls.

²⁰ *China Establishes System*, *supra* note 18.

²¹ Unreliable Entity List, *supra* note 19, art. 2.

²² Lester Ross, Kenneth Zhou & Tingting Liu, *China’s MOFCOM Promulgated the Provisions on the Unreliable Entities List*, WILMERHALE (Sept. 22, 2020), <https://perma.cc/B52A-567L>.

²³ Wang Feng & Dai Menghao, *Four Key Issues on China’s Unreliable Entity List*, CHINA L. INSIGHT (Oct. 16, 2020), <https://perma.cc/92YH-MZ6Z>. The authors, attorneys with King and Wood Mallesons, emphasize the regulation’s “anti-boycotting” nature—to prohibit companies from complying with another country’s sanctions regime. *Id.*

²⁴ Unreliable Entity List, *supra* note 19, art. 10.

²⁵ *Id.* art. 9.

²⁶ *Id.* art. 12.

²⁷ *Id.* art. 13.

Pursuant to various pieces of legislation, the U.S. Treasury Department keeps a list of “specially designated nationals,”²⁸ consisting of entities or individuals. Once so designated, these legal and natural persons face a number of potential penalties: they may be prevented from transacting business with U.S. entities, have their assets frozen in the U.S., or be banned from traveling to the U.S. Towards the end of the Trump administration, the Treasury Department named fourteen Chinese officials to the “Specially Designated Nationals List,” all members of the National People’s Congress Standing Committee (China’s highest legislative body).²⁹ In explaining these designations, the State Department claimed that the fourteen officials “effectively neutered the ability of the people of Hong Kong to choose their elected representatives” by enacting the National Security Law.³⁰ Henceforth, these Chinese officials would face visa restrictions, their U.S.-based assets would be frozen, and they—as well as their immediate family members—would be barred from entering the U.S.³¹ Within the U.S., the move was seen as a way to pressure the incoming Biden administration to take a tough stance on China. Within China, foreign ministry spokeswoman Hua Chunying condemned “the outrageous, unscrupulous, crazy and vile act of the U.S. side,” and accused the U.S. of violating “basic norms governing international relations.”³²

The second feature includes export controls, a vast regulatory apparatus that limits American entities from exporting certain items to designated foreign businesses, entities, or persons. The Commerce Department maintains three lists that U.S. exporters must consult before exporting covered products, lest the exporter run afoul of U.S. export controls. Of particular importance to the Chinese sanctions program is the U.S. Entity List, which names thousands of foreign parties banned from receiving items from American exporters.³³

The U.S. Entity List includes any “foreign party, such as an individual, business, research institution, or government organization” engaged in activities

²⁸ See, e.g., International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1708 (1977); the Global Magnitsky Human Rights Accountability Act, 22 U.S.C. § 2656 (2016); the Hong Kong Accountability Act, Pub. L. No. 116-149, 134 Stat. 663 (2020).

²⁹ *Hong Kong-Related Designations: Specially Designated Nationals List Update*, U.S. DEP’T TREASURY (Dec. 7, 2020), <https://perma.cc/8NKK-W54Y>.

³⁰ *Press Statement: Designation of National People’s Congress Officials Undermining the Autonomy of Hong Kong*, U.S. DEP’T STATE (Dec. 7, 2020), <https://perma.cc/VE93-WST2>.

³¹ *Id.*

³² Shannon Tiezzi, ‘Crazy and Vile:’ China Reacts with Fury to US Sanctions on Top Legislators, DIPLOMAT (Dec. 9, 2020), <https://perma.cc/PCY7-K7K4>.

³³ The other two lists include the Denied Persons List, which targets American parties that have been stripped of export privileges, and the Unverified List, a “list of parties whose bona fides [the Commerce Department’s Bureau of Industry and Security] has been unable to verify.” See generally *Lists of Parties of Concern*, U.S. DEP’T COM., BUREAU INDUS. & SEC., <https://perma.cc/6GJB-CKYY>.

