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Economic Sanctions and International Law: An Introduction

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The use of sanctions and embargoes as tools of foreign policy or (to put it more bluntly) of economic warfare[1] has rarely been more prevalent. At present, there are 17 United Nations sanctions regime and 37 European Union sanctions regimes in force, along with various others imposed by States acting unilaterally or under the umbrella of other international organisations. Yet, at the same time, such practices have rarely been more contested. Targeted or 'smart' sanctions against individuals and entities – in particular, asset freezes and travel bans – imposed by the UN Security Council and Member States acting under its authorisation have been subjected to sustained challenge: to begin with, because they reduced those subject to them to conditions of indigency; and, more generally, because they are based on undisclosed evidence and are not subject to judicial review. So-called unilateral or autonomous sanctions – that is, those imposed by States and international organisations without the Security Council's imprimatur – are criticised as being contrary to international law and in breach of the rights of the States targeted by such measures, including by the UN General Assembly and the Human Rights Council.

Sanctions, it can already be seen, take various forms. United Nations sanctions have traditionally had a special status, as they benefit from the combined effects of Charter Articles 25 (requiring Member States 'to accept and carry out the decisions of the Security Council') and 103 (providing that Member States' obligations under the Charter shall prevail in cases of conflict with any other of their treaty obligations). And although it is sometimes argued that the wording of Article 103 means that only Member States' treaty obligations, and not their obligations under

[1] See generally V Lowe and A Tzanakopoulos, 'Economic Warfare' in *Max Planck Encyclopedia of Public International Law* online edn (last updated March 2013).

general international law, are trumped, application of the *lex specialis* principle would seem to argue the contrary, absent a customary rule having *jus cogens* status.[2] What this means is that discussions about whether the Security Council has acted lawfully in establishing particular sanctions regimes tend to focus on whether the Council has acted within its powers as set out in the Charter.[3]

Unilateral or autonomous sanctions, however, cannot rely on such support. Here, legal justifications differ.

- Some measures, such as embargoes on the export of arms and materiel are occasionally argued as necessary to prevent the State or States imposing them breaching their own legal obligations (under, e.g., the law of neutrality[4]) or being complicit in another State's illegal conduct (under international human rights or humanitarian law or the Arms Trade Treaty[5]). If so, then properly speaking, they are not sanctions.
- Sanctions imposed by an international organisation on one of its Member States – such as those imposed by the African Union and threatened in the Organisation of American States in reaction to unconstitutional changes of Member States' governments[6] – can be justified on the

[2] See International Law Commission (ILC), 'Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682 (13 April 2006) 175–78.

[3] See the critiques of the UN sanctions against Iran, esp UNSC Res 1083 (2008), made by A Orakhelashvili at ch 2, s V.

[4] This seems to be an aspect of Orakhelashvili's argument concerning the EU's abandonment of its arms embargo against Syria: see ch 2, s V.C.

[5] Albeit that States' human rights obligations seem to have limited impact on arms exports: see *Tugar v Italy* App no 22869/93, Commission Decision on admissibility, DR no 83-B, at 2, but *cf Soering v UK*, ECtHR judgment of 7 July 1989, Series A no 161, at 33. See also Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014).

[6] See (as regards the AU) A Charron, 'Sanctions and Africa: United Nations and Regional Response' in J Boulden (ed), Responding to Conflict in Africa: The United Nations and Regional Organizations (2nd edn, Basingstoke, Palgrave Macmillan, 2013); M Eriksson, 'Supporting Democracy in Africa: The African Union's Use of Targeted Sanctions to Deal with Unconstitutional Changes of Government', FOL-R—3000—SE (Swedish Defence Research

basis of consent. The targeted Member State, as a member of the organisation, has agreed to be bound by its rules.

