1. An introduction to unilateral and extraterritorial sanctions: definitions, state of practice and contemporary challenges

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1. THE STUDY OF UNILATERAL AND EXTRATERRITORIAL SANCTIONS

This book is the outcome of the COMPLY research project headed by the author of these lines between 2018 and 2020. The project was initially triggered by the striking contrast between the increased rigour with which the United States has applied its international sanctions policy in recent years and the silence or the rather meek reactions from the states which are not formally targeted by its measures, but whose nationals or companies were nevertheless affected by them. Those third states include not only European countries, but also major powers such as Russia, China or India. As is often the case, this research stems from a series of apparently simple questions. What is the contemporary practice of unilateral and extraterritorial sanctions? What is its scope and lawfulness? Will it have an impact on the progressive development of international law? And what are the consequences of this practice on the affected businesses, individuals and populations? As so often happens, those simple questions led into a forest of challenges, which this book aims to take up.

First, the practice of unilateral and extraterritorial sanctions, deriving as it does from multiple sources, is protean and ever-changing. Therefore, the unilateral and extraterritorial sanctions that are the subject of this book raise above all a definitional challenge, the main elements of which will be outlined below (Section 2). Second, the practice of unilateral and extraterritorial sanctions often goes unnamed. It is thus an arduous field of research within the broader field of international sanctions studies. An examination of the scope of international practice quickly pointed to the conclusion that there has been no comprehensive academic study on this subject to date. This Research Handbook therefore offers a series of case studies which show that international practice is not only expanding but is also likely to accelerate sharply in the coming decades (Section 3). Thirdly, in this context of the exponential development of unilateral and extraterritorial sanctions, the question of their regulation by international law has perhaps never seemed more pressing. Yet, the various chapters dealing with the issue reveal the persistence of the international status quo in the absence of any sufficiently clear and systematic state positions (Section 4). It is in this highly specific context that the effects of unilateral and extraterritorial sanctions on the persons and entities they affect must be analysed. Placed in a situation of uncertainty as to the exact scope of their legal obligations and threatened with dissuasive proceedings and penalties, economic operators have become perfect auxiliaries in the enforcement of unilateral and extraterritorial sanctions. This is demonstrated by an analysis of both de-risking practices and state and arbitral case law, which struggles to deal with the matter in the absence of an appropriate legal arsenal (Section 5).
Because of their individual targets and their cumulative effects, unilateral and extraterritorial sanctions also affect the humanitarian situation of the populations of the targeted states and the human rights of targeted persons. They seemingly require the clarification of a series of civil and criminal procedural guarantees and revive fears about their humanitarian impact that were thought to have been left behind in the 1990s (Section 6). This book shows that while unilateral and extraterritorial sanctions have become and will continue to be indispensable instruments in the conduct of international relations, they stand today at a crossroads between strategic instrumentalization and uncontrolled effects on human rights (Section 7).

2. THE MULTIPLE DEFINITIONS OF UNILATERAL AND EXTRATERRITORIAL SANCTIONS

2.1 International Policy Tools Aimed at Compelling Their Targets to Change Behaviour

The contemporary practice of unilateral and extraterritorial sanctions is indeed protean and evolving. It is also fragmented, in the sense that each state or organization develops its own unilateral sanctions. This has a methodological impact on the present work, which it is now a matter of setting out. Despite this multiple and changing subject of study, it is worth underlining that none of the 28 contributors to this Research Handbook has had any difficulty in grasping the object at stake in their specific chapters – be it state practice, the state of international law, the practice of affected economic operators, or the humanitarian and human rights impact of the sanctions.

This can be attributed to there being a general understanding of what international sanctions are, or, to put it differently, it results from the implicit working definition that can be framed as follows. The term ‘international sanctions’ is generally used to refer to the non-armed coercive measures adopted by a state or organization to put pressure on and ultimately induce a change in behaviour of another state, group of states, or non-state target. From this perspective, the state or organization adopting the international sanctions is often called the sanctioning state, the source or the initiator of the sanctions, while the state or entity that is the subject of the non-armed coercive measures is generally referred to as the sanctioned state or the target of the sanctions. Combining this broad working definition of international sanctions with the notion of unilateralism results in a study focusing on the foreign policy tools that states and some regional economic integration organizations (REIOs), especially the EU, adopt at their own initiative to influence the course of international relations.

While this general definition gives an idea of our field of study, it fails to provide sufficient keys for further analysis. This is why the vast majority of the chapters in this book begin with a brief definitional sequence. More interesting still, none of the definitions used is redundant or repetitive. This plurality can be explained first of all by the fact that this Research Handbook brings together several disciplines that make up the field of research on international sanctions, mainly law, political science and legal sociology. These disciplines focus on different aspects of international sanctions and their definitional preferences are complementary indeed. These multiple definitions can also be explained by the fact that international sanctions, both unilateral and extraterritorial, are a large-scale phenomenon in practice. They are instruments of foreign policy, covering a variety of areas, affecting different people, pursuing quite dif-
ferent objectives and potentially encroaching upon diverse branches of international law and international relations. Each of the chapters of this Research Handbook thus sheds light on part of the subject matter that brings them together – unilateral and extraterritorial sanctions – and of which I will propose a definition here. To this end, I will tackle in turn three core definitional elements that streamline the chapters of this book. The definition of unilateralism in the field of international sanctions will be expounded (2.2), and followed with the notion of extraterritoriality, put in the broader context of what is now called sanctions design (2.3). Then, the very use of the term ‘sanction’ in the field of unilateral and extraterritorial sanctions will be questioned, deconstructed and compared to alternative legal terminologies which are struggling to make their mark in the face of the widespread use of the term ‘sanctions’ (2.4).

