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FROM DISCRETION TO LAW: RIGHTS-BASED CONCERNS AND THE EVOLUTION OF INTERNATIONAL SANCTIONS

Christopher Roberts

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*Christopher Roberts**

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INTRODUCTION

The imposition and implementation of international sanctions has typically been viewed as a discretionary matter dependent on states' political judgments. For a realist, it is only natural that sanctions, easily amongst the most dramatic and consequential forms of international engagement short of military conflict, should be governed by fundamentally political concerns.

Scratch the surface, however, and the international sanctions regime appears a little different. Since the end of the Cold War, the use of sanctions by the United Nations, as well as other major global actors, has increased significantly.¹ At the same time, rights-based concerns have increasingly made themselves felt, gradually reshaping every component of the manner in which sanctions are designed and applied.

'Sanction' is an ambiguous and capacious term.² In the context of the law at large, a 'sanction' is generally understood as "a penalty or punishment provided as a means of enforcing obedience

1. See Richard Haas, *Sanctioning Madness*, 7 FOREIGN AFF. 74 (Nov.–Dec. 1997) (observing that following the end of the Cold War, economic coercion was "fast becoming the United States' policy tool of choice"); Larry Minear, David Cortright, Julia Wagler, George Lopez & Thomas Weiss, *Toward a More Humane and Effective Sanctions Management: Enhancing the Capacity of the U.N. System*, WATSON INST. INT'L STUD., 1998, at i, v ("The end of the Cold War created a climate within the United Nations (UN) Security Council. Sanctions, both comprehensive and partial, are a more viable policy option than earlier. They are no longer the virtual dead letter of the Charter that they had been. . . ."); MICHAEL MATHESON, COUNCIL UNBOUND: THE GROWTH OF UN DECISION MAKING ON CONFLICT AND POSTCONFLICT ISSUES AFTER THE COLD WAR (2006) (highlighting the Security Council's increasing activity following the end of the Cold War on all fronts, including through the imposition of sanctions); Thomas Biersteker, Sue Eckert, Marcos Tourinho & Zuzana Hudáková, *The Effectiveness of United Nations Targeted Sanctions: Findings from the Targeted Sanctions Consortium (TSC)*, WATSON INST. INT'L STUD., Nov. 2013, at 1, 7 ("Targeted sanctions are increasingly utilized by the United Nations to address a wide range of threats to regional peace and security").

2. As Farrall notes, there is no commonly agreed definition of sanctions in international law. See JEREMY FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW (2007). For its part, the international law commission has observed that the term 'sanction' is "imprecise"; see Int'l Law Comm'n [ILC], Draft Articles on Responsibility of States for Internationally Wrongful Acts,

to a law.”³ In general international law, ‘sanctions’ are often understood similarly—as penalties or punishments of one sort or another applied to states or other actors which have violated their international obligations.⁴ In this article, however, the aim is not to establish a more formalistic definition of ‘sanctions,’ but rather to track a particular manner in which the term has been deployed in practice. Overwhelmingly, when discussed in the context of international relations, ‘sanctions’ refers to a set of measures—primarily, but not exclusively economic in nature—imposed against states, organizations or individuals.⁵ Amongst the measures most frequently encountered in this context are general embargoes and boycotts, embargoes and boycotts on specific goods, limitations on particular forms of aid and support, bans on investment, travel bans, and asset freezes.⁶

Part I of this article begins by examining the manner in which rights-based concerns have manifested themselves within the realm of international sanctions in recent years. Two distinct moments are observable here. First, extensive criticism of the human suffering caused by the more comprehensive sanctions imposed in the 1990s, specifically on Iraq, helped to encourage

Rep. on the Work of Its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 26, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles on Responsibility of States for Internationally Wrongful Acts].

3. See *Sanction*, BLACK'S LAW DICTIONARY (2nd ed. 1995).

4. Much of the debate here has focused on whether only officially and multilaterally authorized sanctions should count as sanctions as such. Georges Abi-Saab, for instance, has preferred such an understanding, defining sanctions as “coercive measures taken in execution of a decision of a competent social organ, i.e., an organ legally empowered to act in the name of the society or community that is governed by the legal system.” See Georges Abi-Saab, *The Concept of Sanction in International Law*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW: COLLOQUIUM ON UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 1999 (Genève Vera Gowlland-Debbas ed., 2001).

5. The manner in which ‘sanctions’ has come to be used has tracked the Security Council’s use of its Chapter VII powers – despite the fact, ironically, that Chapter VII refers to ‘measures’ and not to ‘sanctions’. For recognition of this point, see Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 2, art. 22(3).

6. In addition, sanctions in practice are broadly clustered around five thematic purposes: conflict resolution, democratization, the protection of civilians, counter-terrorism, and the non-proliferation of weapons of mass destruction.

the replacement of more comprehensive sanctions by more targeted approaches.⁷ Second, the new, more targeted approach to sanctions, and particularly the broad and undisciplined manner in which it was put into effect following the attacks of September 11, 2001, invited a second rights-based critique, this time on the basis of due process concerns.⁸ This led to a series of gradual reforms aimed at bringing international sanctions more fully into compliance with a rule of law framework.

These two moments already make clear that rights-based concerns have had considerable impact on the shape of international sanctions. There is a third component to this story as well, however—one that is both more overarching and perhaps also, for that reason, subtler and more contested. This third component pertains to when the imposition of sanctions may be deemed required by law. There are doubtless some who would contend that, while the scope of sanctions may have limits, and individuals targeted by sanctions may be entitled to due process guarantees, the decision to impose a sanction or not is a matter of pure state discretion. Careful attention to international law and practice, however, suggests that such discretion is bounded, and that, in particular, the imposition of sanctions is required relative to the worst instances of public international law violation.

The growing sense that sanctions may be required in such instances may be traced in two different manners. First, the various humanist threads of public international law have increasingly come to recognize an expanded regime of responsibility relative to instances of mass harm in particular.⁹ Part II, therefore,

7. See Minear et al., *supra* note 1 (observing the criticisms and making recommendations for reform, under a mandate from the United Nations); see *infra* Part I.A.

8. See, e.g., Peter Fitzgerald, *If Property Rights Were Treated Like Human Rights, They Could Never Get Away with This: Blacklisting and Due Process in U.S. Economic Sanctions Programs*, 51 HASTINGS L.J. 73 (2000); Iain Cameron, *European Union Anti-Terrorist Blacklisting*, 3 HUM. RTS. L. REV. 255 (2003); Peter Gutherie, *Security Council Sanctions and the Protection of Individual Rights*, 60 N.Y.U. ANN. SURV. AM. L. 491 (2005); see *infra* Part I.B.

9. This is testified to by increasing emphasis on extraterritorial responsibility in international human rights law, on positive obligations and obligations of due diligence in international humanitarian law, by the development of international criminal law as such, as well as by the expansion of the jurisprudence on complicity in such a context, and by the historically developing

considers the manner in which ideas of extraterritorial obligations, positive obligations, complicity and the obligation to respond to mass harm have evolved in international human rights law, international humanitarian law, international criminal law and general international law over the last several decades. On the basis of this investigation, it becomes apparent that public international law not only requires that sanctions be appropriately targeted and that sanctions measures comply with due process concerns, but also that sanctions¹⁰ be imposed where serious, ongoing harms are occurring.

Second, the manner in which sanctions are imposed in practice has increasingly come to be defined with reference to rights-based concerns. Part III demonstrates this by exploring the manner in which the practice of the imposition of sanctions on the part of the United States, the European Union and the United Nations has evolved over the last several decades. This investigation reveals that rights-based concerns have been increasingly referenced, and increasingly relied upon to shape, the nature of sanctions in practice.

Thus, both law and practice suggest that, in addition to the shifts in the nature of sanctions detailed in Part II, further shifts, pertaining to a potential obligation to impose sanctions in certain instances, are also underway. This is not meant to suggest that the element of discretion has been entirely removed, nor that all sanctions imposed in practice comply with the relevant rights-based principles—clearly, many do not. The point, rather, is that legal obligations have gradually been thickening and extending, and thereby coming to exert an enhanced pressure on states to comply with their dictates, as demonstrated both by the development of public international law as such, as well as by the growing incorporation of rights into the language and structure of sanctions regimes in practice.

Finally, Part IV of this article takes a step back to contemplate such a development from a bigger picture perspective, considering the manner in which a law and rights-bounded frame has been gradually intruding on a more discretionary one in practice. The section argues that while from one perspective, states and their organs, such as the Security Council, maintain a high

emphasis on *jus cogens* obligations within general international law, as discussed further in Part II below. *See infra* Part II.

10. While the label 'sanctions' is rarely used in such a context, sanctions are, in effect, the measures required by the relevant legal rules.

degree of discretionary authority, from another perspective their decisions—both as a matter of law and practice—have become increasingly constrained.

I. FROM GROUP TO TARGETED SANCTIONS, AND THE RISE OF DUE PROCESS CONCERNS

Developments in the 1990s and 2000s illustrate two distinct ways in which rights-based concerns have influenced the manner in which sanctions are imposed and governed. First, the 1990s saw more comprehensive, nationally-targeted sanctions criticized on the basis of the broad suffering they caused and their negative effects on human rights, contributing to the development of the more targeted approach to sanctions that is the norm today. This development led to a new critique, as targeted sanctions in turn came to be criticized on the basis of the lack of due process guarantees provided for in the context of their application and enforcement.

A. From General to Targeted Sanctions

The Security Council only imposed sanctions twice during the Cold War, against Rhodesia in 1966 and South Africa in 1977.¹¹ After the end of the Cold War, the Security Council imposed sanctions ten times between 1990 and 1998 alone. This rapid expansion in the use of sanctions led immediately to contestation, as several of the assertive sanctions regimes imposed were criticized on the basis that they were leading to widespread suffering. More than any other regime, it was sanctions on Iraq, initially imposed in 1990, after Iraq's invasion of Kuwait, that received the most extensive condemnation.¹² Criticism came in the form of journalistic pieces,¹³ scholarly commentary,¹⁴ and United

11. See S.C. Res. 232 (Dec. 16, 1966); S.C. Res. 418 (Nov. 4, 1977).

12. The sanctions were imposed by S.C. Res. 661 (Aug. 6, 1990). The regime did allow for a humanitarian exception. That exception did little to diminish the harm caused by the sanctions, however, demonstrating the limited ability of exception-based carve-outs to cure fundamentally ill-designed legal regimes.

