1. The individualization and formalization of UN sanctions

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1. INTRODUCTION

The 25 years that followed the end of the Cold War were a peak moment for UN sanctions. This *Research Handbook on UN Sanctions and International Law* maps how UN sanctions multiplied and diversified in this quarter century and, using international law lenses, it analyses the substantive and procedural transformations of UN sanctions regimes over the years. As sanctions are a Chapter VII instrument, these transformations followed broader patterns of Security Council activity. In this sense, the most dramatic alterations in the first post-Cold War decade, the 1990s, obviously concerned the general overall increase of action and the Council's engagement with a great variety of States and with more diverse types of situations and threats as well as the move to address actors beyond the State through targeted sanctions, i.e., the individualization movement. To some extent in response to these changes, the first decade of the 21st century witnessed a transformation that was more procedural in nature and very much inspired also by the memorable *Kadi* litigation, namely the move towards greater proceduralization, which can be seen as part of a formalization movement.

Generally, a differentiation can be made between three distinct types of sanctions regimes, namely (i) counter-terrorism sanctions, (ii) counter-proliferation sanctions, and (iii) conflict-resolution sanctions.¹ These three types of regimes are very distinct in many respects, including also political sensitivity. A quintessential difference concerns the origin of the primary threat that the sanctions aim to address. Counter-terrorism sanctions in the form of the Al Qaeda sanctions aim to curb a threat which emanates primarily from a non-State actor, and this regime has over time been territorially delinked thus gaining a universal focus.² In contrast, the counter-proliferation regimes are still very much State focused as the threat that they confront stems principally from the State.³ Yet, even the counter-proliferation regimes are individualized in their design and they can list individuals and entities upon whom sanctions are to be imposed that are closer to or further removed from the State apparatus. Notwithstanding such differences between the different types of UN sanctions regimes, certain developments can be witnessed across UN sanctions regimes, such as increased references to international legal standards in sanctions design as well as notable interplays with other

¹ The Targeted Sanctions Consortium identified six general categories, namely: armed conflict, terrorism, WMD proliferation, illegal change of government, natural resources and protection of civilians, see also the chapter by Sue E. Eckert in this volume.

² As described in the chapter by Lisa Ginsborg in this volume.

³ See further the chapter by Daniel H. Joyner in this volume.

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processes⁴ and regimes,⁵ and with informal arrangements.⁶ Moreover, certain questions and considerations are of relevance to all UN sanctions regimes despite their underlying differences, including questions of procedural integrity, the value of transparency and fair process considerations, and questions on termination policies.⁷

This *Research Handbook* studies UN sanctions in a holistic manner so as to identify cross-cutting issues and common challenges, be they substantive, procedural, practical or political, and to gauge general trends. One trend that can currently be witnessed across regimes may be a partial return to more comprehensive sanctions. Another trend, to some extent related, is the rise of unilateral sanctions, particularly also EU regional sanctions, raising questions of interaction between parallel sanctions regimes.⁸ This *Research Handbook* examines interplays and synergies between UN sanctions and unilateral measures and it explores the different legal frameworks that shape and govern these respective regimes. In addition to interaction with unilateral sanctions, UN sanctions also operate in tandem with other processes and these types of interplay generally increase as UN sanctions become more sophisticated. Having Chapter VII status, the impact of UN sanctions on those other regimes or areas of international law is significant and warrants further scrutiny.

The *Research Handbook* situates UN sanctions in a broader universe. While the focus of the *Handbook* is on UN sanctions in the sense of measures adopted by the Security Council pursuant to Article 41 of the UN Charter,⁹ many chapters also engage with non-UN sanctions and highlight how these are different.¹⁰ In some chapters the possibility of sanctions recommended by the General Assembly or other types of Article 41 measures, including Security Council referrals to the International Criminal Court (ICC) and the establishment of *ad hoc* tribunals, are mentioned but they do not constitute the prime focus of this *Handbook*.

The *Handbook* thus looks at developments in the UN sanctions scene from an internal as well as an external perspective, using the notions of ‘individualization’ and ‘formalization’ to frame the discussion, while also scrutinizing interplays with other measures and regimes. The notions of ‘individualization’ and ‘formalization’ are referred to, not necessarily as ideal endpoints, but rather as beacons to grasp the flow of recent developments and transformations. The *Research Handbook* concludes with

⁴ See for analysis of the interaction between UN sanctions and peace processes, the chapter by Jeremy I. Levitt in this volume.

⁵ See eg the chapters in Part IV of this volume on interplay with other regimes.

⁶ See for the interaction between UN sanctions and informal arrangements the chapters by Daniëlla Dam-de Jong and Alejandro Rodiles in this volume.

⁷ See the chapters in Part III of this volume on design and procedure governing UN sanctions.

⁸ As analysed in the chapter by Mirko Sossai in this volume.

⁹ Excluded from this primary focus are other Article 41 measures, such as the establishment of *ad hoc* tribunals and referrals to the ICC, although the co-existence of UN sanctions *proper* and criminal prosecutions following these other Article 41 measures does give rise to interesting interactions and discrete questions of interplay. See eg Marina Mancini, ‘UN Sanctions Targeting Individuals and ICC Proceedings: How to Achieve a Mutually Reinforcing Interaction’, in Natalino Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Brill/Nijhoff 2016).

¹⁰ In particular the chapters in Part IV on interplay with other regimes.

some regional perspectives and by painting this broad picture, ultimately, the aim is to provide an outlook on the future of UN sanctions in a 21st-century setting.