2.2 Unilateralism in the Field of International Sanctions

International sanctions can be adopted by single states or in the framework of international organizations. A more refined definition of unilateral and multilateral sanctions could therefore depend on the institutional setting in which they are adopted. This would imply that unilateral sanctions would be adopted by a single state and multilateral sanctions in the framework of an international organization or by an informal group of states.

Although technically correct, this divide fails to take into consideration the primary responsibility of the United Nations Security Council (UNSC) to maintain international peace and security, including through the adoption of so-called multilateral or collective international sanctions. More specifically, according to the UN Charter, these are measures that do not involve the use of armed force but are taken in reaction to specific situations listed in Article 39 of the UN Charter. From this background, what are generally referred to as multilateral or collective sanctions are the collective measures adopted by the UNSC on the basis of Chapter VII of the UN Charter. These UN measures have been the object of various studies and are not dealt with in this Research Handbook, which instead focuses on non-UN international sanctions.

By this logic, the distinguishing feature between unilateral and multilateral sanctions is therefore the political impetus that lies behind them. The UNSC, when it acts under Chapter VII of the UN Charter to maintain international peace and security, reacts to ‘any threat to the peace, breach of the peace, or act of aggression’. On the contrary, unilateral sanctions pursue a much wider range of goals and objectives which are autonomously defined by the sanctioning states or REIOs according to their own individual foreign policy interests. As such, they are of a very different political nature and are intrinsically the instruments of national or supranational foreign policies. For instance, while the United States’ practice of unilateral sanctions rests on the notion of its national interests and national security, the European Union’s practice rests on the notion of the EU’s interests and the values governing its external action. As illustrated by the latter example, from this perspective where unilateral sanctions are conceived in

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1 Article 25 of the UN Charter.
2 Article 41 of the UN Charter.
4 Article 39 of the UN Charter.
opposition to UN collective measures, they may be adopted either by single states such as the US or by REIOs like the EU. From this political perspective, unilateral sanctions may technically be both unilateral or multilateral.

This distinction between multilateral sanctions as UNSC sanctions and unilateral sanctions as non-UNSC sanctions sheds light on two main differences between UN and non-UN international sanctions: their reach and their legitimacy. While international sanctions decided collectively at the UN level by the UNSC must be implemented by all UN Member States, unilateral sanctions suffer from their narrow reach as they theoretically only bind persons within the sanctioning state’s or REIO’s jurisdiction. However, the effectiveness of international sanctions depends on their being widely applied. Otherwise, the activities or persons targeted by unilateral sanctions would simply find alternative partners and unilateral sanctions would then be virtually devoid of any coercive effect on their target. This explains the emergence of various techniques designed to extend the reach of unilateral sanctions. These include the use of extraterritorial legislation and the multilateralization of unilateral sanctions through contractualization or informal diplomatic alignment (see 2.3 below). Turning to the issue of legitimacy, suffice it to say here that international sanctions adopted by the UNSC derive from a collective decision taken either unanimously or at least by a majority vote of nine out of the 15 members of the UNSC, the UN Charter providing that the UNSC acts on behalf of all UN Member States. By contrast, the decision of one single state or REIO to adopt unilateral sanctions depends solely on its own foreign policy options and reflects only its own view and interpretation of the foreign situation to which it reacts and which it seeks to influence. This legitimacy gap probably explains the plethoric practice consisting in adopting unilateral sanctions that are presented as complementary to or supportive of UN multilateral sanctions. For instance, unilateral sanctions supposedly share the same objectives as UN sanctions but extend their material reach. Against this background, and to be sure, REIO measures directed against one of their own member states are excluded from this study as they are institutional sanctions rather than unilateral international sanctions aimed at third countries.

2.3 Extraterritoriality in Contemporary Unilateral Sanctions Design

Sanctions design focuses on the art of tailoring international sanctions so as to best achieve their objectives. Initially, international sanctions took the form of global or comprehensive sanctions against a whole country. The well documented humanitarian crisis that resulted from the imposition of global sanctions by the UN on Iraq, Haiti or Cuba led to a reflection on how to better design these instruments so as to limit their impact on the population of a specific country.

Targeted or smart sanctions were then defined in contrast to the initial comprehensive or global sanctions. They can take two main forms: sectoral or individual sanctions.

Sectoral sanctions first aim at impacting a state’s core economic sector. They generally imply economic restrictions on specific sectors of the domestic economy, such as arms, oil,

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5 Articles 25 and 48 of the UN Charter.
6 Articles 24 and 27 of the UN Charter.
gold or precious wood. The financial and banking sector is often targeted as well, through bans on financial transactions or restrictions on investments. This rise of financial sanctions explains why various areas of financial regulation and compliance, such as anti-money-laundering, anti-bribery and counterterrorism-financing instruments are today strongly intertwined with unilateral and extraterritorial sanctions. Sectoral sanctions may also take a large variety of non-economic forms, such as air traffic constraints, the downscaling of diplomatic relations or boycotts of cultural and sporting events.

Targeted sanctions may also be designed so as to affect the situation of specific persons. These sanctions aim at piercing the veil of the state in directly touching physical and legal persons who are identified as having the power to influence the state’s behaviour. Hence, not only state officials and ministries but also businessmen and banks soon appeared on blacklists. The best known and the most used targeted sanctions take the form of both travel restrictions, including visa bans and travel controls, and financial and banking restrictions in the main form of asset freezes.