13. See, e.g., Michael Powell, *The Deaths He Cannot Sanction: Ex-UN Worker Details Harm to Iraqi Children*, WASH. POST, Dec. 17, 1998; John Muller & Karl Muller, *Sanctions of Mass Destruction*, 78 FOREIGN AFF. 43 (1999).

14. See, e.g., Rene Provost, *Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait*, 30 COLUM. J. TRANSNAT'L L. 577, 616 (1992); Alberto Ascherio et al., *Effect of the Gulf War on Infant and Child Mortality in Iraq*, 327 NEW ENG. J. MED. 931 (1992);

Nations and NGO reports.¹⁵ Following the ouster of Aristide by a coup in 1991, the OAS and the General Assembly called for sanctions,¹⁶ a call given binding force by the Security Council in 1993.¹⁷ After a bloodless coup in Burundi on July 25, 1996, regional heads of state imposed a general embargo.¹⁸ Both sets of sanctions received similar criticisms to those levied against the Iraq sanctions.¹⁹ A series of General Assembly resolutions

David Cortright & George Lopez, *Are Sanctions Just? The Problematic Case of Iraq*, J. INT'L AFF. 735 (1999). For a more recent account, see JAY GORDON, *INVISIBLE WAR: THE UNITED STATES AND THE IRAQ SANCTIONS* (2012).

15. See, e.g., U.N. Secretary-General, Letter Dated 20 March 1991 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/2236 (Mar. 28, 1991); U.N. Secretary-General, WHO/UNICEF Special Mission to Iraq, U.N. Doc. S/22328 (Mar. 4, 1991); U.N. Secretary-General, Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, ¶ 70–75, U.N. Doc. A/50/60-S/1995/1 (Jan. 25, 1995); 26th International Conference of the Red Cross & Red Crescent, *Res. 4: Principles and Action in International Humanitarian Assistance and Protection* (Sept. 15, 1995); U.N., Food & Agric. Org. [FAO], *Evaluation of Food and Nutrition Situation in Iraq* (Dec. 10, 1995), <http://www.hartford-hwp.com/archives/51/261.html>; Ctr. Econ. Soc. Rts., *Unsanctioned Suffering: A Human Rights Assessment of UN Sanctions on Iraq* (May 1996); U.N., Econ. & Soc. Council, Implementation of the International Covenant on Economic, Social, and Cultural Rights, U.N. Doc. E/C.12/1997/8 (Dec. 12, 1997); U.N., Econ. & Soc. Council, Sub-Comm'n on the Promotion and Protection of Human Rights, The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights, U.N. Doc. E/CN.4/Sub.2/2000/33 (June 21, 2000); U.N., Econ. & Soc. Council, General Comment 14: The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000); Anglican Observer Office at the U.N. et al., *Iraq Sanctions: Humanitarian Implications and Options for the Future*, GLOBAL POL'Y F. (2002), <https://www.globalpolicy.org/component/content/article/170-sanctions/41947.html>.

16. See Org. of Am. States [OAS] Res. 1/91, OAS Doc. OEA/Ser.F/V.1, MRE/RES.1/91 (Oct. 2, 1991); OAS Res. 2/91, OAS Doc. OEA/Ser.F/V.1, MRE/RES.2/91 (Oct. 8, 1991); G.A. Res. 47/20 (Nov. 24, 1992).

17. See S.C. Res. 841 (June 16, 1993).

18. For more details on which, see Gregory Mthembu-Salter, *An Assessment of Sanctions Against Burundi*, ACTION AID, May 1999; Julia Grauvogel, *Regional Sanctions Against Burundi: The Regime's Argumentative Self-Entrapment*, 53 J. MODERN AFF. STUD. 169 (2015).

19. See, e.g., U.N. Secretary-General, The Situation of Democracy and Human Rights in Haiti, U.N. Doc. A/47/599 (Nov. 3, 1992); HARVARD CENTER FOR POPULATION & DEVELOPMENT STUDIES, *SANCTIONS IN HAITI: CRISIS IN HUMANITARIAN ACTION* (1993); Carole Cleaver, *Notes from the Hell that is Haiti: On the Verge of Collapse*, NEW LEADER, Jan. 17, 1994, at 5; Cathy Booth, *Still*

passed in the late 1990s similarly criticized United States sanctions on Cuba, amongst other reasons due to “their negative effects on the realization of all the human rights of vast sectors of their populations, in particular children, women and the elderly.”²⁰

At the same time, more targeted measures started to be deployed alongside more comprehensive measures from the early 1990s on. Sanctions imposed on the former Federal Republic of Yugoslavia between 1991–1994, on Libya in 1992 and 1993 and on Haiti in 1994 were overall more general in form, but also took more targeted measures aimed at government finances.²¹ Sub-state actors were targeted for the first time in 1993, in the case of the Bosnian Serbs.²² Sanctions imposed relative to Somalia, Liberia, Angola, Rwanda and Sierra Leone also all included targeted measures—a step prompted by the fact that there were civil wars in all five countries, leading the international community to recognize the need to target particular actors within those states, rather than simply the states as such.²³ Successfully implementing targeted measures required a greater degree of sophistication, however—a challenge the Security Council

Punishing the Victims, TIME, Apr. 11, 1994, at 55; U.N. Secretary-General, *Report of the Secretary-General on the Question Concerning Haiti*, U.N. Doc. S/1994/1012 (Aug. 26, 1994); Gregory Mthembu-Salter, *An Assessment of Sanctions Against Burundi*, ACTION AID, Feb. 1997; Eric Hoskins, *The Humanitarian Impacts of Economic Sanctions on Burundi*, in POLITICAL GAIN & CIVILIAN PAIN (Thomas Weiss et al. eds., 1997); Felicia Swindells, *UN Sanctions in Haiti: A Contradiction Under Articles 41 and 55 of the UN Charter*, 20 FORDHAM INT'L L.J. 1878 (1997); ELIZABETH GIBBONS, SANCTIONS IN HAITI: HUMAN RIGHTS AND DEMOCRACY UNDER ASSAULT (1999). For a similar, more recent argument relative to Myanmar, see Michael Ewing-Chow, *First Do No Harm: Myanmar Trade Sanctions and Human Rights*, 5 NW. J. INT'L HUM. RTS. 153, 153–80 (2007).

20. G.A. Res 51/103, ¶ 2 (Mar. 3, 1997). *See also* G.A. Res 52/120 (Feb. 23, 1998); G.A. Res 53/141 (Mar. 8, 1999); G.A. Res 54/172 (Feb. 15, 2000).

21. *See* S.C. Res. 713, ¶ 6 (Sept. 25, 1991); S.C. Res. 724, ¶ 5 (Dec. 15, 1991); S.C. Res. 731 (Jan. 21, 1992); S.C. Res. 757, ¶ 5 (May 30, 1992); S.C. Res. 760 (June 18, 1992); S.C. Res. 787, ¶ 9 (Nov. 16, 1992); S.C. Res. 820, ¶ 21 (Apr. 17, 1993); S.C. Res. 883, ¶ 3 (Nov. 11, 1993); S.C. Res. 841, *supra* note 17, ¶ 8; S.C. Res. 942, ¶ 7 (Sept. 22, 1994).

22. *See* S.C. Res. 820, *supra* note 21, ¶ 11.

23. *See* S.C. Res. 751 (Apr. 24, 1992) (concerning Somalia); S.C. Res. 788 (Nov. 19, 1992) (concerning Liberia); S.C. Res. 864 (Sept. 15, 1993) (concerning Angola); S.C. Res. 918 (May 17, 1994) (concerning Rwanda); S.C. Res. 1132 (Oct. 8, 1997) (concerning Sierra Leone). *See also* S.C. Res. 1160 (Mar. 31, 1998) (concerning Kosovo).

worked to address by attaching expert groups to sanctions regimes, tasked with monitoring their implementation. The first such group was created in 1995, charged with monitoring the sanctions imposed on Rwanda.²⁴

The use of targeted sanctions has increased dramatically from the end of the 1990s on. A series of meetings and reports, aimed at improving the international sanctions process across the board, were key to this development.²⁵ Sanctions regimes focused on the Taliban and al-Qaeda provided early illustrations of the new, more dedicated commitment to targeted sanctions.²⁶ In time, targeted sanctions would be applied in relation to numerous other situations of conflict and human rights violation as well, as discussed further below.²⁷

As the above brief summary attests, rights-based concerns were not the only factor pushing towards the adoption of a more targeted approach to sanctions; rather, the development of a more targeted approach was also motivated by a desire to find more effective measures through which to target non-state and sub-state actors in particular. At the same time, the rights-based critique of collectively-targeted sanctions in the 1990s was extremely powerful and achieved a high degree of public visibility,

24. See S.C. Res. 1013, ¶ 1 (Sept. 7, 1995).

25. 1997 was a key year, witnessing initial discussions relating to working methods, implementation, and the functioning of sanctions on the whole. A General Assembly resolution the same year highlighted similar themes, as well as the importance of transparency and of considering the potential of adverse humanitarian impacts. G.A. Res. 51/242, annex I, ¶ 2 (Sept. 26, 1997). The following years saw several further efforts that helped to develop the sophistication of international sanctions regimes, with a series of sophisticated guidelines produced early in the 2000s in particular. See The Swiss Confederation, U.N. Secretariat & Watson Inst. for Int'l Stud., *Targeted Financial Sanctions: A Manual for Design and Implementation — Contributions from the Interlaken Process* (2001); Bonn Int'l Ctr. For Conversion, German Foreign Off. & U.N. Secretariat, *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the 'Bonn-Berlin Process'* (2001); MAKING TARGETED SANCTIONS EFFECTIVE: GUIDELINES FOR THE IMPLEMENTATION OF UN POLICY OPTIONS (Peter Wallenstein, Carina Staibano & Mikael Eriksson eds., 2003).