contrary to U.S. national security or foreign policy interests.³⁴ In practice, this means that a designated foreign party cannot receive controlled items from U.S. entities without a license.³⁵ The U.S. imposes administrative sanctions (e.g., temporary or permanent denial of export privileges, compliance audits), civil fines, and even criminal sanctions on those who violate U.S. export controls.³⁶ Sanctions have recently included prison sentences, probation, and community service for natural persons; and criminal fines, civil fines, and denial of export privileges for both natural and legal persons.³⁷ Take the prominent example of Chinese telecommunications company, ZTE. It sent routers, microprocessors, and servers to Iran in defiance of U.S. sanctions on the Islamic Republic.³⁸ ZTE would ultimately pay a combined civil and criminal penalty of \$1.19 billion—the largest fine ever levied for export controls on a company.³⁹ The Chinese firm would also face extensive audit and compliance requirements in the future and denial of export privileges from the U.S.⁴⁰

In response to the U.S., China created its own “Unreliable Entity List.”⁴¹ At present, two years after issuing the regulation, China has not yet listed a single person or entity. That does not mean, however, that the Unreliable Entity List has had no effect. On the day that the Ministry of Commerce issued the guidelines, *Global Times*—the sharpest-tongued of China’s state media entities—intimated that China would sanction the British bank HSBC for its “collusion with the US to frame Chinese tech giant Huawei.”⁴² While HSBC was already under investigation in the U.K., its possible punishment by China was linked to the drop to a 25-year low of the bank’s share price.⁴³ A similar fate befell FedEx after China

³⁴ *Lists of Parties of Concern*, *supra* note 33.

³⁵ *Id.*

³⁶ The Bank of International Settlements published a list of persons sanctioned by U.S. export control laws. They include an American citizen, Ron Hansen, who smuggled forensic hardware and software into China and received a sentence of ten years in federal prison. U.S. DEP’T OF COM., BUREAU OF INDUS. & SEC., DON’T LET THIS HAPPEN TO YOU! ACTUAL INVESTIGATIONS OF EXPORT CONTROLS AND ANTIBOYCOTT VIOLATIONS 47–48 (2020), <https://perma.cc/ZK3G-4WT5>.

³⁷ *Id.* at 37–56

³⁸ *Id.* at 48–49.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Yuanyou Yang, *China Implements its Long-Awaited Unreliable Entities List Mechanism*, CHINA BUS. REV. (Oct. 7, 2020), <https://perma.cc/MS25-ZKZN>.

⁴² See Li Qiaoyi, *HSBC Shares Sink on Scandal Report*, GLOB. TIMES (Sept. 21, 2020), <https://perma.cc/8C2Z-A36N>.

⁴³ Narayanan Somasundaram, *HSBC Shares Hit 25-Year Low on Reported ‘Unreliable List’ Inclusion*, NIKKEI ASIA (Sept. 21, 2020), <https://perma.cc/BTC2-L8XF>.

announced it would investigate the logistics company for diverting packages away from Huawei, to further American sanctions on the tech giant.⁴⁴

In the end, China sanctioned neither HSBC nor FedEx. But the coordination between the Ministry of Commerce and Global Times should give pause to multinational enterprises. As Angela Zhang argues, this is part of a Chinese strategy “to use the minimal threat possible to achieve the purpose of deterrence.”⁴⁵ Given its economic heft, China need not actually use tools of economic coercion; the mere threat may suffice to send signals to foreign enterprises.

B. Blocking Measures

The second plank of China’s economic sanctions is the January 2021 Blocking Measures.⁴⁶ Passed amidst a wave of U.S. sanctions,⁴⁷ the Blocking Measures aim to neutralize the effects of foreign sanctions on Chinese companies. Noting that extraterritorial sanctions violate international law, the measures mandate that (Chinese) persons affected by foreign (Western) sanctions report them to Chinese state authorities.⁴⁸ The measures envision a “working mechanism” to counteract “unjustified extra-territorial application of foreign legislation and other measures.”⁴⁹ The mechanism will determine whether the foreign sanctions are “unjustified” by weighting such factors as whether they violate international law, harm China’s “national sovereignty” or “development interests,” or impact rights and interests of China’s citizens or legal persons.⁵⁰ Upon deeming the sanctions unjustified, members of the mechanism will issue prohibition orders (to nullify the legal effect of foreign sanctions),⁵¹ allow affected Chinese persons (legal or natural) to sue in Chinese courts,⁵² and advise Chinese persons on how to respond to foreign sanctions.⁵³ Finally, the measures allow

⁴⁴ Connor Smith, *FedEx Stock Is Slipping as China Investigates Diverted Huawei Deliveries*, BARRON’S (June 3, 2019), <https://perma.cc/3NRS-HFU8>. While the unreliable entity list came out in 2020, the Chinese government announced it would release such a list in May 2019.