More recently some states and REIOs have begun to adopt so-called thematic or horizontal sanctions. This new form of targeting focuses on individuals or entities related to specific objectives such as the fight against human rights violations or cyberattacks, without specifically targeting a state. The technique in itself is not new, and was first experimented at the UN level with the post 9/11 counterterrorism sanctions that were the first international sanctions without any territorial link to a state and instead targeting transnational criminal networks like Al-Qaeda or Daesh. The same technique is used in thematic or horizontal sanctions, which likewise rest on the establishment of blacklists. These new horizontal unilateral sanctions can overcome diplomatic and legal difficulties associated with the stigmatization of a specific state but they raise issues about the individual guarantees that should accompany this new sanction design.

As mentioned above in the discussion of unilateralism in the field of international sanctions (2.2), unilateral sanctions suffer from a major defect compared to multilateral or collective measures adopted by the UNSC: their scope of application is as limited as the jurisdiction of the state or REIO that adopts them.

Primary sanctions, which constitute the general practice in the field, apply to individuals and entities located on the territory or bearing the nationality of the state or group of states imposing the unilateral sanctions. These persons are prohibited from entering into the restricted relations that define the material scope of the sanction, which can, as just explained, target activities developed on the territory of the sanctioned state as well as persons operating in its territory or bearing its nationality, or other persons targeted through horizontal blacklists.

As such, primary sanctions do not have any controversial extraterritorial reach since they are only binding on persons subjected to the jurisdiction of the sanctioning state/REIO. The only extraterritorial feature lies in the use of the nationality link with a person who remains subject to the jurisdiction of her/his state of nationality when acting abroad.

To achieve the broad application of unilateral sanctions, which is a condition for their being effective as has already been pointed out, two main strategies can be highlighted here. A first strategy consists in finding alternatives to the controversial and unlawful use of extraterritoriality in the field of unilateral and extraterritorial sanctions. From this perspective, some states

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and REIOs undertake diplomatic efforts to make their partners mirror their unilateral sanctions through more or less formalized legal mechanisms ranging from de facto domestic implementation to contractualization through international agreements. Another strategy, which instead raises much controversy, consists in stretching to the maximum the territorial and personal nexus to the jurisdiction of the sanctioning state. This is a key feature of US practice which interprets the territorial nexus by invoking the effects of a foreign situation on US territory or by the clearing in the US of any financial transaction denominated in dollars. The broad understanding by the US authorities of what a US person is, also contributes to the stretching of the personal nexus with the state. This practice of stretching the limits of the theory of state jurisdiction is a first feature of extraterritoriality in the field of unilateral sanctions.

A second (complementary) feature of extraterritorial sanctions is much more straightforward and consists in adopting secondary sanctions. Secondary sanctions, which have also become a key feature of US practice of unilateral sanctions, remain isolated and contested. Their aim is to constrain persons located in or bearing the nationality of a third state, to abide by unilateral sanctions although they are not subject to the jurisdiction of the sanctioning state. Secondary sanctions target foreign persons who pursue their relationships with unilaterally sanctioned individuals, entities or states. Secondary sanctions are therefore intrinsically extraterritorial, as they aim at governing activities that fall outside the reach of the sanctioning state’s legislation. Because of the high economic risk they represent for economic operators, practice shows that unilateral and extraterritorial sanctions are stimulating the development of business compliance programmes around the world, notwithstanding their doubtful legal grounds and contested extraterritorial reach.

2.4 The Notion of ‘Sanction’ in the Practice of Unilateral and Extraterritorial Sanctions

The last step in this definitional exercise is certainly to tackle the notion of ‘sanction’ in the contemporary practice of unilateral and extraterritorial sanctions. As underlined above the current and common use of the term sanction is a handy way to refer to a phenomenon as a whole, encompassing the measures aimed at coercing a third state or entity to change its behaviour (2.1). Two elements could explain the crystallization of the use of sanctions terminology. First, as foreign policy tools, unilateral and extraterritorial sanctions are the manifestation of a political sanction against the target, whose behaviour is considered objectionable. In the legal field, however, the notion of sanction bears a much narrower sense, and strictly refers to the consequences that are attached to a breach of the law; hence the link that is traditionally made between unilateral sanctions and the international law of states and IOs responsibility. Furthermore, in the legal field, the sanction is generally pronounced by a third party, be it an institutional sanction imposed by an international organization on one of its members or a judicial sanction imposed by an independent court. These two points must be discussed further as they have far-reaching consequences for the legality and legitimacy of the unilateral and extraterritorial measures we are dealing with.

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First, on the question of the lawfulness of unilateral sanctions as such, it should be underlined here that international law does not provide for a one-size-fits-all answer. Every measure adopted as a unilateral sanction must be evaluated against the international obligations governing the relationship of the sanctioned state/REIO and the sanctioning state/REIO. If they do not violate any existing international obligation, these unilateral sanctions will be considered as acts of retorsion, which are intrinsically lawful. If, on the contrary, they do violate pre-existing obligations of the sanctioning state or organization, the latter will engage its international responsibility unless it can demonstrate that these measures are justified as countermeasures, which are recognized circumstances precluding wrongfulness. To this end, it must demonstrate that the unilateral sanctions are a reaction to a previous breach of the law by the sanctioned state, generating an intrinsically wrongful act, which the sanctioning state aims to terminate by adopting unilateral sanctions. This remnant of private justice within the international order derives, among other things, from the absence of permanent courts with unconditional jurisdiction to settle international disputes between states and/or organizations. The institution of countermeasures affords them, under very strict conditions, some lawful means of protecting their legal interests. It is only in this very narrow sense that unilateral sanctions, if they were an effective reaction to previous breaches of international law and would qualify as countermeasures, could be considered sanctions in legal terms.