26. S.C. Res. 1267 (Oct. 15, 1999) & S.C. Res. 1333, at 2 (Dec. 19, 2000).

27. As one commentary observes, the majority of challenges to listing between 2006 and 2009 pertained to Liberia and the Democratic Republic of the Congo. See THOMAS BIERSTEKER & SUE ECKERT, ADDRESSING CHALLENGES TO TARGETED SANCTIONS: AN UPDATE OF THE 'WATSON REPORT' 7 (2009).

thereby serving as one among several factors pushing towards the development of a more narrowly tailored approach.²⁸

B. Rendering Targeted Sanctions Due-Process Compliant

Despite the role that rights-based concerns played in helping to drive the development to targeted sanctions, it was the attacks of September 11, 2001 that imparted the most powerful momentum to the development of targeted sanctions.²⁹ In the rapid deployment of targeted sanctions by the Security Council and the United States that took place over the following years, little to no thought was given to rights-based concerns.³⁰

It would not be long, however, before rights advocates and lawyers began to mobilize in response. The move to targeted sanctions helped to place the entire global sanctions regime in a more individualized frame. This, in turn, allowed for new challenges from a more individual rights-focused angle, with the sweeping

28. That the rights-based criticisms were biting is demonstrated by a 1995 letter to the President of the Security Council from the US, UK, France, Russia and China, calling for more targeted sanctions that would avoid unnecessary suffering. Rep. of the S.C., U.N. Doc. S/1995/300 (Apr. 13, 1995). The implications of rights-based concerns relative to the need to avoid overly-broad sanctions have continued to be explored and highlighted since; see, e.g., Amy Howlett, *Getting "Smart": Crafting Economic Sanctions that Respect Human Rights*, 73 *FORDHAM L. REV.* 1199 (2004); U.N. High Comm'r for Hum. Rts., *Report of the UN High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 25, U.N. Doc. A/HRC/4/88 (Mar. 9, 2007).

29. See, e.g., Rep. of the S.C., *UN Sanctions*, at 9 (Nov. 25, 2013), https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/special_research_report_sanctions_2013.pdf ("In the wake of the terrorist attacks on the US of 11 September 2001, the Council greatly expanded its use of sanctions against individuals. . .").

30. See, e.g., Thomas Biersteker, *Targeted Sanctions and Individual Human Rights*, 65 *INT'L J.* 99, 102 (2010) ("In the weeks and months following the attacks [of September 11, 2001] the Bush administration was eager to show progress in its metaphorical 'war' against terrorism. . . . One of the best indicators for demonstrating progress . . . was the addition of new names to the UN list of individuals designated for supporting terrorism. The Treasury Department had a number of individuals already under suspicion of supporting terrorism on its watch list. . . . [The] Treasury [Department] used this list to add new names to the UN's 1267 list. At the time . . . the global outpouring of global sympathy for the US was such that there was very little scrutiny given to the proposed additions. . . . The relative lack of due diligence in this rather unusual period . . . laid the basis for many of the legal challenges that subsequently emerged in European courts. . .").

new targeted sanctions regime being confronted on the basis of its complete disregard for due process rights.³¹ Amongst other things, rights advocates called for respect for the presumption of innocence, listing procedures based upon evidence, notification of those who were listed, and for the potential for listings to be reviewed and challenged and for individuals or entities to be delisted if appropriate.

The result of such counter-pressure has been a long and gradual process of reform of the rules governing the process through which targeted sanctions are imposed, and the introduction of oversight mechanisms aimed at ensuring greater respect for due process standards within the international targeted sanctions regime as a whole. Early steps towards tempering the regime included the introduction of humanitarian aid exemptions in 2001, the introduction of delisting procedures in 2002, and a 2004 Security Council resolution calling upon states to include background information on persons and entities they were proposing to sanction.³²

Pressure around due process issues peaked between 2004 and 2010. The report of the High Level Panel on Threats, Challenges and Change, a body created in 2003 in order to analyze threats and challenges to international peace and security, observed in

31. For an important early official articulation of standards, see Directorate General of Human Rights, *Guidelines on Human Rights and the Fight Against Terrorism*, COUNCIL OF EUROPE (July 11, 2002). For early academic challenges to targeted sanctions on rights grounds, see Peter Fitzgerald, *If Property Rights Were Treated Like Human Rights, They Could Never Get Away with This: Blacklisting and Due Process in U.S. Economic Sanctions Programs*, 51 HASTINGS L.J. 73 (2000); Iain Cameron, *European Union Anti-Terrorist Blacklisting*, 3 HUM. RTS. L. REV. 255 (2003); Iain Cameron, *UN Targeted Sanctions, Legal Safeguards, and the ECHR*, 72 NORDIC J. INT'L L. 159 (2003); Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN J. INT'L L. 593 (2003); Per Cramer, *Recent Swedish Experiences with Targeted UN Sanctions: The Erosion of Trust in the Security Council*, in REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 85 (Erika de Wet & Andre Nollkaemper eds., 2003); Peter Gutherie, *Security Council Sanctions and the Protection of Individual Rights*, 60 N.Y.U. ANN. SURV. AM. L. 491 (2005); Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion*, 17 EUR. J. INT'L L. 881 (2006); Rosemary Foot, *The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas*, 29 HUM. RTS. Q. 489 (2007); E.J. Flynn, *The Security Council's Counter-Terrorism Committee and Human Rights*, 7 HUM. RTS. L. REV. 371 (2007).

32. S.C. Res. 1526, ¶ 17 (Jan. 30, 2004).

2004 that “the way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions”³³—a serious warning shot across the bow of the Security Council targeted sanctions regime. Later, in 2005, the Commission on Human Rights decided to appoint a Special Rapporteur focused on human rights and counterterrorism,³⁴ who immediately set about calling for more rights-respecting standards, including calling for a tighter definition of terrorism.³⁵ That same year, a General Assembly resolution called on the Security Council “to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.”³⁶ That resolution led to an Office of Legal Affairs study, which determined that the Security Council is required to ensure that due process rights are respected, and presented recommendations as to steps that could be taken to reform the Security Council’s targeted sanctions process.³⁷ In response to such mounting pressure, Security Council Resolution 1617, issued in July 2005, reiterated the requirement that background information be included whenever states submitted the names of individuals or entities which they proposed should be added to the targeted sanctions list, and further recommended that states should en-

33. Rep. of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 152, U.N. Doc. 1/59/656 (Dec. 2, 2004).

34. U.N. High Comm’r for Hum. Rts., *Resolution 2005/80 on Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. E/CN.4/RES/2005/80 (Apr. 21, 2005).

35. See Martin Scheinin (Special Rapporteur on the Promotion & Protection of Human Rights While Countering Terrorism), *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. E/CN.4/2006/98 (Dec. 28, 2005).

36. G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 109 (Sept. 16, 2005).

37. See Bardo Fassbender, *Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to Ensure that Fair and Clear Procedures are Made Available to Individuals and Entities Targeted with Sanctions Under Chapter VII of the UN Charter*, U.N. (2006), http://www.un.org/law/counsel/Fassbender_study.pdf. See also THOMAS BIERSTEKER & SUE ECKERT, *STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES* (2006).

deavor to inform individuals and entities of the measures imposed on them and of the procedures for listing and delisting, in the context of a greater sharing of information generally.³⁸

The following year, Secretary-General Kofi Annan suggested that persons against whom measures are taken must be informed of those measures, and the fundamentals of the case upon which they were put in place, as soon as possible and to the extent possible (recognizing concerns pertaining to the secrecy of certain information).³⁹ The paper also suggested that sanctioned persons be guaranteed the right to be represented by counsel and heard within a reasonable time, that a focal point be set up to coordinate such steps in practice, and that an independent and impartial review mechanism be set up and empowered to provide effective remedies.⁴⁰ Shortly thereafter, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism made a series of recommendations pertaining to the sanctions process, in which he called for sharper definitions, emphasized that sanctions must be proportionate, proposed the introduction of temporal limits on those sanctions put in place, and underscored the importance of informing those who had been listed, ensuring that they had access to review and that such review might lead to the provision of appropriate remedies where necessary.⁴¹ Later that year, this accumulated pressure once again helped to drive the Security Council to take another small step in response, by creating a focal point within the Secretariat empowered to receive delisting requests from states.⁴²

Sharper challenges to the Security Council's targeted sanctions regime would come through judicial challenges on the national and regional levels. Particularly significant was a 2008 decision of the European Court of Justice, *Yassin Abdullah Kadi*

38. S.C. Res. 1617, ¶¶ 4–6 (July 29, 2005). S.C. Res. 1735 (Dec. 22, 2006) and S.C. Res. 1822 (June 30, 2008) would continue to push along the same lines.

39. U.N. Secretary-General, Letter dated June 15, 2006 from the U.N. Secretary-General to the President of the Security Council, Proceedings of 5475th Meeting, U.N. Doc. S/PV.5474 (June 22, 2006).

40. *Id.*

41. Martin Scheinin (Special Rapporteur on the Promotion & Protection of Human Rights While Countering Terrorism), *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶¶ 30–40, U.N. Doc. A/61/27 (Aug. 16, 2006).