⁴⁵ ANGELA HUYUE ZHANG, CHINESE ANTITRUST EXCEPTIONALISM: HOW THE RISE OF CHINA CHALLENGES GLOBAL REGULATION, 228–29 (2020).

⁴⁶ *Order No. 1: Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures*, MINISTRY COM. (Jan. 9, 2021) [hereinafter *Blocking Measures*]. An English translation is available at <https://perma.cc/2RYT-Q5Y5>.

⁴⁷ The difference between the international environment should not escape us. In 1996, the U.S. targeted Iran, Libya, and Cuba, not the E.U. In 2020, the U.S. was targeting China.

⁴⁸ *Blocking Measures*, *supra* note 46, art. 5.

⁴⁹ *Id.* art. 4.

⁵⁰ *Id.* art. 6.

⁵¹ *Id.* art. 7.

⁵² *Id.* art. 8.

⁵³ *Id.* art. 10.

Chinese government departments to support Chinese citizens who suffer “significant losses resulting from non-compliance” with foreign sanctions.⁵⁴

As with the Unreliable Entity List, China looked to the West for source material, borrowing heavily from the E.U.’s Blocking Statute. In 1996, the E.U. passed a directive to nullify the extraterritorial effects of U.S. sanctions on Iran, Libya, and Cuba.⁵⁵ Since American sanctions were global in their scope, they applied to European actors that conducted business with Cuban or Iranian entities, even if there were no direct nexus to the U.S. In brief, the E.U. (a) requires any person affected by foreign sanctions to report them to the Commission,⁵⁶ (b) refuses to recognize or enforce judgments that give effect to foreign sanctions in E.U. courts,⁵⁷ (c) prohibits persons from complying with requirements or prohibitions promulgated by foreign sanctions,⁵⁸ and (d) permits affected parties to recover damages, including legal costs, sustained by foreign sanctions.⁵⁹ In 2021, the European Court of Justice clarified the scope of the Blocking Statute, holding that E.U. citizens are prohibited from complying with U.S. sanctions that require the termination of contracts with Iranian businesses.⁶⁰ The court further held that U.S. sanctions, by virtue of their extraterritorial effect, violate international law.⁶¹

China’s measures borrow various features from the European model, including the reporting requirement, private right of action, and exemption process.⁶² But a few differences are worth noting. First, the E.U. statute specifies the foreign laws to which it applies, clarifying the scope of sanctions for concerned European businesses. China’s measures, by comparison, impose no such limitations, perhaps due to the broadening array of international sanctions that diverse jurisdictions—including Canada and the U.K.—currently impose on China.

Second, the Chinese government maintains greater control over the implementation of the blocking measures. The E.U. statute applies directly to

⁵⁴ *Blocking Measures*, *supra* note 46, art. 11.

⁵⁵ See Council Regulation No. 2271/96, Protecting Against the Effects of the Extra-territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (L 309) 1 (EC). The E.U. passed the law in response to American sanctions legislation directed at Iran, Libya, and Cuba, as noted in the directive’s annex.

⁵⁶ *Id.* art. 2.

⁵⁷ *Id.* art. 4.

⁵⁸ *Id.* art. 5.

⁵⁹ *Id.* art. 6.

⁶⁰ Case C-124/20, *Bank Melli Iran v. Telekom Deutschland GmbH*, ECLI:EU:C:2021:1035, ¶¶ 42–51 (Dec. 21, 2021).

⁶¹ See *id.* ¶ 3.

⁶² See *China’s ‘Blocking Statute’ – New Chinese Rules to Counter the Application of Extraterritorial Foreign Laws*, GIBSON DUNN (Jan. 13, 2021), <https://perma.cc/FK32-7J4Q>.

individuals within the E.U., without need for permission from national or supranational authorities.⁶³ China, by contrast, requires the formation of a “working mechanism,” first to decide whether the sanctions are “justified,” and second to determine an appropriate course of action. This reflects China’s desire to control each step of the countersanctions process, whereas the E.U. seems to place responsibility for enforcement on affected individuals or companies. The authoritarian impulse to centralize power overrides the possibility of enabling individuals to act on their own initiative.