However, nothing is less certain. Firstly, it is not sufficient for states or REIOs to declare that they are reacting to a violation of international law by the target of unilateral sanctions for that violation to be established. The two cases put before the International Court of Justice, opposing Iran to the United States on the one hand and Qatar to the United Arab Emirates on the other hand, show that establishing this prior violation of law as a ground for unilateral sanctions is not to be taken lightly. Secondly, the practice, which is widespread today, of resorting to unilateral sanctions as a reaction to very general violations of the law, for example of massive human rights violations in a third country, does not fall for certain within the scope of countermeasures as defined in positive law, but belongs to the emerging and debated practice of third country countermeasures. It follows from the above that what are nowadays called ‘unilateral sanctions’ do not, with perhaps a few exceptions, correspond to sanctions under international law stricto sensu. For this reason, many authors, including in this Research Handbook, prefer to use the term ‘restrictive measures’ rather than sanctions, when referring to the unilateral and extraterritorial measures that form the subject matter of this book. In contemporary practice, restrictive measures is the official terminology used in the EU’s

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12 Chapter II of Part III of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts; and Chapter II of Part IV of the Draft articles on the responsibility of international organizations (n 11).
13 Denis Alland, Justice privée et ordre juridique international (Pedone, 1994).
15 Beaucillon (n 8) 323–31.
founding treaties to describe its own practice of international sanctions, both UN-determined and unilateral.

Moreover, the fact that unilateral and extraterritorial sanctions are adopted by states and REIOs at their own instigation and in accordance with their own foreign policy objectives, that is, in a purely subjective manner, sets them apart from the objective sanctions of law that may be imposed by impartial third parties in an institutional or jurisdictional capacity. This calls for close questioning of their legitimacy. Can states and REIOs legitimately, even without the use of armed force, compel the behaviour of third states and entities in the name of their own interpretation of international law, their own values, their own interests and their own objectives? The contrast with the multilateral framework for the adoption of collective measures by the UNSC is striking here. This is the reason why many states, particularly those which are members of the Non Aligned Movement, are traditionally opposed to the practice of unilateral sanctions, as they consider legitimate only the collective sanctions adopted by the UNSC. It is this debate, particularly within the United Nations, which has seen the flourishing of the notion of ‘unilateral coercive measures’, a terminology that emphasizes the political purpose of these measures – coercion – and raises the question of the legitimacy of the use of such instruments, particularly between states whose relations should be devoid of such constraints on the grounds of their sovereign equality. 16

This clarification of the legal nature of what are commonly referred to as ‘unilateral and extraterritorial sanctions’ – which are in reality only restrictive or coercive measures whose legality is very rarely subject to the control of the international courts – highlights the importance of the stakes that the indisputable growth of this international practice (Section 3) represents for the development of international law (Section 4) and sheds new light on the very important impact it has on economic actors (Section 5) and human rights (Section 6).

3. MAPPING THE CONTEMPORARY PRACTICE OF UNILATERAL AND EXTRATERRITORIAL SANCTIONS

3.1 Scope and Methodology

Part I of this Research Handbook aims at filling a research gap, as there is yet no comprehensive academic study of the state of unilateral and extraterritorial practice. At most, some law firms, whose data have sometimes been referred to in the case studies presented below, provide short summaries of practice towards international sanctions in general (both UN and unilateral), in states where they have a branch or a correspondent. Therefore, while it is known that some states and international organizations make extensive use of unilateral and extraterritorial sanctions, there is still no complete inventory and analysis of this network of measures. With the exception of the United States and the European Union, most states remain discreet about their position and practice regarding unilateral sanctions. However, it is fundamental to understanding the progressive development of international law that we do not limit ourselves to a position that is exclusively oriented towards the West. Beyond the practice of the European Union and the United States, Part I of the Research Handbook focuses on the

16 Article 2(1) of the UN Charter.
practice and diplomatic positions of some states that are members of the group of the BRICS, given their economic weight: China, Russia, India and South Africa.

To achieve this goal, inspiration was taken from seminal studies on sanctions aimed at mapping the domestic schemes governing the implementation of (UNSC) international sanctions. A common scheme of analysis was drawn up so as to ensure as much consistency as possible across the six case studies. To identify the scope of the practice of unilateral and extraterritorial sanctions, both as perceived by the state in question and as practiced by it, the authors have been asked to systematically draw the distinction between unilateral sanctions on the one hand and extraterritorial sanctions on the other. As is shown in Part II of the Research Handbook, these practices are varied and these characteristics do not raise the same issues from a public international law standpoint (see 2.2 and 2.3 above). From a policy standpoint, sanctions that are only unilateral raise the important question of their motive (human rights, protection of the environment, protection of national interests), which should not be obscured by the most studied practice of US unilateral and extraterritorial sanctions. Where applicable, the authors have also been asked to systematically draw a distinction between sectoral sanctions and individual sanctions (see 2.3 above). Finally, the authors have been asked to choose their examples from two sets of practice. First, some sanctions regimes are highly publicized because they affect a large part of world trade and are used as cross-cutting examples throughout the Research Handbook. They include sanctions against Russia, Cuba, Venezuela, China, and against Iran and North Korea, with the latter two posing the problem of unilateral Trojan horses that claim to complement multilateral measures adopted by the UN Security Council on the basis of Chapter VII of the UN Charter (see 2.2 above). The authors have therefore been careful to distinguish their unilateral emitters where applicable. Second, the six authors have also highlighted in their chapters less well-publicized sanctions regimes that illustrate specific issues within their case studies. This second selection enriches the scope of the Research Handbook exponentially. All the sanctions regimes dealt with, both transversal and specific, can be found in the index.