42. S.C. Res. 1730 (Dec. 19, 2006).

and *Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities*, in which the Court of Justice found that measures taken by the European Union, in implementation of the Security Council's call for sanctions, had violated the principle of effective judicial protection.⁴³ In particular, the ruling found the measures adopted failed to comply with the principle of effective judicial protection insofar as they did not provide for a procedure through which those who had been placed on the sanctions list would be informed of the reasons behind their listing, nor for a hearing in which listed individuals might challenge their listing.⁴⁴

The *Kadi* judgment was a moment of high drama, in which the European Court of Justice indirectly challenged the Security Council. The judgment led to further due process-based reforms of Security Council practice in the following years.⁴⁵ Security

43. Case C-402/05 P & C-415/05 P, *Kadi v. Council of the Eur. Union*, 2008 E.C.R. 1-06351.

44. Similar due process concerns were raised in a series of related cases concerning the 'Organisation des Modjahedines du peuple d'Iran,' which the European Union had sanctioned on its own initiative. See Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council of the Eur. Union*, 2006 E.C.R. II-04665; Case T-256/07, *People's Mojahedin Org. of Iran v. Council of the Eur. Union*, 2008 E.C.R. II-03019; and Case T-284/08, *People's Mojahedin Org. of Iran v. Council of the Eur. Union*, 2008 E.C.R. II-03487. The Human Rights Committee decision in *Sayadi* also pointed in a similar direction. See Hum. Rts. Comm., *Sayadi v. Belgium*, Comm'n No. 1472/2006 (Dec. 29, 2008). Other similar cases include: *Abdelrazik v. Canada* (Minister of Foreign Affairs), [2010] 1 F.C.R. 267, 2009 F.C. 580 (CanLII); *Her Majesty's Treasury v. Ahmed*, [2010] UKSC 2, (appeal taken from EWCA Civ 1187); Case T-85/09, *Kadi v. Eur. Comm'n*, 2010 E.C.R. II-05177; *Al-Jedda v. U.K.*, App. No. 27021/08, Eur. Ct. H.R. (2011); and *Nada v. Switzerland*, App. No. 10593/08, Eur. Ct. H.R. (2012).

45. Pressure for reform was kept up by an ongoing stream of criticism; see, e.g., *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, INT'L COMM'N JURISTS (2009), <https://www.icj.org/wp-content/uploads/2012/04/Report-on-Terrorism-Counter-terrorism-and-Human-Rights-Eminent-Jurists-Panel-on-Terrorism-series-2009.pdf>; BIERSTEKER, ADDRESSING CHALLENGES TO TARGETED SANCTIONS, *supra* note 27; David Cortright et al., *Sanctions and Security Research Program, Human Rights and Targeted Sanctions: An Action Agenda for Strengthening Due Process Procedures* (Nov. 2009), https://www.global-policy.org/images/pdfs/Security_Council/Human_Rights_and_Targeted_Sanctions.pdf; Helen Keller & Andreas Fischer, *The UN Anti-Terror Sanctions Regime Under Pressure*, 9 HUM. RTS. L. REV. 257 (2009); Devika Hovell, *The Deliberative Deficit: Transparency, Access to Information and UN Sanctions*, in

Council Resolution 1904, issued in 2009, creating an Office of the Ombudsperson, with certain oversight powers over the targeted sanctions process.⁴⁶ The Office of the Ombudsperson was further strengthened in 2011⁴⁷ and 2012.⁴⁸ While criticism has continued since then,⁴⁹ leading to pressure for further reforms, attention to the issue has in general dimmed over recent years, in part thanks to the due process-based reforms that have already taken place.⁵⁰

SANCTIONS, ACCOUNTABILITY AND GOVERNANCE IN A GLOBALISED WORLD (Jeremy Farrall & Kim Rubenstein eds., 2009); George Lopez et al., *Overdue Process: Protecting Human Rights While Sanctioning Alleged Terrorists*, JOAN B. KROC INST. INT'L PEACE STUD. (2009); Monika Heupel, *Multilateral Sanctions Against Terror Suspects and the Violation of Due Process Standards*, 85 INT'L AFF. 307 (2009); Eckart Klein, *International Sanctions from a Human Rights Law Perspective: Some Observations on the Kadi Judgment of the European Court of Justice*, 4 INTERCULTURAL HUM. RTS. L. REV. 111 (2009); David Cortright & Erika de Wet, *Human Rights Standards for Targeted Sanctions*, SANCTIONS & SECURITY RES. PROGRAM (2010), https://www.researchgate.net/publication/242603593_Human_rights_standards_for_targeted_sanctions; Yvonne Terlingen, *The United States and the UN's Targeted Sanctions of Suspected Terrorists: What Role for Human Rights?*, 24 ETHICS & INT'L AFF. 131 (2010); U.N. High Comm'r for Human Rights, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. A/HRC/16/50 (Dec. 15, 2010).

46. S.C. Res. 1904, ¶ 20 (Dec. 17, 2009). S.C. Res. 1904 ¶ 20 also continued the gradual development of the reforms put forward in resolutions 1617, 1735 and 1822. *Id.*

47. S.C. Res. 1989, ¶ 21 (June 17, 2011).

48. S.C. Res. 2083, ¶ 22 (Dec. 17, 2012).

49. See, e.g., Isaac Kfir, *A Regime in Need of Balance: The UN Counter-Terrorism Regimes of Security and Human Rights*, 4 NAT'L SEC. & ARMED CONFLICT L. REV. 7 (2014); Jared Genser & Kate Barth, *Targeted Sanctions and Due Process of Law*, in THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS (Jared Genser & Bruno Stagno Ugarte eds., 2014); William Bartholomew, *A Due Process Balancing Act: The United States' Influence on the UN al-Qaeda Sanctions Regime*, 59 N.Y.L. SCH. L. REV. 737 (2015); High Level Rev. of U.N. Sanctions, *Compendium of the High Level Review of United Nations Sanctions*, U.N. (Nov. 2015), http://www.hlr-unsanctions.org/HLR_Compendium_2015.pdf.

50. The impact of years of pressure is also indicated by the fact that the website of the Security Council itself declares that "The Council applies sanctions with ever-increasing cognizance of the rights of those targeted." See *Sanctions Committee Information: Sanctions*, U.N., <https://www.un.org/securitycouncil/sanctions/information> (last visited Feb. 24, 2019).

C. Conclusion

The use of sanctions expanded rapidly in the post-Cold War world. Despite the fact that this era of sanctions is not yet three decades old, dramatic changes in the manner in which sanctions have been shaped and deployed have already taken place. Over the course of the 1990s, a gradual shift from general to targeted sanctions took place, spurred both by the need to target sub-state and nonstate actors, and by rights-based critiques of the devastating consequences of collective sanctions. Targeted sanctions, in turn, prompted a new form of rights-based critique, as the discretionary manner in which those sanctions were first implemented and applied was increasingly challenged on due process grounds, leading to a series of procedural reforms.

None of this is to suggest all sanctions are now compliant with these two sources of challenge; rather, collective sanctions continue to be imposed, and due process concerns are often not given the weight they are due. What is clear, however, is that in contrast to the suppositions of realist thinkers, rights-based concerns have already proven their ability to influence even such a significant area of international affairs as sanctions policy, where they have already led to several clearly observable changes.

These have not been the only changes underway in terms of the relation between public international law and sanctions, however. The following sections consider a third manner in which rights-based concerns have been seeping into the law of sanctions. The process in question has been both more gradual and subtler; at the same time, it is also potentially more momentous.

II. THE EXPANSION OF INTERNATIONAL LEGAL RESPONSIBILITY

The previous section considered a few of the most apparent and significant ways in which rights-based concerns have intruded on the law of sanctions in recent years—relative to the scope of sanctions, the manner in which targets are chosen and the rights and recourses afforded to those targeted. All those developments occurred in relationship to the rights of those against whom sanctions are imposed. The relationship between rights and sanctions, however, does not only apply to the negative effects sanctions may have. The absence of sanctions is not an absence of a relationship; rather, there are innumerable ways

in which states and individuals interact with one another. In some instances, those relationships may also lead in rights violations. The question relative to such cases, therefore, is whether there are situations in which certain forms of economic relationship, or other forms of support, should be cut off? In other words, are there certain instances in which sanctions—understood in this context as an umbrella term, referring to any potential cessation of economic or other forms of interaction—are required?

This section considers the manner in which four discrete yet interrelated bodies of public international law—human rights law, international humanitarian law, international criminal law and general international law—have dealt with the issue of obligations arising from transnational harms. The discussion below highlights the manner in which understandings of the scope of responsibility in all four areas of law have been expanding over the last several decades, leading to a growing recognition of the need to impose limits on various forms of support in response to the most serious instances of harm and human suffering.

Historically, the scope of transnational responsibility within international law has been limited. This limitation may be traced to many factors. Amongst the more overt historical demonstrations of resistance to a more encompassing vision of responsibility was the insistence, primarily on the part of the United Kingdom, that a clause limiting the applicability of the rights in the European Convention on Human Rights be inserted

into the draft text.⁵¹ This clause made it to the final text as Article 63.⁵²

The scope of this historic limitation is diminishing, however. In a particularly shameless episode, some sixty years after it had worked to insert the colonial limitation into the European Convention, the United Kingdom attempted to rely upon this provision in order to avoid responsibility in the *Al-Skeini and Others v. the United Kingdom*.⁵³ Fortunately, the European Court of Human Rights was in no mood to accept the British argument, observing curtly that “[t]he existence of [the Article 56] mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term ‘jurisdiction’ in Article 1.”⁵⁴ In doing so, the Court indicated its willingness to employ a more extensive understanding of international responsibility.⁵⁵

51. See Council of Europe, COLLECTED EDITION OF THE ‘TRAVAUX PRÉPARATOIRES’ OF THE ECHR Vol. IV 270 (Arthur Robertson ed., 1975–85); MARCO DURANTI, THE CONSERVATIVE HUMAN RIGHTS REVOLUTION: EUROPEAN IDENTITY, TRANSNATIONAL POLITICS, AND THE ORIGINS OF THE EUROPEAN CONVENTION 203 (2017). The Belgians and the French supported inclusion of the clause. A scathing response to this decision came from Leopold Senghor, the future President of Senegal and a member of the Parliamentary Assembly of the Council of Europe at the time:

In effect, Article 63 appears to be a rather clumsy way of excluding overseas territories from the Convention. It therefore appears to me to be an echo of the Colonial Pact. . . . In adopting Article 63 the Assembly would transform the European Declaration of Human Rights into a Declaration of European Human Rights. This would be to deny the same rights to other men. This would mean betraying the spirit of European Civilisation which—as Valéry has written—made man ‘the measure of all things. . . .’