To date, China has provided little additional guidance on the implementation of the blocking measures. Even now, basic questions—*How will Chinese authorities constitute the working mechanism? How do Chinese citizens qualify?*—linger. In the two reported cases this author has been able to find, Chinese judges refused to apply the blocking measures, apparently with good reason.⁶⁴ At this point, it would be premature to draw conclusions about China’s implementation of its blocking measures. One suspects, however, that China will tread carefully where significant amounts of foreign investment might be at stake.

C. Anti-Foreign Sanctions Law

The third plank of China’s sanctions regime is the Anti-Foreign Sanctions Law (Sanctions Law), the first national-level legislation issued in the field.⁶⁵ According to the National People’s Council (NPC), which enacted the statute, the law fulfills “an urgent necessity in order to counter the hegemonism and power politics of some Western countries.”⁶⁶ The NPC further characterized the law as

⁶³ For example, the E.U. statute uses language such as “no judgment . . . shall be recognized” and “no person . . . shall comply . . . with any requirement of prohibition.” Council Regulation No. 2271/96, *supra* note 55, arts. 4, 5. The implication is that no authorization from an E.U. entity is needed; the foreign sanction *itself* has no legal effect.

⁶⁴ See Ren Qing et al., Zhongguo Chukou Guanzhi he Zhicai Niandu Huigu yu Zhanwang [Annual Review and Outlook on China’s Export Controls and Sanctions] (Jan. 27, 2022), <https://perma.cc/2GJJ-QAKW>. The author is a Chinese lawyer with the Global Law Office. In the first case, a Chinese company sought to prevent the enforcement of a foreign arbitral award, but the Shanghai court found that the blocking measures would not apply to a lawfully rendered arbitral award. *Accord* Sun Jiajia & Xiao Yudan, “Zuduan Banfa” Neng Fou “Zuduan” Waiguo Zhongcai Caijuede Chengren he/huo Zhixing? Cong Shouli ni “Zuduan” Chengren he Zhixing Xinjiapo Zhongcai Caijue’an Shouqi [Can the “Blocking Measures” “Block” the Recognition and/or Enforcement of a Foreign Arbitral Award, Starting From the First Case to “Block” the Recognition and Enforcement of a Singapore Arbitral Award] (Dec. 29, 2021), <https://perma.cc/TB46-ZPC9>. In the second case, the Chinese court decided that the putatively sanctioned company, a Russian Bank that conducted business with North Korea, did not appear on the Treasury Department’s entity list, likewise rendering the blocking measures inapt.

⁶⁵ Zhonghua Renming Gongheguo Fanwaiguo Zhicaiifa [Anti-Foreign Sanctions Law of the People’s Republic of China] (2021), <https://perma.cc/GP59-8SMW> [hereinafter Sanctions Law].

⁶⁶ *Anti-foreign Sanctions Law Necessary to Fight Hegemonism, Power Politics: Official*, NAT’L PEOPLE’S CONG. (June 10, 2021), <https://perma.cc/VGX8-87JU>.

a counterweight to the imposition of “so-called sanctions upon related state organs, organizations and public servants by using pretexts including Xinjiang, Tibet and Hong Kong-related issues.”⁶⁷ It is important to stress that the Sanctions Law opposes sanctions imposed by foreign jurisdictions; it is not “anti-foreign” in the xenophobic sense, as one might glean from the English translation of the law.

The Sanctions Law builds upon the two measures discussed above. For instance, the Sanctions Law includes the same techniques for designating parties as the Unreliable Entity List, and the Blocking Measures.⁶⁸ Likewise, the punishments under the Sanctions Law mirror those from the Unreliable Entity List: visa denials, asset freezes, restrictions or prohibitions on trade with Chinese entities, and the catch-all “other necessary measures.”⁶⁹ But the Sanctions Law also expands upon the prior regulations by broadening potential targets to include “spouses and family members of individuals included on the list,” senior managers of corporate entities included on the list, and organizations where listed individuals serve as senior managers.⁷⁰ Punishing family members is common in other sanctions regimes, including that of the U.S. But it still represents an escalation within China’s own system.