- Sanctions can also be justified as retorsion rather than reprisals (countermeasures), as they breach no obligation owed to the target State.
- Should any such obligation exist, however, then unilateral or autonomous sanctions can only be lawful if they are countermeasures, meaning they are subjected to the stringent criteria codified in the ILC Articles on State Responsibility and its Draft Articles on the Responsibility of International Organisations.[7]

Indeed, this appears to be the crux of the dispute concerning the lawfulness of unilateral or autonomous sanctions. On one side, it is argued that a State's freedom includes the liberty to revise its relations with other States as it pleases providing no specific legal obligations are breached doing so, and that, as there are no customary obligations to maintain any particular economic relations with other States, this includes the restriction or interruption of trade relationships. On this reading, providing sanctions do not breach any applicable treaty (the GATT or other WTO-covered agreement; a regional free trade agreement; a treaty of friendship, commerce and navigation; or a bilateral investment treaty) or customary rules (such as those relating to the treatment of foreign nationals and their property present on the territory of the State), they are lawful. Certainly, this seems to have been the position taken by the International Court of Justice in the *Nicaragua* case,[8] when, discussing the legality of the trade embargo imposed by the USA on Nicaragua, the Court stated that '[a] State is not bound to continue particular trade relations

Agency, 2010); and (as regards the OAS) G Thompson and M Lacey, 'OAS Votes to Suspend Honduras over Coup' *New York Times*, 4 July 2009.

[7] ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, Annex, GA Res 56/83 (12 December 2001) (ASR); and ILC, Draft Articles on the Responsibility of International Organizations, 'Report on the Work of Its Sixty-Third Session' (26 April–3 June and 4 July–12 August 2011) Supp No 10, UN Doc A766/10. As A Tzanakopoulos points out in his contribution at ch 4, s III.A, however, not all of the procedural requirements set out in the ILC Articles may reflect customary international law.

[8] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14.

longer than it sees fit to do so in the absence of a treaty commitment or other specific legal obligation'.[9]

On the other hand, however, it is argued that all 'coercive measures' are unlawful; that is, measures which are coercive in the sense of seeking to require the target State to change its policies on any matter within its domestic jurisdiction, in particular with regard to its political, economic and social system. It is a variant of this latter view that has lately been advanced by the UN Human Rights Council and the General Assembly, and (in this volume) by Alexander Orakhelashvili and Pierre-Emmanuel Dupont.[10] It appears to find its justification in the 1970 Friendly Relations Declaration[11] and, in particular, in Article 32 of the 1974 Charter of Economic Rights and Duties of States,[12] which provides that: 'No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights'. In purported application of the rule contained in Article 32, beginning in 1983,[13] the General Assembly has adopted a long series of resolutions on 'human rights and unilateral coercive measures'. The most recent of such, Resolution 68/180, is clear; stating in its preamble the conviction that 'unilateral coercive measures and legislation are contrary to international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States'. The resolution goes on to urge:

> all States to cease adopting or implementing any unilateral measures not in accordance with international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States, in particular those of a coercive nature, with all their extraterritorial effects, which create obstacles to trade relations among States, thus

[9] Ibid para 276. As it happened, the USA was a party to a treaty of friendship, commerce and navigation with Nicaragua, which the Court found it had breached in imposing the embargo.

[10] See chs 1 and 2.

[11] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV): (24 October 1970). See also S Neff, 'Boycott and the Law of Nations: Economic Warfare and Modern International law in Historical Perspective' (1988) 59 *British Yearbook of International Law* 113.

[12] UNGA Res 3281 (XXXIX) (12 December 1974).

[13] UNGA Res 38/197 (20 December 1983).

> impeding the full realization of the rights set forth in the Universal Declaration of Human Rights and other international human rights instruments, in particular the rights of individuals and peoples to development.