This introductory chapter will first set the stage by offering a very summarized account of the main developments and transformations of UN sanctions in the past 25 years in Section 2. Subsequently, the concepts of individualization and formalization are introduced in Sections 3 and 4 respectively. Section 5 outlines the structure of the book and Section 6 concludes with a preliminary outlook.

2. SETTING THE STAGE

During the Cold War period, the Security Council imposed sanctions regimes only twice, on Southern Rhodesia in response to the declaration of independence by the white minority regime and against South Africa in response to its apartheid system and its regional military aggression and its nuclear ambitions. These sanctions regimes were first voluntary in nature and subsequently rendered mandatory in 1968 and 1977 respectively.¹¹ In the South African context particularly, sweeping but non-binding General Assembly sanctions functioned as a motor for the adoption of mandatory Security Council sanctions.¹² These traditional comprehensive sanctions offered some blueprints still in use today as for instance with the concept of humanitarian exemptions.¹³ However, as is well known, the concept of comprehensive sanctions as such came under fire after its re-use in the post-Cold War period specifically in the situations of Iraq, Haiti and Yugoslavia. Hence, a new model of targeted sanctions was introduced in policy processes as described by Sue E. Eckert in her chapter. Scholars played an influential role in this transition by contributing to the transnational policy networks that functioned as breeding grounds for introducing the model of targeted sanctions in the UN system.¹⁴

Intertwined with the move to targeted sanctions and the differentiation in types of measures, the 1990s also witnessed an overall proliferation of UN sanctions in which sanctions were used for a greater variety of purposes and goals. The significant changes in sanctions design also impacted on working methods and procedures. Given the extreme political setting of the Security Council with permanent undercurrents of discord and antagonism, the procedural evolutions that took place were extraordinary,¹⁵

¹¹ UN Docs. S/RES/253 (1968) and S/RES/418 (1977).

¹² These General Assembly sanctions are also discussed in the chapter by Pierre-Emmanuel Dupont in this volume.

¹³ As observed in the chapter by Amelia Broodryk and Anton du Plessis in this volume.

¹⁴ Thomas J. Biersteker, Sue E. Eckert, Aaron Halegua and Peter Romaniuk, 'Consensus from the Bottom Up? Assessing the Influence of the Sanctions Reform Processes', in Peter Wallensteen and Carina Staibano (eds), *International Sanctions; Between Words and Wars in the Global System* (Frank Cass 2005) 15–30; Thomas J. Biersteker, 'Participating in Transnational Policy Networks: Targeted Sanctions', in Mariano E. Bertucci and Abraham F. Lowenthal (eds), *Narrowing the Gap: Scholars, Policy-Makers and International Affairs* (Johns Hopkins University Press 2014) 137–154.

¹⁵ Joanna Weschler, 'The Evolution of Security Council Innovations in Sanctions' (2009–2010) 65 *International Journal* 31–44.

even if not always appreciated as such.¹⁶ Over time, an elaborate sanctions apparatus emerged with significant scope for external elements, for instance in the form of monitoring committees and panels of experts.¹⁷ In an extraordinary move, the Security Council even subjected itself to some form of supervision in the form of an Ombudsperson, but for the Al Qaeda sanctions regime only in specific response to non-compliance threats coming from the EU. Despite these great strides forward, P5 members were always careful to maintain the *ad hoc* nature of the architecture so as to keep maximum control. In this spirit also, attempts to gradually extend the mandate of the Ombudsperson to all sanctions regimes and to integrate this institution more systematically in sanction design across the board were stunted.¹⁸ Still, the incremental professionalization and proceduralization of UN sanctions is notable and further discussed in the chapters by Sue E. Eckert and Kimberly Prost specifically.

A trigger for enhanced scholarly scrutiny of UN sanctions, in particular from international law scholars, were the fair process questions that came up first and foremost in the Taliban/Al Qaeda counter-terrorism sanctions regime. Litigation questioning the excessive post-9/11 listings exposed the extreme shortcomings of the targeted sanctions procedure. The human rights dimensions of these issues and the fact that the litigation took place before EU courts resulted in great involvement of international and EU law scholars and ultimately it may have increased the attention of international lawyers to UN sanctions more generally.¹⁹ In response to the litigation, procedural reforms were introduced in the Al Qaeda regime. Those reforms had modest ripple effects beyond their own setting as some were transposed to the other sanctions regimes, a notable exception being – as indicated – the Office of the Ombudsperson, by far the most advanced reform, whose reach was cautiously limited to the Al Qaeda regime only. The view that Ombudsperson jurisdiction should be extended to all sanctions regimes as it is an inherent consequence of the individualization move has become a commonplace for most law scholars, but its implementation hinges on political will, which seems to be absent for the time being. More generally, there is a question whether the Al Qaeda regime is indeed a forerunner and whether its reforms should thus be copied and transplanted into other regimes, or whether it is uniquely different, warranting a different approach. In the spirit of the latter conception, the

¹⁶ See for the under-appreciation of European courts also the chapter by Penelope Nevill in this volume.

¹⁷ Institutional changes started with the UNITA regime under the leadership of the Chairman of the related sanctions committee, Canadian Ambassador Fowler, see eg UN Doc. S/PV.4027, 29 July 1999. See specifically for an example of how and when panels of experts can exert influence, Alex Vines and Tom Cargill, 'The Impact of UN Sanctions and Their Panels of Experts' (2009–2010) 65 *International Journal* 45–68.

¹⁸ See eg the letter of Like-Minded States, UN Doc. S/PV.6964.