### 3.2 Shifting Policies: Unilateral and Extraterritorial Sanctions As the New Normal?

Some states or REIOs have traditionally opposed the use of unilateral and extraterritorial sanctions in international relations. They develop extremely varied positions. South Africa’s position is particularly important not only in terms of its economic influence on the African continent, but also in terms of its past experience as a target for economic sanctions. As Hennie Strydom demonstrates in Chapter 3, South Africa remains the staunchest opponent to the use of any form of unilateral and a fortiori extraterritorial sanctions in international relations. It takes the view that they are contrary to international law and only recognizes the legitimacy of collective measures adopted by the UN Security Council on the basis of Chapter VII of the UN Charter. Of all the case studies presented, South Africa’s position seems the least subject to change, as Strydom shows it is strongly intertwined with post-Apartheid democracy and membership of the Non Aligned Movement (NAM). Another member of the NAM, and another former target of international sanctions, India has also long opposed the use of unilateral and...
extraterritorial sanctions. However, as Rishika Chauhan demonstrates in Chapter 4 with the examples of counter-proliferation sanctions against North Korea and Iran, India has already tempered its position, giving support to US unilateral sanctions and might further explore this practice in the future.

China has also traditionally been against any use of unilateralism in international sanctions, and even more so when they are extraterritorial. While Congyan Cai presents the theoretical foundations of this position in Chapter 5, he also shows how the so-called economic war with the United States may well have been a turning point for Beijing. Indeed, China has recently altered its position and adopted its first regulatory framework to compile its own ‘Unreliable Entities List’. Along the same lines, the case of Russia illustrates that a state that is traditionally opposed to the use of unilateral and extraterritorial measures may be pushed to resort to them, in particular in response to unilateral measures imposed on it. In Chapter 6, Ivan Timofeev not only shows the mechanics of this policy shift, but also points to the latest legislative developments aimed at increasing Russia’s resilience to EU and US unilateral sanctions.

For its part, the European Union adopts a much less strict position, having used unilateral measures for a decade. Chapter 7 gives an overview of the EU practice of unilateral restrictive measures, presents the related legal framework as well as the procedural guarantees that have been developed in this respect. It shows, however, that the EU’s take is very firm on the extensive extraterritoriality of some unilateral measures, which the EU condemns and undertakes not to use. Instead, it prefers the multilateralization tools such as informal alignment or contractualization, the consequences of which may also be questioned. Finally, Zachary Goldman and Alina Lindblom offer a dive into the US practice of unilateral and extraterritorial sanctions in Chapter 8. They present the legal framework for US unilateral and extraterritorial sanctions and take us to the diverse levers of the US sanctions policy, from the dollar hegemony to the race for software domination.

As Erica Moret shows in Chapter 2 with her transversal analysis of the current practice of unilateral sanctions, this trend towards the generalization of unilateral sanctions in industrialized nations and the emergence of the practice in rising powers and non-industrialized countries also holds in Latin America and the Middle East. These unilateral sanctions allow governments to react quickly and publicly to very different situations, while giving the impression of doing something concrete, but without incurring excessive expense such as would result from an armed confrontation, for example. Seen by most states and REIOs as handy tools of statecraft, Moret’s analysis supports the view that the global run to unilateral and extraterritorial sanctions might well exacerbate the issues that are identified in the following Parts of the Research Handbook.
are high, insofar as the practice of unilateral and extraterritorial sanctions questions the most fundamental principles of the international legal order. The sovereign equality between states, the extent of their international competence to adopt such measures and their relationship with the law of international responsibility are all central examples.

The practice of unilateral and extraterritorial sanctions thus appears to be an element of the further development of public international law and has not yet been analysed from this angle. Yet public international law is largely shaped by the positions and reactions of states and international organizations on the international scene. It is thus essential to tackle the question of its long-term effect on tomorrow’s positive international law.

To determine this potential evolution, it is necessary to take a benchmark. The topical examples that are traditionally used date back to the 1980s and 1990s. First, the US unilateral sanctions adopted in 1982 to hinder the construction of a Euro-Siberian gas pipeline between Europe and Russia in the broader context of the reaction to the introduction of martial law in Poland in 1981, triggered important European reactions. Second, the adoption in 1996 by the United States of the Helms-Burton Act on Cuba and D’Amato-Kennedy Act on Iran and Libya, both with extraterritorial scope and effects on third party companies, particularly European ones, also generated strong reactions. It was at this time that the state of positive international law crystallized, which we take as a reference today. These episodes were interpreted as sealing the victory of the theory of state jurisdiction over the unilateral and extraterritorial velleities of the world’s leading power. In contrast, the resumption by the United States, at the turn of the decade, of a very sustained policy of unilateral and extraterritorial sanctions did not generate such strong reactions from the European Union or affected third states. This development in practice is explained in particular by the increased use of unilateral sanctions by states and REIOs. Indeed, any jurisprudential or political precedent concerning unilateral and extraterritorial sanctions would limit the practice of unilateral sanctions, which is, as I have shown, in full expansion. This Gordian knot needs to be examined further in so far as it has consequences for the law of international responsibility, for the unilateral and multilateral positions taken by states and international organizations, and for the jurisdictional mechanisms for the settlement of international disputes.