States are 'strongly' urged not to adopt or apply unilateral measures, in particular economic financial or trade measures, not in accordance with international law which might impede economic and social development. The inclusion of States in unilateral lists 'under false pretexts ... including false allegations of terrorism sponsorship' is condemned. Such measures' 'extraterritorial nature' are also said to threaten the sovereignty of States. Indeed, unilateral coercive measures are stated to be 'one of the major obstacles to the implementation of the Declaration on the Right to Development'. And the resolution condemns:

> the continuing unilateral application and enforcement by certain Powers of unilateral coercive measures, and rejects those measures with all their extraterritorial effects, as being tools for political or economic pressure against any country, in particular developing countries, adopted with a view to preventing those countries from exercising their right to decide, of their own free will, their own political, economic and social systems, and because of the negative effects of those measures on the realization of all the human rights of vast sectors of their populations, in particular children women, the elderly and persons with disabilities[.]

The Human Rights Council has also passed a series of similarly worded resolutions,[14] and in 2014 decided to appoint a Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights.[15]

It might be said, however, that such sweeping statements and blanket condemnations rest on uncertain foundations. The Charter of Economic Rights and Duties of States, despite its name, is nothing more than a General Assembly resolution and, although adopted by a large majority,[16] its customary status is doubtful given the number of developed States that abstained or voted against its adoption. The General Assembly and Human Rights Council's resolutions on human

[14] Beginning with UNHRC Res 6/7 (30 September 2007).

[15] UNHRC Res 27/21 (26 September 2014) para 22.

[16] It was adopted by 115 votes to 6, with 10 abstentions.

rights and unilateral coercive measures have been adopted by much less convincing majorities: General Assembly Resolution 69/180 received 134 votes for and 53 against, with one abstention. The most recent Human Rights Council resolution, Resolution 30/2,[17] was adopted by 33 to 14 votes with no abstentions. The least that can be said is that States are divided on the issue, with a substantial minority opposed to the view of the majority on the general illegality of unilateral economic sanctions.

In his chapter, Alexander Orakhelashvili argues that States possess rights under international law which other States are obliged to respect, with those rights being codified in the 1970 Friendly Relations Declaration, which provides, in particular, that:

> No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.[18]

This seems a securer basis for arguing that unilateral or autonomous sanctions are generally illegal than the Charter of Economic Rights and Duties of States, given that the Friendly Relations Declaration was adopted by the General Assembly without a vote and is frequently considered to be an authoritative interpretation of the principles set out in Article 2 of the UN Charter. However, it might be that the relevant provisions of the Friendly Relations Declaration fall within the section on '[t]he duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter', and that the extent of a State's domestic jurisdiction at any one time is a relative question dependent on the development of international relations,[19] so that references in the Declaration to the illegality of measures taken against 'the personality of the State', 'its political, economic and cultural elements' and 'its sovereign rights' need to be parsed carefully. Matters such as the degree to which a State respects the human rights of its nationals, which some

[17] UNHRC Res 30/2 (1 October 2015).

[18] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (n 11).

[19] See *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) (1923) PCIJ Series B no 4, at 24.

decades ago might have been seen as wholly internal, are now seen as matters of international concern to which other States and international organisations may react.

It might also be questioned whether State practice comports with the high-minded statements of the General Assembly and the Human Rights Council. An obvious example is the Organisation of Arab Petroleum Exporting Countries' oil embargo in 1973–74 against Canada, Japan, the Netherlands, the UK and the USA in response to those States' support of Israel during the Six Days War. Ironically, the Arab States' use of their 'oil weapon' was at the time condemned by many Western scholars as unlawful coercion.[20] The point here, however, is not so much that the embargo sought to prevent those States targeted 'from exercising their right to decide, of their own free will, their own political, economic and social systems' but that it was expressly intended to be coercive and was justified on the basis either that the Arab States were not in breach of any treaty obligations owed towards the target States or because it was a countermeasure undertaken in the community interest.[21]

In addition, many treaties of an economic nature contain security exceptions permitting the interruption of commercial relations. One famous example is Article XXI of the GATT, which, inter alia, provides that:

> Nothing in this Agreement shall be construed
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> …
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> (*b*) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
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> …
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> (iii) taken in time of war or other emergency in international relations;

[20] See J J Paust and A P Blaustein, 'Commentary: The Arab Oil Weapon – A Threat to International Peace' in J J Paust and A P Blaustein (eds), *The Arab Oil Weapon* (Dobbs Ferry, New York, Oceana, 1977).