¹⁹ UN sanctions have of course always received scholarly attention in international law circles, see eg the standard works of Vera Gowlland-Debbas, *United Nations Sanctions and International Law* and *National Implementation of United Nations Sanctions* (Martinus Nijhoff 2001 and 2004). These volumes also devoted much attention to questions of implementation. Also see the works of Jemery Farrall, *United Nations Sanctions and the Rule of Law* (CUP 2007) and Jeremy Farrall and Kim Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World* (CUP 2009). For a focus more on unilateral measures, see eg Matthew Happold and Paul Eden, *Economic Sanctions and International Law* (Hart 2016).

suggestion is put forward in this volume that the Al Qaeda regime has become so *sui generis* that it merits separate treatment. The argument made by both Sue E. Eckert and Lisa Ginsborg in their chapters is that, since the Al Qaeda/Daesh regime has effectively become permanent, it should perhaps not be framed as a sanctions regime any longer and it should rather be placed under the supervision of another subsidiary organ or agency more styled as a policing body instead of a Chapter VII emergency regime. In its stead, new types of sanctions regimes addressing new threats or other dimensions of existing threats can be envisaged in particular as part of the conflict-resolution regimes, as suggested by Eckert with various examples given in her chapter, including counter-corruption sanctions or sanctions aimed at digital technologies and protecting cyber security.

The *Research Handbook* purports to deal with the multiple dimensions of UN sanctions, discussing the concept of UN sanctions and questions of effectiveness in Part I, the variegation of functions of UN sanctions in Part II, the remarkable progressions in sanctions design and procedure in Part III, the multi-level interplay with other regimes that also ensued from the increased sophistication of UN sanctions in Part IV, and concluding with a panorama of regional perspectives in Part V. These different dimensions are discussed through the lenses of regional perspectives ensuing from the increased sophistication of UN sanctions.

3. INDIVIDUALIZATION OF UN SANCTIONS

The individualization of sanctions principally refers to the development from comprehensive to targeted sanctions. This development is part of a greater trend of the humanization of international law,²⁰ and more specifically the individualization of enforcement in international law.²¹ The increased focus on the individual as an actor or perpetrator is also central in international criminal law.²² In her book *Beyond Human Rights*, Anne Peters discusses the controversies around the concept of individualization of international law and she maps the scholarly discussions as to whether this individualization has effectively transformed the structures of the international legal system or whether in fact the age of the BRICS countries demonstrates a re-emphasis on the role of the State engendering a simultaneous backlash against over-individualization.²³ While acknowledging the great importance of such reflections, this *Research Handbook* zeroes in specifically on the trend of individualization in the

²⁰ As diagnosed by Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff 2006). For an inquiry into the position of the individual in the international legal system, also see Gerhard Hafner, 'The Emancipation of the Individual from the State under International Law' (2011) *Recueil des Cours* 358.

²¹ See Larissa van den Herik, 'The Individualization of Enforcement in International Law; Exploring the Interplay between United Nations Targeted Sanctions and International Criminal Proceedings', in Tiyanjana Maluwa, Max du Plessis and Dire Tladi (eds), *The Pursuit of a Brave New World in International Law* (Brill 2017) 234–263.

²² *ibid.*

²³ Anne Peters, *Beyond Human Rights* (CUP 2016) 1–6. These reflections by Peters only set the stage for the actual theme of her book, which focuses on the global legal *acquis individuel*.

context of UN targeted sanctions. In this setting, the more concrete question arises whether the UN Security Council is architecturally, structurally and procedurally equipped to deal with individuals. A more fundamental question concerns the legal basis for the UN Security Council to target individuals and other non-State actors.

As indicated by Lisa Ginsborg in her chapter, by shifting to the concept of targeted sanctions the Security Council effectively copied a design already in use in the United States. The Council thus responded to the outrage at the consequences of the Iraq sanctions as discussed in the chapter by Daniel H. Joyner. The main drivers for the P5 to revisit the concept of comprehensive sanctions were therefore legitimacy concerns. Indeed, the P5 considered change so as to make sure that 'further collective actions in the Security Council within the context of any future sanctions regime should be directed to minimize unintended adverse side-effects of sanctions on the most vulnerable segments of targeted countries'.²⁴ To some extent, legitimacy concerns also underlay the creation of the Ombudsperson, albeit that those concerns were more directly tied also to considerations of effectivity given the threat of European non-cooperation.²⁵

In terms of targeting, different shades of individualization may be identified. At one end of the spectrum, there are regimes which target State leaders, hence which target individuals because of their position and affiliation to the State. These individuals in turn can use the State apparatus and diplomatic means to challenge their targeting. Perhaps this may be called 'individualization light'. At the other end of the spectrum is the Al Qaeda regime, without any link to the State, where individuals are targeted for their acts not their position or link to the State. This could be seen as the most extreme form of individualization. But despite such differentiation, questions of procedural fairness and the need for remedies arise in relation to any individual personally affected by coercive measures.²⁶ In addition to directly targeting the individual as such, also other non-State entities may be subjected to targeted sanctions. These can include legal entities, such as corporations and banks in the non-proliferation regimes, but also underground entities or other groups with a more diffuse legal status, as in particular in the context of the counter-terrorism sanctions. Targeting entities may ultimately also affect individuals. In this respect, questions have been raised as to whether subjecting a central bank to sanctions or other central economic actors and segments of an economy should still be seen as a form of *targeted* sanctions, or whether this is rather more comprehensive in its effects. In turn, the targeting of armed groups under the counter-terrorism regime can also affect populations on a larger scale, in particular also through the immobilizing effects that this may have on humanitarian assistance

²⁴ 'Letter from the Permanent Representatives of China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the President of the Security Council' (13 April 1995) UN Doc. S/1995/300, Appendix B, 299, as also cited by Kimberly Prost in her chapter in this volume.