European Consultative Assembly, *Second Session of the Consultative Assembly* (Aug. 7–28, 1950), reprinted in 6 COUNCIL OF EUROPE, COLLECTED EDITION OF THE “TRAVAUX PRÉPARATOIRES” OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 2, 172–77 (1985).

52. It forms Article 56 of the current text.

53. *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. (2011) [hereinafter *Al-Skeini*] (concerning the killing of six Iraqi civilians in 2003, and the inadequacies of the investigation process subsequently set up).

54. *Id.* ¶ 140.

55. For more on *Al-Skeini*’s impact, see Barbara Miltner, *Revisiting Extraterritoriality After Al-Skeini: The ECHR and its Lessons*, 33 MICH. J. INT’L L. 693 (2012).

The discussion below highlights two different manners in which understandings of the scope of responsibility have been growing. First, there has been increased attention to positive obligations, such as the obligation under Common Article 1 of the 1949 Geneva Conventions and Additional Protocol I, requiring that states work to ensure all parties to a conflict respect the rules of international humanitarian law.⁵⁶ Second, there has also been increased recognition of the ways in which direct responsibility overflows the narrow boundaries within which it has more traditionally been confined. This is demonstrated both by the growing emphasis on extraterritorial responsibility in human rights law,⁵⁷ as well as by the emphasis on complicity in international criminal law.⁵⁸

The regimes discussed below are still contested. The point here is not to suggest otherwise; on the contrary, it is taken as evident that international law is defined by tensions between different points of view, at times motivated by political calculations and alignments, and at times by more normative concerns.⁵⁹ While

56. See, e.g., Luigi Condorelli & Laurence Boisson de Chazournes, *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, 82 INT'L REV. RED CROSS 67 (2000); Tomasz Zych, *The Scope of the Obligation to Respect and to Ensure Respect for International Humanitarian Law*, 27 WINDSOR Y.B. ACCESS TO JUST. 251 (2009); Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 INT'L REV. RED CROSS 707 (2015).

57. See, e.g., EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno Kamminga eds., 2004); MICHAL GONDEK, THE REACH OF HUMAN RIGHTS IN A GLOBALIZING WORLD: EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (2009); MARK GIBNEY & SIGRUN SKOGLY, UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS (2010); MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES AND POLICY (2011).

58. See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgment, ¶ 61 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1999); Prosecutor v. Naser Oric, Case No. IT-03-68-T, Judgment, ¶ 282 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006); Prosecutor v. Milan Milutinovi, Case No. IT-05-87-T, Judgment, ¶ 92 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009); Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment (Sept. 26, 2013).

59. Tensions famously explored in MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (REISSUE WITH NEW EPILOGUE) (2006).

from a more general perspective international law may be perpetually contested, on the level of concrete detail significant shifts and developments in the nature of law and practice frequently take place. The growing strength and volume of rules pertaining to international responsibility, discussed below, represents one such significant shift.

General international law, international humanitarian law, international criminal law and international human rights law may be discrete regimes, but they are all closely interconnected as well.⁶⁰ The intent of considering each area of law separately below is not to deny these interconnections, but rather to highlight in more detail the changes that have been taking place in each area of law. Developments in all four areas reinforce each other, however, and may all be taken as testimony of a broader movement towards greater recognition of extraterritorial and transnational responsibility.

A. Human Rights Law

Within human rights law, the question of international responsibility has primarily been addressed through considerations of extraterritorial rights obligations. Recognition of extraterritorial rights obligations has been growing over recent decades. The language of Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) has been key to debates around extraterritorial obligations. That article stipulates that the human rights obligations in the Covenant will apply with respect “to all individuals within [a state’s] territory and subject to its jurisdiction.”⁶¹ An early interpretation of Article 2(1) came in the Human Rights Committee’s decision in *Delia Saldias de Lopez v. Uruguay*.⁶² In that case, the Committee stipulated that

Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights “to all individuals within

60. As recognized by various international tribunals; for one such recognition, see *Ilascu v. Moldova*, App. No. 48787/99, Eur. Ct. H.R. at ¶ 312 (2004) [hereinafter *Ilascu*].

61. International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

62. U.N. Hum. Rts. Committee [HRC], *Delia Saldias de Lopez v. Uruguay*, Comm. No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981), available at <http://www.refworld.org/cases,HRC,4028d4954.html> [hereinafter *Delia Saldias*].

its territory and subject to its jurisdiction,” but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.⁶³

The approach of *Delia Saldias* was emulated and expanded upon by the European Court of Human Right’s judgment on preliminary objections in *Loizidou v. Turkey*.⁶⁴ In *Loizidou*, the Court found that

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.⁶⁵

The judgment, in short, both referenced a broad, effectivity-based approach to interpretation, and also gave further shape to the idea of ‘jurisdiction’ by linking it to the notion of ‘control.’

63. *Id.* ¶ 12. The Committee continued by referring to Article 5(1) of the Covenant, which stipulates:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

ICCPR, *supra* note 61, art. 5(1). Relative to this clause, the Committee observed, “In line with this, it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.” *Delia Saldias*, *supra* note 62, ¶ 12.

64. *Loizidou v. Turkey*, App. No. 15318/89, Judgment on Preliminary Objections, Eur. Ct. H.R., (1995) [hereinafter *Loizidou*]. The language pertaining to the scope of the European Convention’s obligations is similar to that of the ICCPR, as Article 1 of the European Convention states that states parties must “secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention.” European Convention on Human Rights art. 1, Nov. 4, 1950, E.T.S 5.

65. *Loizidou*, *supra* note 64, ¶ 62.

A similar approach was employed by the Inter-American Commission on Human Rights,⁶⁶ and further confirmed in the ICCPR context by the Human Rights Committee's General Comment 31.⁶⁷ Moreover, this line of reasoning was furthered in the European context by *Al-Skeini*, as referenced above.⁶⁸

While this strand of reasoning expanded understandings of extraterritorial responsibility, it did so in relatively straightforward terms, relative to situations in which states or state agents were more directly involved in committing extraterritorial rights violations. Another strand of rights jurisprudence has gone a step further. This strand of jurisprudence has broadened the potential for states to be held responsible for extraterritorial rights violations, by contemplating more indirect forms of responsibility. Key to the formation of this strand was jurisprudence pertaining to the expulsion of refugees, in which the responsibility of the expelling state hinged upon the nature of the actions of the state to which the individual in question was being expelled.⁶⁹ A key articulation of this broader standard also came in

66. See *Saldano v. Argentina*, Petition, Inter-Am. Comm'n H.R., Report No. 38/99, OAE/Ser.L./VII.106, doc. 6 rev. ¶ 19 (2000).

67. U.N. HRC, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶¶ 10–12, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004) [hereinafter *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*]. See also Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 12, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010), available at <https://undocs.org/CEDAW/C/GC/28> [hereinafter *CEDAW General Recommendation No. 28*].

68. *Al-Skeini*, *supra* note 53, ¶¶ 130–40 (highlighting a variety of ways in which states' obligations can apply beyond their territory, including through the actions of their agents, or on the basis of their exercise of de facto control of territory).

69. See *Soering v. United Kingdom*, App. No. 14038/88, Eur. Ct. H.R. at ¶¶ 85–91 (1989) [hereinafter *Soering*]; *Cruz Varas v. Sweden*, App. No. 15576/89, Eur. Comm'n. H.R. at ¶¶ 80–81 (1991); *Vilvarajah v. United Kingdom*, App. Nos. 13163/87, 13164/87, 13165/87, 13447/87 & 13448/87, Eur. Ct. H.R. (1991). See also U.N. HRC, *A.R.J. v. Australia*, ¶ 6.9, U.N. Doc. CCPR/C/60/D/692/1996 (Aug. 11, 1997), available at <http://www.refworld.org/cases,HRC,4028adfa7.html>; U.N. HRC, *Roger Judge v. Canada*, U.N. Doc. CCPR/C/78/D/829/1998 (Aug. 13, 2003), available at <http://undocs.org/CCPR/C/78/D/829/1998>; U.N. HRC, *Alzery v. Sweden*, U.N. Doc. CCPR/C/88/D/1416/2005 (Oct. 25, 2006), available at <http://hrlibrary.umn.edu/undocs/1416-2005.html>.

Loizidou, in which the European Court highlighted that “the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.”⁷⁰ By referring to the ‘effects’ of state action, the *Loizidou* judgment suggested that extraterritorial state responsibility may have a broad scope.

The precise scope of effects-based extraterritorial liability in human rights law remains unclear. The European Court’s earlier judgment in *Soering v. the United Kingdom* indicated several of the key concepts that might be used to flesh out the parameters of such responsibility, highlighting the interrelated notions of the proximity of the consequences, foreseeability of the harms, and the question of whether or not the actor in question had knowledge or substantial grounds for believing that a rights violation might flow from their acts.⁷¹ Reference to such terms has been reiterated in subsequent cases. In *Ilascu and Others v. Moldova and Russia*, the European Court of Human Rights highlighted that effects must be “sufficiently proximate” in order for responsibility to attach.⁷² In *Munaf v. Romania*, the Human Rights Committee highlighted that responsibility will apply where an extraterritorial violation is “a necessary and foreseeable consequence [as] judged on the knowledge the state party had at the time.”⁷³ Decisions by the Committee on the Elimination of all Forms of Discrimination Against Women (“CEDAW Committee”) have followed a similar line of reasoning.⁷⁴ In its 28th General Comment, moreover, the CEDAW Committee stipulated that states’ anti-discrimination efforts must not only combat national acts of discrimination, but rather that they must

70. *Loizidou*, *supra* note 64, ¶ 62. *See also* *Saldano v. Argentina*, *supra* note 66, ¶ 17; CEDAW General Recommendation No. 28, *supra* note 67, ¶ 12.

71. *Soering*, *supra* note 69, ¶¶ 85, 86, 88, 90.

72. *Ilascu*, *supra* note 60, ¶ 317.