[21] See I F Shihata, 'Destination Embargo of Arab Oil: Its Legality under International Law' in Paust and Blaustein, *The Arab Oil Weapon* (n 20).

It was Article XXI which the USA successfully relied upon when Nicaragua brought a complaint concerning its general embargo before a GATT panel.[22] And a similar provision of the 1955 USA-Iran Treaty of Amity, Economic Relations, and Consular Rights,[23] relied upon less successfully by the USA in the *Oil Platforms* case,[24] will also be recalled. For present purposes, however, what is important is not the precise ambit of such provisions (which, it might be thought, varies for treaty to treaty) nor even whether or not they are self-judging, but their existence. Were economic sanctions generally unlawful as a matter of customary international law then such provisions would be otiose. States' assumption when agreeing such provisions must have been that they would be effective. And their effectiveness can only have been premised on a further assumption that in the absence of the constraints imposed on them by the treaty the States parties enjoyed freedom of action regarding their economic relations.

Increasingly, of course, States do not enjoy such freedom of action, as their activities are constrained by ever-more-complex webs of treaty obligations. In such cases, sanctions can only be justified as countermeasures.[25] This introduction will not attempt to analyse the rules on countermeasures, which is done in a number of the contributions.[26] Suffice it to say, as Antonios Tzanakopoulos points out in his chapter,[27] that when enacting countermeasures a State does so at its peril; as if its assessments (in particular of the existence of prior wrongful conduct by the target State or of the proportionality of the measures undertaken against it as countermeasures) are incorrect, it acts illegally. Two issues have, however, taken on particular salience in recent years. The first concerns the legality of countermeasures taken in the community interest, that is, to enforce compliance with obligations owed by States *erga omnes* or (at least) *erga omnes partes*.

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[22] See Neff, 'Boycott and the Law of Nations' (n 11) 128.

[23] Art XX, which provided that: 'The present Treaty shall not preclude the application of measures: … (d) … necessary to protect its essential security interests'.

[24] *Oil Platforms (Iran v USA)* (Judgment) [2003] ICJ Rep 161.

[25] See ASR (n 7) ch 3, pt II.

[26] See esp the chapters by A Orakhelashvili, at ch 2, s V.C, P-E Dupont, at ch 3, ss II.C and III and A Tzanakopoulos, at ch 4, s III.

[27] At ch 4, s III.A.

Notoriously, the ILC Articles on State Responsibility avoided the issue.[28] Subsequent State practice, however, has increasingly been seen as arguing that such countermeasures are lawful.[29] And many of the sanctions regimes established by the European Union were established in response to patterns of human rights and humanitarian law violations.[30] Indeed, the EU's sanctions against Iran have been justified on the basis that Iran has failed to comply with its obligations under the Non-Proliferation Treaty, which obligations are of an integral character, breach of which threatens the integrity of the treaty structure as a whole and therefore justifies a response by any of its parties. [31]

The second issue is the one that has received most publicity: the potential for sanctions to violate individuals' human rights. The argument that any sanctions amount to countermeasures cannot justify the application of sanctions which violate a State's obligations under international human rights law for two reasons: first, because countermeasures may not affect obligations for the protection of fundamental human rights;[32] and, secondly and more fundamentally, because a

[28] ASR (n 7) Art 54 simply provides that: 'This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached'. The term 'lawful measures' is, of course, entirely question-begging.

[29] See eg C Tams, *Enforcing Obligations Erga Omnes* (Cambridge, Cambridge University Press, 2010) and L-A Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford, Oxford University Press, 2010).