²⁵ Larissa van den Herik, 'Peripheral Hegemony in the Quest to Ensure Security Council Accountability for its Individualized UN Sanctions Regimes' (2014) 19 *Journal of Conflict and Security Law* 427–449.

²⁶ See also the chapter by Kimberly Prost in this volume.

schemes.²⁷ Hence, when measured in terms of collateral effects, the subjecting of entities to targeted sanctions is thus often not so targeted after all.²⁸

Beyond targeting strategies, the State veil is also pierced in modern sanctions regimes in respect of the actors that are asked to implement sanctions. Indeed, Daniëlla Dam-de Jong shows how the Security Council has turned to business actors, such as importers and processing industries generally, and also the diamond industry specifically, to adopt preventive policies or to develop cooperation arrangements with a view to implementing sanctions. And Lisa Ginsborg exposes the problems involved in privatizing the implementation of UN sanctions in the counter-terrorism regime in terms of over-compliance and risk avoidance. The involvement of private actors may be problematic from a formalization perspective as it leads to shadow lists which tend to stick as they do not always immediately replicate formal delistings pursuant to Ombudsperson recommendations. More generally, termination of sanctions regimes at the formal level may not be instantly implemented by the private actors, which posed problems particularly also in the context of the Iran sanctions regime.²⁹

Apart from those more pragmatic matters, a fundamental query concerns the legal basis for the Security Council's practice to impose sanctions on actors other than States and to demand assistance in the implementation thereof from actors other than States. Ultimately, this can be traced back to the Council's vast discretion under Chapter VII and its primary mandate to maintain and restore peace. As observed by the International Court of Justice (ICJ) in the *Kosovo* Advisory Opinion, it has not been uncommon for the Security Council to make demands on actors other than the United Nations Member States and intergovernmental organizations.³⁰ Yet, it must be underscored that in the context of UN targeted sanctions regimes, the Security Council does not tend to create general legal obligations for individuals directly. Rather, the system is that the UN targeted sanctions regimes are principally directed at States, not immediately at individuals. Typically in resolutions imposing sanctions, the Security Council decides that all States shall take certain measures, such as asset freezes or travel bans, against individuals. Subsequently, specifically created sanctions committees designate the exact individuals whom these sanctions are to be imposed upon.³¹ This designation, even if central, does not produce instantaneous binding effects on individuals and the

²⁷ As discussed by Ben Saul, 'Improving Respect for International Humanitarian Law by Non-state Armed Groups', Chatham House, April 2016. On unintended consequences also see Concept note for the debate of the Security Council on the working methods of the subsidiary organs of the Security Council, UN Doc. S/2016/102, 11 February 2016.

²⁸ See also the chapter by Sue E. Eckert in this volume on the sliding scale from comprehensive to targeted sanctions.

²⁹ See eg the reporting on British Prime Minister David Cameron writing a letter to Barclays, arguing that its refusal to process payments from Iran is 'in opposition to the policy of the UK government'. Mohamad Al Shabani, 'Will Iran be able to win over Britain when it comes to banking sanctions?', *Al Monitor*, 18 March 2016.

³⁰ ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, para. 116.

³¹ The designation by sanctions committees has been described as a form of secondary normative power, Annalisa Ciampi, 'Security Council Targeted Sanctions and Human Rights', in Bardo Fassbender (ed.), *Securing Human Rights? Achievements and challenges of the UN Security Council* (Oxford University Press 2011) 98–140. Exceptionally, listing can also be done

restraints envisaged by the sanctions are only activated after implementation by the State. Hence, UN sanctions regimes produce indirect international obligations which are mediated through States and which only concern specific, centrally identified, individuals. Moreover, as also illustrated by Matthew Happold in his chapter, even though increasingly violations of international law are included as listing criteria,³² these mostly do not constitute the primary or sole basis for subjecting individuals to sanctions. From a legal perspective, therefore, UN targeted sanctions are very hybrid in how they relate to the individual.

4. FORMALIZATION OF UN SANCTIONS

In comparison to the two Cold War sanctions regimes against apartheid South Africa and Southern Rhodesia, post-Cold War sanctions have become infinitely more complex and technical.³³ This has also affected the relationship with and reliance upon law and the rule of law³⁴ in the context of UN sanctions regimes.³⁵ While the Security Council's vast discretion remains, the increased sophistication of UN sanctions regimes offers an equal increase in opportunity to include a legal dimension in UN sanctions dialogue. The community of international law scholars and theorists have so far engaged with UN targeted sanctions mostly on the fair process *problématique*, which evoked broader questions of Security Council accountability and legitimacy.³⁶ Theories on global administrative law,³⁷ the exercise of public authority,³⁸ constitutionalism³⁹ and legal

by the Security Council itself, as happened in the Iran sanctions regime, in the annex to Resolution 1737, 23 December 2006.

³² As also analysed in Najwa M. Nabti, 'Increasing the Cost of Rape: Using Targeted Sanctions to Deter Sexual Violence in Armed Conflict', in Alo Z. Marossi and Marisa R. Bassett (eds), *Economic Sanctions under International Law; Unilateralism, Multilateralism, Legitimacy, and Consequences* (Springer 2015) 43–67.