IV. APPLICATION OF CHINA’S SANCTIONS

China’s sanctions edifice was, in many ways, a reaction to the imposition of sanctions by Western countries, the U.S. chief among them. Moreover, China has used many of the same techniques, mechanisms, and punishments devised by North American and European sanctions programs. Though still incipient, China’s sanctions program shows a few discernible trends. As Professor Ginsburg would predict, China’s applications diverge from the liberal principles that animated Western sanctions and reveal a distinctively authoritarian spirit. Indeed, it is no surprise that China is experimenting in a field where the divide between public and private is somewhat porous, where China can “slip back and forth across roles depending on the urgency and important of the issue.”⁷¹

Two points in particular are worth noting. First, China’s sanctions are reactive. In 2020, the U.S. sanctioned four high-ranking Chinese officials for their

⁶⁷ *Id.*

⁶⁸ The Sanctions Law and Unreliable Entity List both target foreign entities that apply “discriminatory measures against Chinese individuals, enterprises or other organizations.” Sanctions Law, *supra* note 65, art. 4; Unreliable Entity List, *supra* note 19, art. 2(2). The Sanctions Law and Blocking Measures both respond to situations where foreign countries apply sanctions that “violate international law and basic principles of international relations.” Sanctions Law, *supra* note 65, art. 4; Blocking Measures, *supra* note 46, art. 2.

⁶⁹ Sanctions Law, *supra* note 66, art. 6; Unreliable Entity List, *supra* note 19, art. 10.

⁷⁰ *Id.* art. 5.

⁷¹ GINSBURG, *supra* note 1, at 272.

roles in creating detention camps for Uyghurs in Xinjiang. Four days later, China imposed sanctions on high-ranking U.S. officials (Ted Cruz, Marco Rubio, and Chris Smith) as well as individuals working in federal agencies (and the director of Human Rights Watch) who have criticized China's treatment of Uyghurs.⁷² Such tit-for-tat sanctions recall the mimicry at the heart of authoritarian appropriation of liberal international ideals.

Second, and more concerning to liberal internationalists, China has repurposed sanctions to bludgeon foreign critics of China. This is a worrisome development for the global community of observers, academics, and experts on China, many of whose criticisms of China are supported by empirical, documentary, or anecdotal evidence. In February 2021, China sanctioned ten British nationals: mostly politicians, but also one lawyer (discussed here) and one academic (discussed below). The lawyer, Geoffrey Nice,⁷³ currently leads an independent tribunal investigating atrocities committed against Uyghur, Kazakh, and Turkic citizens of the People's Republic.⁷⁴ China has long bristled at Western criticisms of its treatment of Muslim minorities, an issue that flared up after the American allegation of genocide. By sanctioning a person who leads an independent civil society organization tasked with investigating human rights abuses, China is reforging a tool of liberal internationalism into a weapon of authoritarian intolerance, revealing disdain for independent inquiry, freedom of speech, and freedom of thought. Targeting Geoffrey Nice can also be seen as a crackdown on civil society, an essential element of liberal democracy. China has long suppressed human rights defenders, lawyers, and independent non-governmental organizations within its own borders. But in suppressing foreign critics, China is replicating its own authoritarian logic on the world stage.

China has also used its inchoate sanctions program to silence foreign critics, both prominent and obscure. Among the more prominent persons targeted by Chinese sanctions are Sophie Richardson of Human Rights Watch (HRW), and Adrian Zenz, a German anthropologist. Richardson has worked at HRW since 2006, authoring dozens of reports and commentaries on China's domestic and foreign policy. China did not specify the reasons for sanctioning Richardson, though it does not seem that her (relatively sparse) work on Xinjiang embroiled her in sanctions. Richardson was one of many contributors to a 2021 HRW report

⁷² See *China Sanctions 11 US Politicians, Heads of Organizations*, ABC (Aug. 10, 2020), <https://perma.cc/CGB2-FKJ2>.

⁷³ See Patrick Wintour, *China Imposes Sanctions on UK MPs, Lawyers and Academics in Xinjiang Row*, GUARDIAN (Feb. 26, 2021), <https://www.theguardian.com/world/2021/mar/26/china-sanctions-uk-businesses-mps-and-lawyers-in-xinjiang-row>.

⁷⁴ See *Frequently Asked Questions*, UYGHUR TRIBUNAL, <https://perma.cc/664Z-4F4M>.

on Xinjiang, yet was the only person sanctioned.⁷⁵ Instead, the sanctions seem like more of a “lifetime achievement” award for an extended period of criticism, and perhaps a broader reproach to human rights more generally.