73. U.N. HRC, *Munaf v. Romania*, ¶ 14.2, U.N. Doc. CCPR/C/96/D/1539/2006 (Aug. 21, 2009), *available at* http://dag.un.org/bitstream/handle/11176/278952/CCPR_C_96_D_1539_2006-EN.pdf?sequence=1&isAllowed=y.

74. *See, e.g.*, *M.N.N. v. Denmark*, U.N. Doc. CEDAW/C/55/D/33/2011 (July 15, 2011), *available at* <https://undocs.org/CEDAW/C/55/D/33/2011>; *Y.W. v. Denmark*, U.N. Doc. CEDAW/C/60/D/51/2013 (Mar. 2, 2015), *available at* <http://undocs.org/CEDAW/C/60/D/51/2013>.

“also extend to acts of national corporations operating extraterritorially.”⁷⁵ The CEDAW Committee has also applied an effects-based test in the context of the extraterritorial effects of financial secrecy rules.⁷⁶

Insofar as the jurisprudence of the International Court of Justice (ICJ) pertains to general international law, it is discussed further below. In a number of its cases the ICJ has referred to human rights law specifically, however, and in doing so has lent support for a wider understanding of the scope of extraterritorial obligations within human rights law. In its *Legal Consequences of the Construction of a Wall* advisory opinion, the ICJ supported the control test by finding that the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC) should all be understood to apply to areas and acts under a state’s control.⁷⁷ At the same time, the ICJ also supported the effects test, when it observed, relative to the ICESCR in particular, that it placed Israel “under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.”⁷⁸

The above points of reference, taken together, highlight the expanding scope of extraterritorial obligations within human rights law over recent decades, indicating increased attention on

75. CEDAW General Recommendation No. 28, *supra* note 67, ¶ 36.

76. See Committee on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Switzerland, ¶ 40(c), U.N. Doc. CEDAW/C/CHE/CO/4-5 (Nov. 25, 2016) (finding that “financial secrecy policies and [restrictive] rules on corporate reporting and taxation . . . potentially [have a] negative impact on the ability of other States, in particular those already short of revenue, to mobilize the maximum available resources for the fulfillment of women’s rights”).

77. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 107–14 (July 9) [hereinafter *Legal Consequences of the Construction of a Wall*]. See also *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168 (Dec. 19). In its *Application of the International Convention on the Elimination of all Forms of Racial Discrimination* decision, meanwhile, the ICJ asserting a particularly broad version of the control test, observing that states should “do all in their power to ensure that public authorities and public institutions under their control or influence do not engage” in rights violations. See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.)*, Provisional Measures Order, 2008 I.C.J. Rep. 353, ¶ 149(4) (Oct. 15).

78. *Legal Consequences of the Construction of a Wall*, *supra* note 77, ¶ 112.

the part of human rights actors to transnational rights violations and an increased willingness on the part of rights adjudicatory bodies to adopt progressive approaches to such issues.⁷⁹ While the development of the control test represents a positive trend in such a direction in its own right, the development of the effects test suggests an even broader scope of obligation, and one that may continue to expand in years to come.

B. International Humanitarian Law

Considerations of expanded notions of international responsibility within international humanitarian law have taken place in a number of different areas.⁸⁰ First, the scope of international responsibility has been advanced through reference to positive obligations. Key here is Common Article 1 of the 1949 Geneva Conventions and Additional Protocol I thereto, which requires that the contracting parties “undertake to respect and to ensure respect for the present Convention in all circumstances.”⁸¹ The

79. Attention to the issue on the academic plane has also increased: *see, e.g.*, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno Kamminga eds., 2004); MICHAL GONDEK, THE REACH OF HUMAN RIGHTS IN A GLOBALIZING WORLD: EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (2009); MARK GIBNEY & SIGRUN SKOGLY, UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS (2010); MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES AND POLICY (2011).

80. Humanitarian law was, moreover, already a key resource for pushing back against overly broad sanctions, thanks to its prohibition of starvation, and requirement that foodstuffs, medical supplies and other necessities be allowed to pass freely (*see* Protocol Additional to the Geneva Conventions of 12 August 1969, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 54, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 65, Dec. 12, 1977, 1125 U.N.T.S. 609; Declaration on Minimum Humanitarian Standards art. 3, ¶ 2(f), U.N. Doc. E/CN.4/Sub.2/1991/55 (Dec. 2, 1990); Geneva Convention Relative to the Protection of Civilian Persons in Time of War IV art. 23, Aug. 12, 1949, 75 U.N.T.S. 287). The need to avoid overly broad, collective sanctions could also be understood as flowing from international humanitarian law’s prohibition of collective punishment, intimidation and terrorism (*see* Geneva Convention Relative to the Protection of Civilian Persons in Time of War IV art. 33, Aug. 12, 1949, 75 U.N.T.S. 287; Convention (IV) Respecting the Laws and Customs of War on Land art. 50, Oct. 18, 1907, 36 Stat. 2277, T.S. 539).

81. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) art.

practical implications of this obligation were developed by the Nicaragua decision of the International Court of Justice, where the Court found that Common Article 1 places states “under an obligation not to encourage persons or groups engaged in . . . conflict . . . to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.”⁸² Subsequent ICJ cases have gone further, by emphasizing the positive side of the obligation flowing from Article 1. In its advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ observed, “It follows [from Article 1] that every State party to [the Geneva Conventions], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.”⁸³ Customary international humanitarian law has been understood to require the same.⁸⁴ Indeed, the publication of the International Committee of the Red Cross’s compendium on customary international humanitarian law in 2005 may be taken as an important milestone in its own right in terms of reaffirming this obligation.⁸⁵ The positive obligation to ensure respect for the laws of war flowing from Article 1 has also been

1, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) art. 1, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) art. 1, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) art. 1, Aug. 12, 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 80, art. 1.

82. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 220 (June 27). *See also* INT’L COMM. OF THE RED CROSS [ICRC], 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, ch. 40, ¶ 129 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

83. Legal Consequences of the Construction of a Wall, *supra* note 77, ¶ 158. *See also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), *supra* note 77, ¶¶ 211, 345. For further relevant jurisprudence, *see* Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶¶ 517–19 (Int’l Crim. Trib. For the Former Yugoslavia Jan. 14, 2000).

84. *See* ICRC, 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 82, ch. 41.

85. ICRC, 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 82.

extensively emphasized in various United Nations reports and resolutions,⁸⁶ as well as in the scholarly literature.⁸⁷

86. See, e.g., U.N. Secretary General, *Report Submitted to the Security Council by the Secretary-General in Accordance with Resolution 605 (1987)*, ¶¶ 24–27, U.N. Doc. S/19443 (Jan. 21, 1988); U.N. Sub-Comm'n on the Promotion and Protection of Hum. Rts., Res. 1990/12, ¶ 4 (Aug. 30, 1990). For recognition of the obligation by other international organizations, see, e.g., North Atlantic Treaty Organization Parliamentary Assembly, Civilian Aff. Comm. Res. No. 287, ¶ 7 (Nov. 15, 1999); Rep. of the ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 47 (Sept. 2003); Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL), 2009 O.J. (C 303) 12. On the obligation's applicability to the conflict in Yemen that began in 2015, see Panel of Experts on Yemen, Letter dated Jan. 27, 2017 from the Panel of Experts on Yemen addressed to the President of the Security Council, ¶ 129, U.N. Doc. S/2017/81 (Jan. 31, 2017).

87. See, e.g., Hans-Peter Gasser, *Ensuring Respect for the Geneva Conventions and Protocols: The Role of the Third States and the United Nations*, in EFFECTING COMPLIANCE (Hazel Fox & Michael Meyer eds., 1993); Luigi Condorelli & Laurence Boisson de Chazournes, *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, 82 INT'L REV. RED CROSS 67 (2000); Toni Pfanner, *Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims*, 91 INT'L REV. RED CROSS 305 (2009); Tomasz Zych, *The Scope of the Obligation to Respect and to Ensure Respect for International Humanitarian Law*, 27 WINDSOR Y.B. ACCESS TO JUST. 251 (2009); U.N. Secretary-General, *Secretary-General's Remarks to the Informal Meeting of the General Assembly on the Humanitarian Situation in Syria* (Feb. 25, 2014); Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 INT'L REV. RED CROSS 707 (2015). The greater prevalence of the argument as to the scope of the positive obligation flowing from Article 1 as of the mid-2010s was demonstrated by United States legal advisor Brian Egan's feeling the need to speak directly against it in 2016. Egan observed:

Some have argued that the obligation in Common Article 1 of the Geneva Conventions to “ensure respect” for the Conventions legally requires us to undertake such steps and more vis-à-vis not only our partners, but all States and non-State actors engaged in armed conflict. Although we do not share this expansive interpretation of Common Article 1, as a matter of policy, we always seek to promote adherence to the law of armed conflict generally and encourage other States to do the same.

Brian Egan, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations*, 92 INT'L L. STUD. 235, 245 (2016).

Second, in addition to their obligation to encourage parties to conflicts to respect the rules of international humanitarian law, states must of course respect international humanitarian law whenever they are taking part in hostilities themselves. At what point exactly a state should be understood as being involved in hostilities is a complex and contested question, however.⁸⁸ Here too, understandings have evolved, with recent sources suggesting a broader scope as to when states might be adjudged engaged in a conflict than would traditionally have been recognized.⁸⁹

Agreement on the Arms Trade Treaty presents a particularly tangible crystallization of norms in this area.⁹⁰ The process that would lead up to agreement on the treaty began at a 1998 meeting in Oslo.⁹¹ Numerous regional commitments to work to control the flows of arms came in the following years.⁹² In 2006, the

88. See Nathalie Weizmann, *Why U.S. Being a Party to Armed Conflict in Afghanistan May Not End Soon*, JUST SECURITY (Jan. 7, 2015), <https://www.justsecurity.org/18904/u-s-forces-transition-drawdown-afghanistan/> (“International law is not well developed on the question of when a state becomes, or ceases to be, a party to an ongoing armed conflict”).