³³ See Michael Brzoska and George A. Lopez, 'Security Council Dynamics and Sanctions Design', in Thomas J. Biersteker, Sue E. Eckert and Marco Tourinho (eds), *Targeted Sanctions; The Impacts and Effectiveness of United Nations Action* (OUP 2016) 60.

³⁴ On the meaning of an international rule of law applicable to the Security Council, see eg Simon Chesterman 'I'll take Manhattan': The International Rule of Law and the United Nations Security Council', [2009] *Hague Journal on the Rule of Law* 1; Alejandro Rodiles, 'Non-Permanent Members of the United Nations Security Council and the Promotion of the International Rule of Law', (2013) 5 *Goettingen Journal of International Law* 333.

³⁵ On the Security Council's relationship with and reliance on law in a sanctions context, see Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (CUP 2007) 16.

³⁶ See eg the symposium on Security Council accountability edited by Philippa Webb and Christopher Michaelsen in (2014) 19 *Journal of Conflict and Security Studies* 3.

³⁷ See Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law' [2005] 68 *Law & Contemporary Problems* 15.

³⁸ See Armin von Bogdandy, Matthias Goldman, and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' [2016] *MPIL Research Paper Series* 2016-2.

³⁹ Anne Peters, Jan Klabbers and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009).

pluralism⁴⁰ offer frameworks to situate such discussions and some of them provide guidance towards the identification of disciplining standards or principles. It is not the aim here to compete with such grand theories, perhaps rather to complement them on a very practical level and to apply some of their ideas in the concrete setting of UN sanctions, which is a setting – it must be noted – that is much broader than the Al Qaeda sanctions regime alone. The *Research Handbook* has the ambition to be more comprehensive, not only in terms of focusing on all types of sanctions regimes, but also through its focus on different dimensions of UN sanctions regimes where law and legal considerations play a role or could be of relevance. Beyond the procedural, there are also a number of other sites where substantive or institutional norms of international law or other rule of law considerations have infused the political setting in which UN sanctions operate.

The *Research Handbook* uses the notion of ‘formalization’⁴¹ to capture those ‘sites of infusion’ and to recognize the instances where there has been a careful move towards more rules-based sanctions regimes. It thus proposes a loose notion of formalization as encompassing references to law in order to (i) limit power and political discretion, (ii) further shape and give content to broadly phrased obligations, and (iii) coordinate interplay with other regimes. While generally underscoring the need for legitimacy and accountability or a greater ‘culture of formalism’⁴² even in a Security Council context, the *Research Handbook* is not premised on absolute advocacy of some ideal endpoint. Indeed, several authors highlight the downsides of formalism,⁴³ or indicate that applying rule-of-law standards to the Security Council should better be approached as a policy issue rather than a matter of law.⁴⁴ The notion of formalism is used in this *Research Handbook* to offer a shared vocabulary that allows for cross-cutting observations regarding the invocation or relevance of international legal norms in the setting of UN sanctions regimes. On the basis of such a flexible use of this notion as a red thread rather than a full-fledged concept, a further differentiation can be made between:

⁴⁰ See eg Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Post-National Law* (OUP 2010).

⁴¹ For reflection on different uses of this concept, see Jean d’Aspremont, *Formalism and the Sources of International Law; A Theory of the Ascertainment of Legal Rules* (OUP 2011) chapter 2.

⁴² See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2002) 508.

⁴³ Eg, Alejandro Rodiles highlights in his chapter the legitimacy problems involved in a move towards a more robust and regulated system of implementation of sanctions if this occurs through a deformed process with references to informal standards and undue influence of informal arrangements. In a very different context, Ward Ferdinandusse and Pieter Rademakers in turn demonstrate how overly formalistic approaches leading to the annulment of sanctions for procedural defects may adversely affect domestic prosecutions. Elsewhere, I have also argued against the formalization of interaction and coordination between Security Sanctions regimes and ICC prosecution favouring a case-by-case approach: Larissa van den Herik, ‘The Individualization of Enforcement in International Law; Exploring the Interplay between United Nations Targeted Sanctions and International Criminal Proceedings’ in Tiyanjana Maluwa, Max du Plessis and Dire Tladi (eds), *The Pursuit of a Brave New World in International Law* (Brill 2017, forthcoming).

⁴⁴ See the chapter by Devika Hovell in this volume.

(i) procedural formalization, which concerns the insertion of legal considerations and principles in processes governing the creation, operation and termination of sanctions regimes, including the move towards a certain juridification of accountability models in response to EU and other proceedings, (ii) substantive formalization, which refers to increased reference to legal categories in sanctions design, and particularly the inclusion of norms of international law as listing criteria. This development is very strong in the conflict-resolution regimes, as analysed by Matthew Happold. In contrast, the counter-terrorism regime imposes obligations in the absence of a clear definition as exposed by Lisa Ginsborg in her chapter, and here some further substantive formalization is needed. In his chapter, Alejandro Rodiles critiques the use of informal norms for standards-setting purposes as they lack legitimacy. A final sub-differentiation relates to (iii) institutional formalization, which is a heading that serves to assemble questions of interplay between UN sanctions regimes and other international organizations.