4.2 What Practice Shows: The International Precedent is in the Making

The contemporary practice of unilateral and extraterritorial sanctions is part of a complex legal framework in which unilateral measures must be articulated and distinguished from collective measures adopted within the framework of the United Nations. However, as Jean-Marc Thouvenin shows in Chapter 9, some state and REIO practices consist precisely in combining unilateral and collective measures, making their distinction difficult or inoperative for the addressees of the prohibitions they entail. Thouvenin offers a refined legal analysis of the

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21 Charlotte Beaucillon, ‘Panorama de la pratique contemporaine en matière de sanctions extraterritoriales’ in Alina Miron and Bérangère Taxil (eds.), Extraterritorialités et droit international (Société française de droit international, colloque d’Angers, Pedone 2020) 75.
current practice of states and some REIOs to implement UN sanctions and to impose unilateral sanctions in parallel. Cases differ, depending on the arguments of the states, sometimes going beyond the scope of UN obligations but following the same rationale, sometimes rather arguing to respond to UN authorizations. Some go so far as to impose unlawful extraterritorial sanctions on the alleged grounds of UN requirements. In the end, Thouvenin also addresses the not overly theoretical issue of the imposition of unilateral sanctions that are supposedly contrary to UN sanctions.

Against this background, the contemporary practice of unilateral and extraterritorial sanctions questions two fundamental branches of international law: states and REIOs’ competences and their international responsibility. In Chapter 10, Yann Kerbrat offers a specific analysis of extraterritoriality in the field of international sanctions, thanks to a systematic analysis of state practice and diplomatic reactions. Through the prism of the theory of state jurisdiction, Kerbrat shows that the trend to resort to an extensive nexus with the territory or the nationality of the state imposing unilateral sanctions is not lawful under international law. However, he also shows how lukewarm contemporary diplomatic reactions are likely to leave room for the advancement of positive law, from which there will be no turning back. Alexandra Hofer then turns to the analysis of unilateral and extraterritorial sanctions from the perspective of international responsibility law. Although unilateral and extraterritorial sanctions are part of the measures that may be considered as tools of reaction against wrongfulness (see 2.4 above), Hofer shows that their logic goes far beyond this traditional framework of analysis. In particular, she questions the use of such measures to respond unilaterally to violations of obligations owed to the international community as a whole, and the legitimacy of such a developing practice.

Proposing an incursion into international economic law, Sabrina Robert-Cuendet shows in Chapter 12 that unilateral and extraterritorial sanctions have a strong impact on international investment law. She thus reveals the power and long reach of unilateral and extraterritorial sanctions, which interfere in unsuspected business relationships. Moreover, its analysis reveals that international investment law is now sometimes used as the silent vector of unilateral sanctions, in particular through the establishment of foreign investment screening mechanisms.

These issues having been exposed, the last two contributions focus on the reaction mechanisms available to states and REIOs to contain the effects of the practice of unilateral and extraterritorial sanctions. The major instrument, born of the 1996 crisis recalled earlier, is the adoption by each state or organization of a so-called blocking law/regulation, intended to prevent foreign legislation deemed illegitimate from producing legal effects on its territory. Examining a wide variety of blocking laws – in the EU, Canada, Russia and Mexico, among others – Daniel Ventura shows in Chapter 13 that while these instruments have a clear diplomatic value in marking opposition to the development of the practice, they suffer from structural defects. Ventura shows, moreover, that these legislative defects have repercussions at the level of their application by courts and tribunals, both national and international. He thus suggests a series of corrections affecting not only the text of the blocking laws, but also the legislative context in which they operate, which are indispensable to the effectiveness of these instruments. In the same vein, Lena Chercheneff explores in Chapter 14 the multilateral mechanisms that states and REIOs could use to deal with the rise of unilateral and extraterritorial sanctions. Focusing particularly on the Organization for Cooperation and Development in Europe and the World Trade Organization, Chercheneff shows the reluctance of states to take any steps that could set a precedent that might curb the expansion of unilateral sanctions,
whether extraterritorial or not. She shows that only a few states, all targeted by such measures but which do not yet impose them themselves, have attempted to submit their cases to such multilateral fora.