Adrian Zenz, by comparison, has taken a narrower—but more trenchant—tack by exposing China’s abuse of Muslim minorities in Xinjiang. He has methodically documented China’s campaign, using government documents to show, *inter alia*, that China has forcibly sterilized thousands of Uyghur women and coercively inserted intrauterine devices into thousands more.⁷⁶ He has also shown that China has detained male Uyghurs for having too many children.⁷⁷ Zenz’s research grounded the U.S. government’s claim that China committed genocide against the Uyghurs. U.S. Secretary of State Mike Pompeo first leveled the genocidal accusation on the last day of the Trump administration.⁷⁸ The Biden team retained that Trump-era policy, as it has elsewhere.⁷⁹ Needless to say, this allegation likely motivated Chinese sanctions on Zenz.

China also targets lower-profile academics.⁸⁰ As part of the British sanctions noted above, China added Professor Jo Smith Finley of Newcastle University to the list.⁸¹ Professor Finley has published dozens of articles about Xinjiang, Uyghur identity, and Chinese Islam; several recent articles characterize China’s treatment of Uyghurs as genocide.⁸² Sanctioning Professor Finley replicates on a global scale the internal repression that the People’s Republic of China already directs at Chinese academics who criticize or oppose government policy.⁸³

⁷⁵ See “Break Their Lineage, Break Their Roots:” *China’s Crimes Against Humanity Targeting Uyghurs and Other Turkic Muslims*, HUM. RTS. WATCH (April 19, 2021), <https://perma.cc/F5Y3-EKZS>. Contributors to this report on Xinjiang include Beth Van Schaack (professor at Stanford Law School), Maya Wang (HRW), Brad Adams (HRW), and Sophie Richardson, yet only Richardson was formally sanctioned.

⁷⁶ See Adrian Zenz, *China’s Own Documents Show Potentially Genocidal Sterilization Plans in Xinjiang*, FOREIGN POL’Y (July 1, 2020), <https://foreignpolicy.com/2020/07/01/china-documents-uighur-genocidal-sterilization-xinjiang/>.

⁷⁷ *See id.*

⁷⁸ See Humeysra Pamuk & David Brunnstrom, *In Parting Shot, Trump Administration Accuses China of ‘Genocide’ against Uyghurs*, REUTERS (Jan. 19, 2021), <https://perma.cc/5YFF-RTPE>.

⁷⁹ See John Hudson, *As Tensions with China Grow, Biden Administration Formalizes Genocide Claim Against Beijing*, WASH. POST (Mar. 30, 2021), <https://perma.cc/7KCG-QY9Y>.

⁸⁰ China has simultaneously clamped down on Chinese academics looking to participate in academic conferences and exchanges with Western institutions. See Emily Feng, *China Tightens Restrictions and Bars Scholars from International Conferences*, NPR (Mar. 30, 2022), <https://perma.cc/NCY5-J7ZN>.

⁸¹ See Wintour, *supra* note 74.

⁸² Her webpage at Newcastle University lists dozens of publications, several of which accuse China of committing genocide against Uyghurs and other minorities. See *Staff Profile: Dr Jo Smith Finley*, NEWCASTLE UNIV., <https://perma.cc/5NWY-VH23>.

⁸³ Sanctioned academics, currently or formerly at Chinese law schools, include He Weifang (Peking University), Xu Zhangrun (Tsinghua), and Xu Zhiyong (Beijing University of Post and Telecommunications).

China has also sanctioned mild critics. A Swedish researcher, Björn Jerdén, published a handful of pieces critical of China,⁸⁴ though nothing particularly scathing or relevant to Xinjiang. But he was included as part of a broader package of sanctions that China directed at European citizens after the E.U. sanctioned China in 2021.⁸⁵

Perhaps the most mystifying target of Chinese sanctions is Jónas Haraldsson, an Icelandic lawyer critical of China's response to the Covid-19 pandemic and Chinese tourists in Iceland.⁸⁶ As with other targets, Haraldsson was sanctioned after Iceland placed sanctions on China.

China has long used informal sanctions to cow foreign critics. Scholars who write about topics that China deems sensitive—Tibet, Taiwan, Tiananmen, Xinjiang—face difficulty entering China. To take one noteworthy example, China denied visas to most of the sixteen contributors to the 2004 book, *Xinjiang: China's Muslim Borderland*.⁸⁷ In a similar vein, Professor Perry Link faced visa denials as early as 1995.⁸⁸

What differs about the current sanctions are the openness and transparency with which they are levied. Previously, China did not openly discuss who was banned from entering China; scholars were left guessing after their visas were denied. Under the new regime, China directs its embassies to inform the sanctioned person of his or her punishment, but not why or how to appeal.