5. MAPPING THE STRUCTURE OF THE BOOK

The book is composed of five parts. Part I on *Conceptualization and effectiveness of UN sanctions* offers two framework chapters. In his chapter Tom Ruys situates UN sanctions in the broader universe of sanctions, retorsions and countermeasures. Noting the lack of a single definition of the concept of ‘sanctions’ in international law, Ruys discerns different approaches to defining ‘sanctions’ and subsequently he maps the international legal framework governing retorsions, countermeasures and third-party countermeasures. This analysis provides a basis for subsequent chapters, particularly those in Parts IV and V, which further explore how different legal regimes interact with UN and non-UN sanctions differently.⁴⁵ The subsequent chapter by Sue E. Eckert traces the evolution of UN targeted sanctions and she describes the sanctions reform processes of Interlaken, Bonn-Berlin, Stockholm and beyond, through which sanctions design, administration and implementation were strengthened and further formalized. She also presents new methodologies that were developed to assess the effectiveness of targeted sanctions and notes the current tendency in sanctions practice to a ‘recomprehensivisation’, ie, a return to more comprehensive sanctions. Eckert offers concrete suggestions for new types of sanctions and she identifies ways forward in terms of improving procedure. These suggestions tie in to the mapping of the different functions of sanctions in Part II as well as the exploration of architectural and procedural aspects of sanctions regimes in Part III.

Part II on *The functions of UN sanctions* presents the different types of UN sanctions regimes as also identified above, namely (i) the counter-terrorism regime(s), (ii) the counter-proliferation regimes, and (iii) the conflict-resolution regimes. Lisa Ginsborg sets out how the trends of individualization and procedural formalization were taken furthest in the counter-terrorism regime that originated in Resolution 1267, currently known as the ISIL/Daesh and Al Qaeda sanctions regime. She locates this regime within broader Security Council counter-terrorism strategies and highlights how the

⁴⁵ See also A. van Aaken, ‘International Investment Law and Targeted Sanctions: An Uneasy Relationship’ [2015] *Bucerius Law Journal* 1.

regime has turned into a de facto law enforcement tool. She exposes in particular the problems and dangers involved in the move towards global individual counter-terrorism sanctions and in this context the question also arises how such thematic and quasi-permanent measures fit with the strictures of Chapter VII and its emergency nature. Ginsborg also offers insight into the implementation problems of the different types of individualized sanctions with specific attention to the role of the private sector. In the next chapter, Daniel H. Joyner discusses counter-proliferation sanctions. He traces the development of these types of sanctions across the four regimes applied on Iraq, Libya, North Korea and Iran. He observes how the Iraq sanctions triggered sanctions reform towards targeted sanctions and how it is in that sense paradoxical that the latest two non-proliferation regimes have witnessed a recomprehensivisation as also noted by Eckert. The recomprehensivisation occurred in two different forms: through an accumulation of UN and US/EU sanctions in the case of Iran and more directly with a package of new comprehensive UN sanctions in the case of North Korea. Given that non-proliferation sanctions have this tendency to become comprehensive, Joyner inquires into the legal limitations that international law places on the imposition of such comprehensive coercive measures. This type of inquiry also invites reflection on the need to differentiate between various actors imposing sanctions and how to do so. Related questions concern shared responsibility schemes and how to measure proportionality in the case of cumulative measures originating from different sources. Lastly in Part II, the chapters of Matthew Happold and Daniëlla Dam-de Jong zero in on the third type of UN sanctions, namely conflict-resolution sanctions. Most sanctions regimes are of this type and they are particularly pluriform in nature. Within this pluriformity, Happold and Dam-de Jong focus on specific issues. Happold examines the Security Council's use of sanctions as devices to induce compliance with human rights norms and international humanitarian law. He interrogates the linkages between the Council's thematic work on children and women specifically and the use of sanctions and observes a certain ambivalence, or perhaps reluctance to institute automatic connections or to intervene outside situations of armed conflict. Nonetheless, in certain specific situations violations of human rights norms or international humanitarian law are included as listing criteria in sanctions designs. While acknowledging the importance hereof, Happold also makes the point that these criteria, so far, usually function as add-ons rather than having a self-standing character. Shifting focus, Dam-de Jong looks at efforts by the UN Security Council to target the illegal trade in natural resources that fuels armed conflict. She maps the practice of commodity sanctions from its early use in the very first sanctions regime against Rhodesia. Exploring different regimes and practices concerning diamonds, minerals and wildlife, Dam-de Jong specifically inquires how natural resource regimes draw on and interact with informal mechanisms, respectively the Kimberley Process Certification Scheme (KPCS), the OECD Due Diligence Guidelines, and the International Consortium on Combating Wildlife Crimes (ICWC) both for standard-setting as well as implementation purposes.

Part III on *Design and procedure governing UN sanctions* explores the creation, operation and termination of UN sanctions regimes from a more procedural perspective. Continuing the inquiry into the external relations of UN sanctions regimes with informal arrangements, Alejandro Rodiles looks at how the Financial Action Task Force