5. BURDEN-SHIFTING TO PRIVATE PERSONS: THE IMPACT ON ECONOMIC OPERATORS

5.1 The Stark Evolution of Business Practices

Even though contemporary practice relating to unilateral and extraterritorial sanctions calls into question central principles of international law, and although it is firmly condemned by many states, the latter do not manage to deprive the most intrusive unilateral and extraterritorial sanctions of effect on their national territories. This results in the legal and financial risk of compliance with or violation of unilateral and extraterritorial sanctions being borne by national economic operators. According to their own economic logic, these operators will submit to the injunctions associated with the biggest sanctions on the market, even if these injunctions are not legal or legitimate. Indeed, economic operators that are greatly exposed internationally are bound to be compliant so as not to incur domestic proceedings and penalties. To address this situation, that they perceive as a risk for the development of their business activities, economic operators have integrated unilateral and extraterritorial sanctions into their compliance programmes. The combination of these private mechanisms is likely to lead to a phenomenon of over-execution of unilateral and extraterritorial sanctions despite their questionable legitimacy and lawfulness. In this Research Handbook, this phenomenon is referred to as overcompliance. As Emmanuel Breen shows in Chapter 15, the willingness of corporations to be compliant with US unilateral and extraterritorial sanctions so as to guarantee their access to the US market, combined with several factors, leads to overcompliance processes throughout the law enforcement cycle. This phenomenon incidentally illustrates that unilateral and extraterritorial sanctions are complied with depending on the economic risk they represent for the economic actors, which is not necessarily fully correlated with their binding value. Examining the banking sector specifically and taking the example of counter-proliferation unilateral and extraterritorial sanctions, Grégoire Mallard and Anna Hanson show in Chapter 16 how forcefully the compliance programmes are shaping current business practices. They explore the implications of banks’ use of US-based financial data-management software and expose the results of in-depth interviews with former US officials, international organizations and global bank officers to show how the rationale of unilateral and extraterritorial sanctions is perceived and understood. Exploring the same lines, but from the public authority’s standpoint, Ilze Znotiņa and Paulis Iljenkovs unveil the levers of the ABLV case, the Latvian bank which disappeared in less than a month following its involvement in a matter related to the violation of US unilateral and extraterritorial sanctions. As Znotiņa and Iļjenkovs show in Chapter 17, the intertwinement of unilateral and extraterritorial sanctions compliance with other compliance issues, such as anti-money laundering, can have a windfall effect and give the impression that compliance with foreign unilateral and extraterritorial sanctions is likely to help the adoption of best practices by supervised financial entities. This has led Latvia down an unexpected legislative path, trying to reconcile its membership of the European Union and its voluntary submission to certain unilateral and extraterritorial foreign sanctions.
5.2 The Lack of Case Law Counterbalancing Opportunities

The observation of the evolution of business practices leads to further reflection on the tools at the disposal of economic operators to ascertain their situation with regard to their actual obligations deriving from unilateral and extraterritorial sanctions. An interesting angle of observation to answer this question is to query the national and arbitral litigation relating to unilateral and extraterritorial sanctions.

In Chapter 18, Marjorie Eeckhoudt offers a systematic analysis of French and British case law on unilateral and extraterritorial sanctions. She shows that French and British courts face major legal issues when economic operators targeted by unilateral and extraterritorial sanctions challenge them in court. Echoing the flaws of existing blocking statutes and regulations, Eeckhoudt shows that these instruments produce little effect in court, because of their overly narrow scope. Actually, the major legal challenge which is not clearly decided for now, consists in controlling contractual practices such as unilateral termination of contracts on the grounds of the risks generated by extraterritorial sanctions, or the generalization of sanctions clauses in international contractual relationships. Very interestingly, Eeckhoudt also evidences the state practice of imposing unilateral sanctions in parallel to EU sanctions, which is all the more relevant today in the face of Brexit. This practice is paving the way for the development of national jurisprudence on the procedural and substantial guarantees that should accompany domestic listings. If they undoubtedly follow in the footsteps of EU jurisdictions, Eeckhoudt shows that domestic courts may also issue decisions diverging from their EU peers, when asked by the same targeted entity to review two different but complementary sets of domestic and EU unilateral sanctions.

Taking another domestic perspective, Jin Sun examines the state of unilateral sanctions-related dispute settlement concerning bank payments in China, Hong Kong and Macau. Chapter 19 thereby opens up a new horizon to the East and provides an uncompromising analysis of the various administrative and judicial remedies that can be found by affected economic operators in these three separate legal jurisdictions in China. Sun also shows the variety of the effects that unilateral and extraterritorial sanctions can have in business relationships in China, Hong Kong and Macau, and exposes the variety of judicial and non-judicial remedies available to any economic operator doing business in China.

Turning to the analysis of international commercial arbitration, Eric de Brabandere and David Holloway show in Chapter 20 how international arbitration sometimes has difficulty grasping the specificity of unilateral and extraterritorial sanctions and collective UN sanctions. To do so, they guide us through the analysis of rules governing the admissibility of the arbitration and substantive law applicable to unilateral sanctions cases while recalling the relevant jurisprudential elements relating to international collective sanctions. Then examining the effect of unilateral sanctions on contracts, they illustrate that contractual practice has largely adapted to accommodate the rise of unilateral sanctions, in particular by examining the effect of so-called sanction clauses in contemporary international arbitration.
6. BURDEN-SHIFTING TO PRIVATE PERSONS: THE HUMANITARIAN AND HUMAN RIGHTS IMPACT

The second aspect of burden-shifting to private persons, which results from the combination of the rise of the practice of unilateral and extraterritorial sanctions with the persistence of the international status quo on the lawfulness of this practice, concerns its humanitarian and human rights impact.

6.1 The Unanswered Concerns of the Humanitarian Impact of Unilateral and Extraterritorial Sanctions

Pierre-Emmanuel Dupont exposes in Chapter 21 that the practice of unilateral and extraterritorial sanctions is now grasped at the UN level through the notion of unilateral coercive measures. Still rooted in the logic of the prohibition of coercion between sovereign states, the debate has found a recent development in the field of human rights, as illustrated by the mandate of the UN Special Rapporteur on the impact of unilateral coercive measures on the enjoyment of human rights. Offering an attempted typology of unilateral coercive measures, Dupont shows the variety of unilateral measures liable to have an impact on the humanitarian situation of a state targeted by unilateral and extraterritorial sanctions. Indeed, since its establishment in 2014, this special procedure of the UN Human Rights Council has helped in gathering data on the impact of unilateral and extraterritorial sanctions on human rights. However, Dupont shows that mapping such practices remains very difficult, most states being reluctant to voluntarily report their use of such measures. He advocates the reinforcement of the powers of the Special Rapporteur to conduct this yet missing mapping exercise.