[30] See European Commission, 'Restrictive Measures in Force' (TFEU, Art 215) available at: http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf.

[31] See N Jansen Calamita, 'Sanctions, Countermeasures, and the Iranian Nuclear Issue' (2009) 42 *Vanderbilt Journal of Transnational Law* 1393; and (more generally) M Happold, 'The "Injured State" in Case of Breach of a Non-Proliferation Treaty and the Legal Consequences of Such a Breach' and S Singh, 'Non-Proliferation Law and Countermeasures' both in D H Joyner and M Roscini (eds), *Non-Proliferation Law as a Special Regime: A Contribution to Fragmentation Theory in International Law* (Cambridge, Cambridge University Press 2012).

[32] ASR (n 7) Art 50(1)(b). Quite which human rights are 'fundamental human rights' is not wholly clear. The ILC Commentary suggests that it is those 'human rights which may not be derogated from even in time of war or other public emergency': ILC, 'Report on the Work of its Fifty-Third Session' (23 April–1 June and 2 July–10 August 2001), Official records of the General Assembly, Fifty-Sixth Session, Supp No 10, UN Doc A756/210, Commentary to draft Art 50, p 132.

countermeasure 'concerns the legal relations between the injured State and the responsible State'.[33] A State's human rights obligations are owned not only to other States but also to individuals, in particular persons within its jurisdiction.[34]

In the last two decades, both the Security Council and States and international organisations acting of their own motion have moved away from comprehensive towards targeted sanctions directed at specific named persons and entities. Indeed, all current UN and EU sanctions have at least a targeted component, in particular through the imposition of asset freezes and travel bans. The reasons for this development are well known: comprehensive sanction were seen as both inefficient and indiscriminate, so that targeting sanctions specifically against those whose behaviour the sanctions sought to enjoin would be more effective and avoid collateral damage. Moreover, targeted sanctions can be directed not only at State organs and agents but against any persons or entities, including terrorist and other criminal groups which may not even have corporate personality under any legal system, being illegal organisations. Such problems are avoided because the measures are directed at the group's members, not at the group itself. Issues concerning sanctions and human rights are discussed in the contributions to this volume by Paul Eden and Clemens Feinäugle (both of whom concentrate on UN sanctions), and by Matthew Happold (who ranges more widely to contrast the UN and EU regimes), as well as by Luca Pantaleo (in his examination of sanctions cases in the EU courts) and Rachel Barnes (who although concentrating on US sanctions, makes interesting comparisons between the approach of the US courts and those of the English and EU judiciaries).

Three things can be said about the effect of targeted sanctions on their targets' human rights. The first is that, in general, the substantive rights engaged are qualified rights (the right to property and to private and family life in particular), which means that restrictions on their exercise can be justified if they are proportionate and undertaken for an appropriate purpose. Secondly,

[33] ILC Commentary, ibid, Commentary to draft Art 49, p 130.

[34] See eg European Convention on Human Rights, Art 1 and International Covenant on Civil and Political Rights, Art 2(1). Of course, what being within a State's jurisdiction requires can be hotly disputed.

sanctions regimes have in general evolved to provide for exemptions to take account of specific cases where the measures might have disproportionate effects or might breach absolute rights. Thus, asset freezes allow exceptions to permit the payment of listed persons' ordinary expenses, and travel bans allow them to return to their State of nationality. Thirdly, the real issue concerning targeted sanctions today is their compatibility with procedural rights: the right of access to a court, to a fair trial, and to a remedy when there has been a violation of their rights (i.e. if they have been wrongfully targeted). It is, one might say, a rule of law issue.[35] And, although as Luca Pantaleo shows, the Court of Justice of the European Union has gone a long way towards providing an effective system of judicial review for EU sanctions (and of UN sanctions implemented in the EU legal order), this is by no means the case at the UN level. With the exception of the Ombudsperson established to reviews requests from persons seeking removal of their names from the consolidated Al-Qaida Sanctions list,[36] there is nothing resembling judicial review of Security Council sanctions decisions, and the Ombudsperson herself suffers from a lack of objective independence.[37] Indeed, Clemens Feinäugle shows that problems with UN sanctions, from a rule of law perspective, go rather further than just the absence of judicial review, with different sanctions regimes taking inconsistent approaches and providing different levels of safeguards.[38]