(FATF) influences sanctions design in the context of counter-terrorism and non-proliferation sanctions, and specifically how FATF standards are used for interpretive schemes and how the FATF guides implementation up to a point at which the FATF effectively functions as an 'informal arm of the Security Council'. Rodiles highlights the hazards of relying on such selective, informal clubs and observes that, while perhaps efficient, this approach may also entail costs from a legitimacy and rule-of-law perspective. The chapter by Devika Hovell further pursues a rule of law inquiry, specifically focusing on the value of transparency. Hovell presents transparency as a relational and contextual concept rather than a principle of law. Hence, the construction of a workable transparency regime in a sanctions context must be informed by a vision on the foundations of the Security Council Council's legitimate authority. As such, transparency is viewed not as being about individual access to information but rather as being about *public* access. Kimberly Prost, in turn, does zoom in on individual rights through the lenses of fair process. Prost describes the road to the fair process crisis that inevitably followed the transition to targeted sanctions. She then depicts the gathering storm in the forms of criticism and challenges, the Security Council's response and ultimately the judicial intervention by the European Court of Justice in the *Kadi* case, but also by the European Court of Human Rights in the cases of *Nada* and *Al-Dulimi*. Finally, she tests the Ombudsperson process against the core elements of fair process, showing how the requirement of independence has been most difficult to meet so far. This requirement has ramifications on different levels. Obviously there is the problem of a possibility of Security Council overturn of Ombudsperson decisions, but Prost indicates that there are also more subtle hitches, which may in fact ultimately be much more damaging overall. She particularly exposes how the Secretariat has implemented the Security Council's call for an independent Office of the Ombudsperson in a way that does not respect the Ombudsperson's autonomy as it was envisaged by the Security Council. The idea that the Secretariat may be equally or even more threatening to Ombudsperson independence than the Security Council is worrisome, at the very least. In the last chapter of Part III, Kristen E. Boon looks at the policies and practices that govern how UN sanctions end. Based on a review of current termination practices, Boon identifies three general models. Connecting these to voting rules and other internal processes, such as periodic review of individual listings and delisting procedures, Boon makes the argument that in most cases, short sanctions with clearly defined termination procedures in the form of sunset clauses combined with proper review and delisting processes are the preferred model.

Part IV on *Interplay with other regimes* surveys the relationship between or impact of UN sanctions on other regimes and it highlights how such regimes differentiate between UN and non-UN sanctions. In his chapter, Pierre-Emmanuel Dupont clarifies whether international financial institutions (IFIs), such as the World Bank and the International Monetary Fund (IMF), are under a legal obligation to adhere to and implement UN sanctions regimes, even if this leads to a *prima facie* conflict with their own mandate and objectives. Dupont maps practice ranging from the early Rhodesia case to Iraq, North Korea and Iran, and specifically inquires to what extent IFIs are empowered to interpret sanctions regimes, including the scope of humanitarian and developmental exceptions. He also distinguishes between obligations flowing from UN sanctions regimes versus those emanating from unilateral sanctions, in particular also

for IFIs that are not a member of the 'UN family'. Similarly, in his chapter on the World Trade Organization (WTO), Andrew D. Mitchell also demonstrates the distinct legal governance of sanctions imposed by the Security Council, sanctions recommended by the General Assembly, and unilateral sanctions, with particular attention for the question how the KPCS tested the scope of Article XXI(c) of the General Agreement on Tariffs and Trade (GATT). Mitchell indicates that the move to individualized sanctions has reduced questions of interplay with the WTO as those types of sanctions do not constitute trade barriers and thus do not need to be justified under GATT. He also meticulously sets out the legal regime under the WTO that governs unilateral sanctions, as laid down in Article XXI(b) GATT. Mitchell argues that WTO Members are offered considerable, but not total, discretion and underscores the possibility of review. So-called 'hybrid' sanctions, which are related to UN sanctions but which exceed the scope of the authorizing Chapter VII resolution, are excused under Article XXI(c) only for the part that complies with the Security Council resolution and must rely on Article XXI(b) for the remaining part. Subsequently, Eric De Brabandere and David Holloway examine how international sanctions interact with and impact on processes of international arbitration. Their focus goes beyond UN sanctions and they cover both commercial as well as investment arbitration. With some caution, De Brabandere and Holloway argue that it is likely that most arbitral tribunals will find that the presence of a sanctions regime does not render a dispute inarbitrable. The question whether sanctions may render arbitral awards unenforceable on public policy grounds is less easy to answer unequivocally and De Brabandere and Holloway indicate that this will depend on several aspects, including the specific features of the award and the nature of the sanctions regime in place. De Brabandere and Holloway also look at the direct implications of sanctions regimes for arbitrators and arbitral institutions and observe that this sensitive matter may require further reflection. Mércedeh Azeredo da Silveira pursues the inquiry with a focus on the impact of international sanctions on contracts. Specifically, Azeredo da Silveira addresses the question how international sanctions should be characterized from a private law perspective and how the relevance of this characterization differs for unilateral versus UN sanctions. Azeredo da Silveira pays particular attention to situations where Security Council sanctions resolutions are not implemented by States, but may nonetheless be taken into account by a domestic court or arbitral tribunal. In addition, she examines the substantive effects of sanctions programmes on the rights and obligations of private operators both during the sanctions term as well as after they have been lifted, indicating that resuming performance under the initially agreed terms may not always be possible if market conditions have changed whereby the performance has become radically more onerous or dramatically less profitable for one of the parties. This may be the case especially where sanctions have been in place for a long time. The final chapter of this part looks at the interplay between international sanctions and a very different area of law, namely criminal law. In their chapter, Ward Ferdinandusse and Pieter Rademakers discuss the prosecution of sanctions busters as a means of enforcing international sanctions. On the basis of different cases, they discuss prosecutorial strategies and particularly the choice between prosecuting violations of the sanctions regime or rather prosecuting the underlying crimes, such as terrorism or complicity in war crimes. They point out that the evidentiary advantages of prosecuting on the basis

of sanctions listings may evaporate if the listing is annulled during the process, and thus argue that the consequences of such annulment for individual criminal responsibility must be revisited and refined and that too formalistic approaches in this context undermine the effectiveness of sanctions regimes.