After sanctioning Jónas Haraldsson, the Chinese embassy in Reykjavik stated, “China has decided to impose reciprocal sanctions on one individual on the Icelandic side who seriously harms China's sovereignty and interests by maliciously spreading lies and disinformation.”⁸⁹ The statement further demanded that “Iceland should truly respect China's sovereignty, security, and development

⁸⁴ See, e.g., Björn Jerdén & Viking Botham, *China's Propaganda Campaign in Sweden, 2018–2019*, <https://perma.cc/B4F6-KPEL>. The report concludes that the Chinese embassy in Stockholm has conducted “an intense campaign of public criticism of Swedish media outlets, journalists, scholars, human rights activists, political parties and authorities,” some of which contain “implicit threats and personal accusation.” *Id.* at 2. See also Björn Jerdén, *Sweden: Not Quite Friends in Need with China Amid the Covid-19 Crisis*, in COVID-19 AND EUROPE-CHINA RELATIONS: A COUNTRY-LEVEL ANALYSIS (John Seaman, ed. 2020), <https://perma.cc/UNN3-ELQX> (finding that China's embassy repeatedly targeted individuals and organizations that aired views contradicting official Chinese positions).

⁸⁵ See *China Hits Back at EU*, *supra* note 17.

⁸⁶ See Gréta Sigríður Einarssdóttir, *Chinese Authorities Blacklist Icelander in Response to Sanctions*, ICE. REV. (Apr. 19, 2021), <https://perma.cc/7H3E-K2ML>.

⁸⁷ See Elizabeth Redden, *The Blacklist Academic Leaders Ignore*, INSIDE HIGHER EDUC. (July 14, 2008), <https://perma.cc/F6LV-GEDK>.

⁸⁸ See *id.*

⁸⁹ See *China Sanctions Icelandic Individual over Xinjiang*, CHINA DAILY (Apr. 18, 2021), <https://perma.cc/2ZD9-HT8G>. I could find no statement by Haraldsson concerning Xinjiang, though my search was limited by my inability to read Icelandic.

interests, and stop interfering in China's internal affairs under the pretext of human rights issues."⁹⁰

Whether one accepts China's proffered explanations is, of course, a different matter. It is difficult to characterize sanctions as "reciprocal" when China targets a single individual for actions taken by his government; China's sanctions lack proportionality and send a chilling message to critics of China. It strains credulity to suggest Haraldsson's statements—written in the Icelandic language to a population of at most 330,000 people—harmed the sovereignty and national interests of a powerful state thousands of miles away. Instead, they attempt to muzzle critics of China, wherever they may roam.

V. CONCLUSION

Professor Ginsburg's *Democracy and International Law* provides much food for thought on the ways that liberal democracies differ from repressive autocracies in drafting, interpreting, and using international law. In this brief contribution, we have charted how China took an instrument from the toolkit of liberal internationalism and repurposed it into a weapon with which to punish its critics. Western states developed economic sanctions to inflict limited reputational, financial, and operational damage on state or corporate actors engaging in human rights abuses or anti-democratic behavior. To be sure, one can criticize the scope, breadth, and aim of these sanctions, and the extraterritorial effects they bring to bear on actors far beyond American or European shores. Nevertheless, Western sanctions do not generally apply to people for beliefs, opinions, or criticisms they espouse.

China's sanctions regime, up until the present, remains rudimentary. No doubt it will expand in scope, complexity, and sophistication in the years to come. But the past year has already yielded insights into how China will apply sanctions in the short to medium term. It is telling that China has not publicly sanctioned any corporations—perhaps to mollify fears from foreign (non-Chinese) investors about conducting business with a country subject to a widening web of international sanctions. China has, of course, imposed sanctions on high-level political actors from Europe and North America, generally in response to sanctions from those same Western states—a clear instance of mimicry. Where China is breaking new ground—repurposing the sanctions regime—is in targeting foreign critics of the People's Republic. This use of sanctions raises obvious concerns for academics, experts, and observers, whose careers may depend upon access to China. But it also shows how China uses law to advance authoritarian aims: to limit speech, to deflect criticism, and to turn public opinion against those who dare question China's actions or motives.

⁹⁰ *Id.*