More difficulties arise out of economic sanctions' effects on the population of countries targeted. This was the issue that discredited comprehensive sanctions in the 1990s, leading to the switch to targeted sanctions. However, the controversy surrounding targeted sanctions' human rights compatibility and, perhaps more importantly, the emergence of avenues permitting their judicial review, has had the perverse effect of reviving States' use of more generalised sanctions.

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[35] See C Feinäugle's chapter in this volume; J M Farrell, *United Nations Sanctions and the Rule of Law* (Cambridge, Cambridge University Press, 2009); F Stenhammar, 'United Nations Targeted Sanctions, the International Rule of Law and the European Court of Justice's Judgment in *Kadi and al-Barakaat*' (2010) 79 *Nordic Journal of International Law* 113; M Kanetake, 'The Interfaces between the National and the International Rule of Law: The Case of UN Targeted Sanctions' (2012) 9 *International Organizations Law Review* 267; and M Happold, 'United Nations Sanctions and the Rule of Law' in C A Feinäugle (ed), *The United Nations and the Rule of Law* (forthcoming, 2016).

[36] See UNSC Res 1904 (2009); UNSC Res 1989 (2011); UNSC res 2083 (2013); and UNSC Res 2161 (2014).

[37] See the chapters by M Happold and P Eden at ch 5, s V and ch 7, ss VII and IX.

[38] C Feinäugle's chapter at ch 6, s III.

Although such sanctions are not comprehensive, being directed against certain types of trade and transactions, they can have quite similar effects, especially when central banks and financial transactions are targeted.[39] Even if exceptions are provided for necessities (foodstuffs, medicaments and medical technology, etc), exporters may still be unwilling to trade, not considering the extra efforts worthwhile to access often quite small markets and concerned to avoid any risk of prosecution for violating sanctions.[40] So questions concerning sanctions' effects on the economic and social rights of the populations of targeted States have not gone away and seem to be moving up the agenda again,[41] as witnessed by the concerns expressed by the UN General Assembly and the Human Rights Council mentioned above;[42] and the appointment of a Special Rapporteur on the negative impact of the unilateral coercive measures on the enjoyment of human rights is likely to add to the issue's visibility.[43] The questions concerning sanctions' compatibility with economic and social rights are even more complex than those related to the human rights-compatibility of targeted sanctions. Although considerable work has recently been done seeking to demonstrate that States do have extraterritorial obligations in the area of economic and social rights,[44] it is less clear that all States agree. And to a very large extent forums do not exist to which affected individuals can bring claims that their rights have been violated.

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[39] See P-E Dupont at ch 3, s I. In compliance with Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2, OJ L 88/1, 24.3.12, SWIFT, the principal global provider of secure financial messaging services (which is incorporated in Belgium), disconnected all listed Iranian banks, including the Central Bank of Iran.

[40] See S Namazi, *Sanctions and Medical Supply Shortages in Iran*, Viewpoints No 20 (February 2013), Middle East Program, Woodrow Wilson International Center for Scholars.

[41] See M Happold at ch 5, s VI.

[42] Text to nn 13 to 15.

[43] The Special Rapporteur, Idriss Jazairy (Algeria), took office on 1 May 2015. He issued his first report in August 2015: Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Idriss Jazairy, UN Doc A/HRC/30/45 (10 August 2015).