Finally, Part V zooms in on the regional. First, Mirko Sossai offers an analytical framework to understand the different forms of interplay between regional and UN sanctions. He distinguishes between four scenarios, namely (i) the implementation of UN sanctions by regional organizations, (ii) regional ‘supplementary measures’ in addition to UN sanctions, (iii) regional sanctions against members prior or coincidental to UN sanctions, and (iv) regional autonomous measures in the absence of UN sanctions. Specific attention is given to the EU as it is currently the only regional actor that imposes restricting measures against non-members. The focus of Penelope Nevill’s chapter is also on Europe, but then on European courts and their engagement with UN sanctions. Nevill presents the pivotal *Kadi* case and situates it within broader litigation outcomes. She criticizes European courts, both the European Court of Justice in *Kadi II* as well as the Grand Chamber of the European Court of Human Rights in *Al-Dulimi*, for their parochial approaches closing off ‘the public space for discussion’. Machiko Kanetake and Congyan Cai offer some less well-known Asian perspectives and examine the Chinese and Japanese position on the tool of sanctions. They observe that the move to targeted sanctions has also resulted in a shift to more rigorous implementation demands and they thus analyse Chinese and Japanese implementation schemes. They also discuss the Chinese and Japanese perspective more generally on due process issues given their centrality in targeted sanctions discourse. In addition, in light of geographic proximity, they examine and contrast Chinese and Japanese approaches to the North Korea sanctions regime. In turn, Amelia Broodryk and Anton du Plessis set out African perceptions of UN sanctions. They look at Africa’s experiences as a prime recipient of UN sanctions, but also at African actions to initiate UN sanctions and the interplay with African Union (AU) sanctions as also discussed by Mirko Sossai. Finally, the issue of implementation is discussed with special regard to capacity limitations as well as reporting fatigue. The very last chapter by Jeremy I. Levitt zeroes in on West Africa as a region that has tested the UN’s capacity to ‘prevent, manage, resolve and maintain international peace and security’ most. The chapter focuses on Liberia, Sierra Leone and Guinea-Bissau and specifically examines whether and how UN targeted sanctions have impacted or shaped peace construction processes. The picture given is mixed, and Levitt points out that UN sanctions did not influence decisions on who could partake in peace construction. Levitt suggests that this may be explained by the fact that the practice of targeted sanctions was still in its infancy at the time. In any event, his case study clearly illustrates how UN targeted sanctions operate at a crossroads of international peace processes, politics and law.

6. OUTLOOK

A 21st-century use of UN sanctions is obviously contingent on the extent of possible P5 alignment, and speculation about the future use of UN sanctions thus hinges on broader geopolitical inquiries. Yet, it is to be expected that whenever the Security

Council acts, UN sanctions are among the essential tools to be considered. UN sanctions will thus continue to evolve and new types of sanctions regimes will be envisaged addressing new threats such as possibly cyberthreats. Moreover, new means will be tested to address threats, such as combating corruption, and new types of threats will be identified related to emerging values and interests, also perhaps in the area of environmental law, and specifically the protection of wildlife or maybe even climate change. Similarly, the Council's working methods are also likely to be continuously revisited and perhaps at some point some steps towards further institutionalization may be taken.

At the external level, certain decentralization trends were noticeable that hinted at a transatlantic sanctions policy between the United States and the European Union, although Trump and Brexit seem to signal a move away from joined approaches.⁴⁶ In any event, UN sanctions will increasingly compete with or be complemented by other measures. Issues of interplay will therefore become more prevalent. In this setting, it is important to recognize the different legal framework that governs UN versus non-UN sanctions, which each having their unique traits and impact capacity. Obviously, the existence of mandatory or recommended UN sanctions may inform questions of legality of parallel unilateral measures as such, but otherwise these measures respond to a very different legal logic.

Future interplays may also go beyond the legal. Indeed, if the traditional Cold War regimes do offer some more blueprints after all, they may well concern the interplay between UN sanctions and civil society sanctions. The South African experience with sanctions presents a case in point: the idea that UN sanctions ended apartheid is open to question. As pointed out by John Dugard, a variety of factors led to the end of apartheid, including internal dissent but also civil society sanctions, such as sports sanctions, cultural protests notably in the form of Bruce Springsteen's anti-apartheid song 'Sun City', the position of universities, and banks withdrawing credit and withdrawal of investment in pension funds.⁴⁷ Dugard observed that UN actions encouraged civil society to mobilize and as such they had a legitimising effect preventing States from instituting legal obstacles to civil society action in the form of legislation suppressing advocacy of a boycott. This issue has regained relevance in the context of the Boycott, Divestment and Sanctions (BDS) movement, given that various States have adopted legislation outlawing or even criminalizing BDS advocacy.

A future perspective on UN sanctions in any event requires to see them as part of a larger web of measures and actions, and the web is woven differently for each situation.

⁴⁶ Simond de Galbert, 'Transatlantic Economic Statecraft; The Challenge to Building a Balanced Transatlantic Sanctions Policy between the United States and the European Union', Economic Statecraft Series, Center for Strategic International Studies, Center for a New American Security, 2016; Elizabeth Rosenberg, Zachary K. Goldman, Daniel Drezner and Julia Solomon-Strauss, 'The New Tools of Economic Warfare; Effects and Effectiveness of Contemporary US Financial Sanctions', Center for a New American Security, 2016.

⁴⁷ Comments made by John Dugard at a special panel on UN sanctions at the ILA Annual Conference in Johannesburg, August 2016.

Within the context of such webs, this volume offers a panorama of the legal landscape surrounding UN sanctions policies. The volume is thus premised on the aspiration that, given the increased sophistication of international society, the legal landscape becomes a more present landscape.