89. See Tristan Ferraro, *The Applicability and Application of International Humanitarian Law to Multinational Forces*, 95 INT’L REV. RED CROSS 561 (2013); Weizmann, *Why U.S. Being a Party to Armed Conflict in Afghanistan May Not End Soon*, *supra* note 88; Nathalie Weizmann, *International Law on the Saudi-Led Military Operations in Yemen*, JUST SECURITY (Mar. 27, 2015), <https://www.justsecurity.org/21524/international-law-saudi-operation-storm-resolve-yemen/>; Nathalie Weizmann, *Are the U.S. and U.K. Parties to the Saudi-Led Armed Conflict Against the Houthis in Yemen?*, JUST SECURITY (Sept. 22, 2016), <https://www.justsecurity.org/33095/u-s-u-k-parties-saudi-led-armed-conflict-houthis-yemen/>.

90. For some academic background, see ICRC, *ARMS AVAILABILITY AND THE SITUATION OF CIVILIANS IN ARMED CONFLICT* (1999); Alexandra Boivin, *Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons*, 87 INT’L REV. RED CROSS 467, 476–78 (2005); DENISE GARCIA, *SMALL ARMS AND SECURITY: NEW EMERGING INTERNATIONAL NORMS* (2006); ZERAY YIHDEGO, *THE ARMS TRADE AND INTERNATIONAL LAW* (2007); Theresa A. DiPerna, *Small Arms and Light Weapons: Complicity “With a View” Toward Extended State Responsibility*, 20 FLA. J. INT’L L. 25, 38–41 (2008); Maya Brehm, *The Arms Trade and States’ Duty to Ensure Respect for Humanitarian and Human Rights Law*, 12 J. CONFLICT & SEC. L. 375 (2008).

91. *An International Agenda on Small Arms and Light Weapons: Elements of a Common Understanding — Concerns and Challenges*, Oslo, July 13–14, 1998, cited in GARCIA, *supra* note 90, at 46–58.

92. See, e.g., Nairobi Declaration on the Problem of the Proliferation of Illicit Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa (Mar. 15, 2000); OAS, *Model Regulations for the Control of Brokers of*

General Assembly called for the creation of a group of experts to study the potential for a legally binding convention on conventional arms transfers.⁹³ Finally, the Arms Trade Treaty was adopted by the General Assembly in 2013.⁹⁴ Among other significant features, the treaty sets out a due diligence standard relative to arms exports, while further highlighting that no arms transfers may be authorized should a state be aware that weapons would be used in the commission of violations of international criminal law.⁹⁵ In doing so, the treaty has helped to extend notions of complicity in international law.⁹⁶

C. *International Criminal Law*

International criminal law, too, has contributed to the growing recognition of transnational and international responsibility relative to the worst sorts of rights violations in a number of ways. In the first place, international criminal tribunals have affirmed the notion of *jus cogens* on several occasions, highlighting that “most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law of *jus cogens*, i.e. of a non-derogable and overriding character.”⁹⁷ The development of international criminal law has thus been key in

Firearms, Their Parts and Components and Ammunition (2003); Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa (Apr. 21, 2004); Org. for Security & Co-operation in Eur. [OSCE], *Document on Small Arms and Lights Weapons*, OSCE Doc. FSC.DOC/1/00/Rev.1 (Nov. 24, 2004); Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons, Regional Centre on Small Arms and Light Weapons (2005); Econ. Community of W. Afr. States [ECOWAS], *Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials* (2006).

93. G.A. Res. 61/89 (Dec. 18, 2006).

94. G.A. Res. 67/234 (Apr. 2, 2013).

95. *Id.* arts. 6(3), 7.

96. The treaty was relied upon to such effect in *Prosecutor v. Taylor*, *supra* note 58. In addition to the Arms Trade Treaty, the judgment in the *Taylor* case also relied on the Leahy law (discussed further below) in support of a knowledge standard rather than an intent standard for complicity, highlighting the fluid connections between various areas of law and legal instruments pertaining to complicity.

97. *Prosecutor v. Kupreskic*, *supra* note 83, ¶ 520. *See also* *Prosecutor v. Furundzija*, *supra* note 58; *Prosecutor v. Kayishema*, Case No. ICTR-95-1, Judgment, ¶ 88 (May 21, 1999); *Prosecutor v. Stakic*, Case No. IT-97-24-T,

providing support for the general notion of *jus cogens*, which has also been developed through general international law, as discussed further below.

More concretely, international criminal law has laid out clear, forceful standards on complicity, which apply with little to no regard to international borders. Individuals are complicit under the terms of customary international criminal law where they take an action that has a substantial effect on the commission of a crime,⁹⁸ with knowledge of the substantial likelihood that their conduct will assist in such commission.⁹⁹

The ‘knowledge of substantial likelihood’ *mens rea* standard advanced by international criminal law in this context is particularly important. This standard is more clearly assertive than that developed in the context of state responsibility, where the question of whether a more stringent intent standard or a broader knowledge standard is required has been extensively debated.¹⁰⁰ The fact that a more extensive standard has developed

Judgment, ¶ 500 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003); *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42, Judgment, ¶ 2136 (Dec. 14, 2015).

98. See U.N. War Crimes Commission, *The Zyklon B Case: Trial of Bruno Tesch and Two Others*, in 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (1947); *Prosecutor v. Akayesu*, *supra* note 58; *Prosecutor v. Furundzija*, *supra* note 58; *Prosecutor v. Aleksovski*, *supra* note 58, ¶ 61; *Prosecutor v. Naser Oric*, *supra* note 58, ¶ 282; *Prosecutor v. Milan Milutinovi*, *supra* note 58, ¶ 92; *Prosecutor v. Taylor*, *supra* note 58.

It is worth observing that even moral support and encouragement have been held to potentially constitute substantial assistance by international criminal tribunals, demonstrating the impetus towards broad interpretation operating in such a context. See *Prosecutor v. Akayesu*, *supra* note 58, ¶ 692; *Prosecutor v. Furundzija*, *supra* note 58, ¶¶ 207–09; *Prosecutor v. Taylor*, *supra* note 58.

99. See *Prosecutor v. Furundzija*, *supra* note 58; *Prosecutor v. Taylor*, *supra* note 58. The language of the Rome Statute potentially suggests a stricter *mens rea* standard, but is yet to be conclusively interpreted.

100. On which see, e.g., Vaughan Lowe, *Responsibility for the Conduct of Other States*, 101 JAPANESE J. INT’L L. & DIPLOMACY 1 (2002); HELMUT AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* 230–49 (Cambridge Univ. Press, 2011); Ryan Goodman & Miles Jackson, *State Responsibility for Assistance to Foreign Forces (aka How to Assess US-UK Support for Saudi Ops in Yemen)*, JUST SECURITY (Aug. 31, 2016), <https://www.justsecurity.org/32628/state-responsibility-assistance-foreign-forces-a-k-a-assess-us-uk-support-saudi-military-ops-yemen/>; See Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, CHATHAM HOUSE RES. PAPER (Nov. 2016), <https://www.chathamhouse.org/publication/aiding-and-assisting-challenges-armed-conflict-and-counterterrorism>.

in the international criminal law context is surprising, given that criminal liability is generally understood as the most serious form of liability, in the context of which the strictest standards should be applied. At the same time, as a practical and political matter, it is understandable that a stronger standard has developed in the international criminal context, given the general lack of sympathy for the internationally criminally accused.¹⁰¹ The stronger standard recognized in the international criminal context may logically be taken to apply to state responsibility as well, however—given that it is the standard that governs the liability of state agents, and where a state agent is liable, the state on behalf of which they act will be as well.¹⁰²

Perhaps most significantly, international criminal law has played an important role within the constellation of public international legal regimes simply by attaching responsibility for violations of international law directly to individuals. As the Nuremberg Tribunal famously put it, “Crimes against international law are committed by men, not by abstract entities, and *only* by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹⁰³ The evolution of targeted sanctions has had a close interaction with this development. As one commentator has stated,

The evolution of targeted sanctions represents a trend towards the personalization and individualization of measures in the field of peace and security, a development mostly visible in the rise of ad-hoc international tribunals to deal with war crimes

101. On the interstate level, by contrast, states have been more aware of the potential that a stronger complicity standard might be applied to their own actions and have hence pushed against it. The United States has been particularly active on this question, pushing firmly in favor of the intent standard in the context of discussions on the Draft Articles on State Responsibility. See U.S. DEPT OF STATE, DRAFT ARTICLES ON STATE RESPONSIBILITY — COMMENTS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA (Mar. 1, 2001).

102. For a similar point, see Miles Jackson, *Aiding and Assisting: The Relationship with International Criminal Law*, JUST SECURITY (Nov. 15, 2016), <https://www.justsecurity.org/34441/chatham-houses-paper-aiding-assisting-international-criminal-law/>.

103. THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY, PART 22, at 447 (1950). As Hersch Lauterpacht similarly put it, “unless responsibility is imputed and attached to persons of flesh and blood, it rests with no one.” HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 40 (F.A. Praeger, 1950).

such as the international criminal tribunal for the former Yugoslavia, the international criminal tribunal for Rwanda, the special tribunal for Cambodia, and the International Criminal Court.¹⁰⁴

In short, the movement towards individual responsibility exemplified by international criminal law may be taken as one background force that has helped to enable the move towards more targeted sanctions,¹⁰⁵ while more targeted sanctions may, in turn, be taken as another piece of evidence of the movement of international law towards a more individualized, and thanks to that more law-governed, direction.¹⁰⁶

104. Clara Portela, *National Implementation of United Nations Sanctions: Towards Fragmentation*, 65 INT'L J. 13, 17 (2010). In the words of another commentator:

it is also important to reassess the place and ethics of sanctions in an international legal system which is giving increased importance to the individual. For developments in international law enforcement have also taken off in another direction, in moving towards the institutionalization of individual criminal responsibility. This pierces another corporate veil: the fiction of the monolithic state and the traditional position that it is responsible for all acts imputable to it which are committed within its territory. This is a development that, in certain cases, may well be preferable to holding entire populations accountable for the acts of their leaders, as the International Military Tribunal at Nuremberg recognized some time ago.

Vera Gowlland-Debbas, *Introduction*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 27–28 (Vera Gowlland-Debbas ed., 2001).