[44] See the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights and their Commentary (2012) 34 *Human Rights Quarterly* 1084; and M Langford, W Vandenhole, M Scheinin and W van Genugten (eds), *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge, Cambridge University Press, 2013).

This leads to a further issue: the extent to which the legality of sanctions can be contested. We have already seen how targeted sanctions, including those imposed by the UN Security Council, have been increasingly subject to judicial review before various national and international courts. As regards targeted States, however, matters are not so simple. Nicaragua's claims before the International Court of Justice and two GATT Panels are rare examples of a State challenging the unilateral imposition of sanctions through international adjudication,[45] whilst the International Court of Justice's decision on the indication of provisional measures in the *Lockerbie* cases revealed the Court's unwillingness to entertain challenges to Security Council sanctions regimes.[46] And problems can also arise when States consider that they are being asked to implement sanctions regimes which they consider to be unlawful. In his contribution, Antonios Tzanakopoulos rejects the idea that when the Security Council acts beyond its powers its decisions are legal nullities; ultra vires Council resolutions are, he argues, binding but disobedience can be justified as a countermeasure. Other commentators disagree, not least because of the apparent oddity of holding that a refusal to comply with an illegal act is a countermeasure to that act, as opposed to the simply holding that in such circumstances States do not have a legal obligation to comply.[47] In all cases, however, the lack of easy access to any form of adjudication means that States' responses to sanctions, whether imposed by the UN or by States acting unilaterally or autonomously, are played out at the political level – in diplomatic exchanges and before the political organs of the UN and other international fora – with legal arguments serving to bolster political positions rather than being decisive in themselves. This is, of course, the primary reason why the content of the applicable law on economic sanctions remains so contested.

While such high-level manoeuvrings continue, however, private parties continue to have to deal with the disruptions of commercial relationships that sanctions impose. Penelope Nevill's chapter on sanctions and commercial law examines how commercial operators have sought to

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[45] See Neff (n 11) and text to n 22.

[46] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v UK*) (Provisional Measures, Order of 14 April 1992) [1992**]** ICJ Rep 3, 15; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v USA)* (Provisional Measures, Order of 14 April1992) [1992] ICJ Rep 114, 126.

[47] Certainly this was the view of the ILC Study Group on the fragmentation of international law: see (n 2) 169.

mitigate the effects of sanctions on their contractual relationships (in particular through specific clauses in standard form contracts) and how the courts and the legislator have responded to such situations (such as through development of the doctrine of frustration). What her chapter clearly shows is how far such attempts date back, as a result of the long history of States' use of economic warfare against their political adversaries; a history going back centuries before the adoption of the UN Charter. This also suggests that neither the UN Security Council, nor States and another international organisations acting autonomously, are likely to abandon such practices in the foreseeable future.

This introduction can only deal superficially with the myriad legal issues arising out of States' use of economic sanctions. For further elucidation readers are referred to the individual contributions. These, as might be expected, both deal with different aspects of the subject and do so from a variety of perspectives. The diversity of approaches and conclusions of the contributors, however, only serves to show how contested are the issues which they examine – and how current they are likely to remain.

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This book has its origin in the 22nd Annual Society of Legal Scholars Subject Section on International Law and British Institute of International and Comparative Law conference on theory and international law, which was held at Charles Clore House on 29 April 2013. The editors, who at the time were the co-convenors of the SLS international law subject section, are grateful to BIICL, and its director Professor Robert McCorquodale, for their assistance in organising the event. Thanks are also due to our authors for their contributions; to Sinéad Moloney and Emily Braggins at Hart Publishing for bearing with us during the rather long gestation of the project; and to Johannes Hendrik Fahner, PhD candidate at the University of Luxembourg and Matthew Happold's assistant, for his help in editing the contributions.

One of the speakers at the 2013 conference was Professor Vera Gowlland-Debbas, who also kindly agreed to write the preface to this volume. Sadly, Vera passed away before its completion. Accordingly, the editors would like to decide the book to her memory.