Contributing to this line of reflection, Ioannis Prezas proposes in Chapter 22 to explore the international responsibility of states and REIOs for the negative impact of their unilateral sanctions on the humanitarian situation and the human rights of the populations of targeted states. Taking stock of the existing international case law at the domestic, regional and international levels, he highlights various obstacles to the development of specific litigation on this issue. The fact remains that the cumulative impact of unilateral and extraterritorial sanctions on the humanitarian situation of the populations of the targeted states is supported by numerous public data, and that this issue should be the subject of priority corrections in future international practice.

6.2 The Evolutive Impact of Unilateral and Extraterritorial Sanctions on Individual Human Rights

When they take the form of so-called blacklists, unilateral and extraterritorial sanctions are likely to affect the individual guarantees of human rights of the listed persons. This raises the question of the respect of due process when imposing such unilateral sanctions, an issue that is touched upon by various authors in the course of their chapters (Beaucillon, Sun, Prezas). However, this question has been unevenly tackled by states and REIOs that are imposing unilateral and extraterritorial targeted sanctions and deserves a specific focus. To illustrate the variety of the guarantees of due process in current practice, Anton Moiseienko offers in Chapter 23 a comparative analysis of the state of US, EU and UK law in the field. He examines the stage of the imposition of the sanctions and the potential challenges to such unilateral sanc-
tions, both administrative and judicial. Moiseienko proposes a rare comparative analysis of the current state of due process guarantees in three of the most important issuers of unilateral and extraterritorial sanctions. By doing so, he also illustrates the marked differences in guarantees between the US, the EU and the UK, which should in turn better inform the strategies that individual targets might favour to ensure their rights are fully observed.

In parallel, a new trend arguably resulting from an extension of the practice developed under the international anti-corruption regime consists in imposing criminal sanctions on entrepreneurs and top managers who fail to comply with secondary unilateral and extraterritorial sanctions (see 2.3 above). This raises the question of the right of these persons, who are not the primary targets of unilateral and extraterritorial sanctions, to be protected against such risks, and even more so when the international lawfulness of the sanctions they allegedly violated is questionable. Taking the Huawei case as the starting point of her reasoning, Muriel Ubeda Saillard advocates in Chapter 24 that the logic of unilateral and extraterritorial sanctions should be submitted to the general guarantees of criminal law. However, she shows that the highly political stakes governing the imposition of unilateral and extraterritorial sanctions might well interfere with the implementation of well-set protective standards, notably against political extraditions and should be eagerly defended by the judiciary. Although it is not yet certain how this practice in the making will be settled, it is already clear that a lack of protection from criminal prosecution of top managers for alleged secondary sanctions violations will only reinforce the overcompliance trends illustrated in Part III of the Research Handbook.

A third recent development which is likely to affect human rights must be mentioned here. It consists in the new practice of horizontal or thematic unilateral sanctions, as exemplified in US, EU and other practices in reaction to human rights violations or cyberattacks rather than targeting a single state. In Chapter 25, Clara Portela examines the drivers of this trend and exposes its various apparent advantages, including the elimination of the stigmatization effect on states, which is questioned by various authors (Hofer, Dupont). However, this emerging practice in turn raises the old question of the nature of international targeted sanctions – are they preventive or punitive? Indeed, the establishment of thematic lists of targets raises the eternal question of the grounds on which a person should be listed, but this time with no possibility of referring to his or her relation to a targeted state. Portela therefore warns of the guarantees that should accompany these new practices, and advocates the judicialization of such measures.

7. UNILATERAL AND EXTRATERRITORIAL SANCTIONS AT THE CROSSROADS

The 25 chapters of this Research Handbook show that the practice of unilateral and extraterritorial sanctions stands at a crossroads and undoubtedly constitutes an extremely dynamic field of study for the years to come.

Not only is the practice evolving very rapidly, but the instruments used are becoming increasingly sophisticated and the number of actors involved seems to be growing exponentially. As a result, the rise of unilateral and extraterritorial sanctions is likely to lead to changes in the relevant rules of international law that are supposed to govern them. This, in relation to the issues set out above regarding the legality and legitimacy of such unilateral practices, is bound to raise questions.
Beyond the issue of their conformity with international law, the generalization of unilateral and extraterritorial sanctions raises the question of their impact on private actors, which is bound to be proportionally exponential to their intensification. One can thus consider – and question – the crossroads at which unilateral and extraterritorial sanctions find themselves in international practice. They stand between the proven risk of their instrumentalization for economic strategy or economic warfare purposes on the one hand, and their humanitarian and human rights effects which one would expect to see corrected, given that human rights and human dignity have been erected as cornerstones of the post-1945 world order.22

Only the evolution of the practice of unilateral and extraterritorial sanctions will make it possible to know the outcome reserved for these questions. Let us trust that the community of academics and practitioners in the field of international sanctions studies, some of whom have honoured this book with their presence, will be ready to analyse it. In the meantime, let us hope that the studies and analyses presented here by a dedicated orchestra conductor will find their echo where they will be most useful.

22‘WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom …’. First paragraph of the preamble of the UN Charter.