105. In this sense, the well-documented collapse of the language of 'state criminality' in the context of the ILC's Articles on State Responsibility may be seen, rather than as a diminishment of international responsibility, as further recognition of the importance of attaching the most serious sanctions to individuals, rather than to states. For more on the history of the idea of state criminality in the ILC's Articles on State Responsibility, see INTERNATIONAL CRIMES OF STATES: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY (Joseph Weiler, Antonio Cassese & Marina Spinedi eds., 1989).

106. A key underlying point to highlight here, however, is the extent to which international criminal responsibility—despite its greater force, on some measures—has been far more extensively developed than international financial responsibility. One exception has been the regime generated by and through the Alien Tort Statute, which, for that very reason, is worthy of wider dissemination and utilization.

D. General International Law

The previous sections have considered several manners in which the content of the rules concerning the international and transnational responsibility of both states and individuals has been gradually thickening over the past several decades, within the three human-oriented subfields of international law: international human rights law, international humanitarian law, and international criminal law. While these bodies of law do not use the language of 'sanctions', they impose obligations on states and individuals not to engage in certain forms of cross-border activity, thereby substantively requiring what in another lexicon would readily be termed sanctions.

This section turns to consider the position of general international law on the matter. This position is not distinct from the positions taken within the three subfields of international law discussed above, but rather has been, in significant part, made up of and informed by the legal standards that have developed in each of those areas.

There are multiple instances in which general international law might be taken to imply one sort of duty to sanction or another. This article is only concerned with a subset of those instances, however—those which apply relative to the most serious sorts of violations. It is necessary in the first place, therefore, to explore in basic outline the historical evolution of the idea of higher order obligations within international law.

Higher order obligations in general international law have come to be referred to as *jus cogens* obligations. The origin of the idea of *jus cogens* obligations has been much debated.¹⁰⁷ Some trace the concept to the idea of *jus strictum* in Roman law, while others point to the natural law ideas of the sixteenth and seventeenth centuries.¹⁰⁸ More recently, some trace the idea to the

107. For more, see Martti Koskenniemi, Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* ¶ 361, U.N. Doc. A/CN.4/IL.682 (Apr. 13, 2006) [hereinafter *Fragmentation Report*]; Dire Tladi (Special Rapporteur on *Jus Cogens*), *First Report on Jus Cogens*, ¶¶ 18–27, U.N. Doc. A/CN.4/693 (Mar. 8, 2016).

108. See, e.g., MAX KASER, *DAS ROMISCHE PRIVATRECHT, ERSTER ABSCHNITT: DAS ALTROMISCHE, DAS VORKLASSISCHE UND KLASSISCHE RECHT* 198 (2nd ed., 1971); Eric Suy, *The Concept of Jus Cogens in Public International Law*, in 2 *THE CONCEPT OF JUS COGENS IN INTERNATIONAL LAW* 17, 19 (Carnegie Endowment for International Peace, 1967).

rule in the Napoleonic Codes that laws which conflict with *ordre public* (“public order”) and public policy objectives will be null, while others credit the nineteenth century Pandectists.¹⁰⁹ A 1937 article by Alfred Verdross, the prominent Austrian jurist and member of the International Law Commission (ILC), is cited in a great deal of the literature as playing a key role in originating the term *jus cogens*,¹¹⁰ though earlier references in the 1930s can be found as well.¹¹¹ In a broader, normative sense, the inhumanity of the Second World War helped to encourage the development of the idea of *jus cogens*,¹¹² just as it helped lead to the development of the modern human rights and international criminal law regimes.

A key early statement by the ICJ came in *United Kingdom v. Albania*, known as the *Corfu Channel* case, in which the Court observed that “elementary considerations of humanity” serve as the source of certain state obligations.¹¹³ The Genocide Convention, which came shortly thereafter, represented an important, early treaty law crystallization of the notion of higher-order, humanist-inspired obligations in the post-World War II order.¹¹⁴ As the ICJ would observe in its decision concerning the Genocide

109. *Id.*

110. Alfred Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571 (1937); see also Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55 (1966); Bruno Simma, *The Contribution of Alfred Verdross to the Theory of International Law*, 6 EUR. J. INT'L L. 33, 51 (1995).

111. Aust highlights August Freiherr von der Heydte, *Die Erscheinungsformen des zwischenstaatlichen Rechts: jus cogens und jus dispositivum im Völkerrecht*, 16 ZEITSCHRIFT FÜR VÖLKERRECHT 461 (1932), cited in AUST, *supra* note 100, at 321 n. 8. See also Ernest Lorenz, *Commercial Arbitration — International and Interstate Aspects*, 42 YALE L.J. 716 (1934), cited in Paul Stephan, *The Political Economy of Jus Cogens*, 44 VAND. J. TRANSNAT'L L. 1073, 1081 n. 21 (2011). See also Pablo Nájera (Fr. v. Mex.), 5 R.I.A.A. 466, 470, 472 (French-Mexican Claims Comm'n 1928); Oscar Chinn (U.K. v. Belg.), Judgment, 1934 P.C.I.J. (ser. A/B) No. 63, at 65, 149 (Dec. 12) (separate opinion by Schucking, J.).

112. See, e.g., Stephan, *supra* note 111, at 1081; Jochen Frowein, *Jus Cogens*, in MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 1 (Rudiger Wolfrum ed., 2012).

113. *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 22 (Apr. 9).

114. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

Convention, “the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.”¹¹⁵

The idea of *jus cogens* obligations took on further concreteness through its inclusion under the heading of ‘peremptory norms’ in the Vienna Convention on the Law of Treaties.¹¹⁶ This inclusion was incorporated in large part thanks to support for the idea from socialist and decolonizing states in the 1960s.¹¹⁷ The idea also built on the work the widely respected Polish-British jurist, Hersch Lauterpacht, and other early ILC rapporteurs had done to formulate a rule stipulating that treaty obligations would be rendered void where they conflicted with “overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*).”¹¹⁸ In its 1970 decision in *Barcelona Traction, Light and Power Company, Ltd.*, the ICJ endorsed a similar

115. Reservations to the Convention on the Prevention and Punishment of the Crimes of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15, ¶ 23 (May 28). In his dissent, Judge Alvarez observed:

the new international law . . . includes within its domain . . . conventions which seek to establish new and important principles of international law [and] conventions seeking to regulate matters of a social or humanitarian interest with a view to improving the position of individuals. . . . The new international law, reflecting the new orientation of the legal conscience of the nations, condemns genocide—as it condemns war—as a crime against civilization. . . .

Id. ¶ 51 (separate opinion of Alvarez, M.). A decade later, another dissent would emphasize the idea of higher-order obligations as well, with Judge Tanaka in the *South West Africa Cases (Second Phase)* observing that “the law concerning the protection of human rights may be considered to belong to the *jus cogens*.” *South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Second Phase, Judgment, 1966 I.C.J. Rep. 6, at 298 (July 18) (separate opinion of Tanaka, K.).

116. Vienna Convention on the Law of Treaties art. 32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

117. See ANTONIO CASSESE, INTERNATIONAL LAW 199–200 (2005); Marina Spinedi, *International Crimes of State — The Legislative History*, in INTERNATIONAL CRIMES OF STATES: A CRITICAL ANALYSIS OF THE ILC’S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 12–13 (Joseph Weiler, Antonio Cassese & Marina Spinedi eds., 1989).

118. Hersch Lauterpacht, *Report on the Law of Treaties of Special Rapporteur*, 1953 Y.B. Int’l L. Comm’n 155, U.N. Doc. A/CN.4/SER.A/1953/Add.1,

idea, while demonstrating a notable reluctance to employ the term *jus cogens*, referring instead to “obligations *erga omnes*.”¹¹⁹

More recently, in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ returned to the contemplation of higher-order norms, observing:

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity” . . . that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.¹²⁰

As James Crawford, a respected Australian jurist and the Special Rapporteur on State Responsibility of the ILC from 1997 until 2001, has put it, while the ICJ referred to the fundamental rules of international humanitarian law as ‘intransgressible,’ “[s]ince such rules are regrettably often transgressed, it presumably meant peremptory without wishing to say so.”¹²¹

As attested above, by the end of the twentieth century, there was solid legal support for the idea of *jus cogens* obligations. The ILC’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts (“Draft Articles”) built on that tradition

119. See *Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain)*, Second Phase, Judgment, 1970 I.C.J. Rep. 3, 32 ¶ 33 (Feb. 5). As one commentator has observed, in doing so, the ICJ

added to the armoury of multilateralism but in a confusing way, since all the examples it gave of “obligations . . . towards the international community as a whole” could equally have been taken as examples of peremptory norms—and indeed most of them had been listed by the ILC as potential examples in its commentary.

James Crawford, *Multilateral Rights and Obligations in International Law*, 319 RECUEIL DES COURS 325, 410 (2006), citing 1966 Y.B. Int’l L. Comm’n 248, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

120. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, 257, ¶ 79 (July 8). The ICJ also referred to the idea in the interim in *Nicaragua v. United States*, albeit in the context of referring to the briefs submitted to it. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, *supra* note 82, ¶ 190. See also Tladi, *supra* note 107, at ¶ 46.

121. Crawford, *supra* note 119, at 415.

and went a step further by providing more details as to the responsibilities flowing from jus cogens obligations. In particular, Articles 40 and 41 of the Draft Articles addressed “serious breaches of peremptory norms of general international law.”¹²²

122. Previously, the Draft Articles had referred to state criminality. This language, however, was dropped for a number of reasons. For more on the problems involved in the idea of state criminality and the decision to drop that terminology, see Crawford, *supra* note 119, at 460–71.

The precise coverage of the category of ‘serious breaches’ remains open to debate. The Articles on State Responsibility specifically recognize the category as including the prohibitions on the following: (1) aggression; (2) self-determination; (3) genocide; (4) slavery and the slave trade; (5) apartheid; (6) racial discrimination; (7) torture; and (8) the basic rules of international humanitarian law. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 2, at 112–13, art. 40, cmt. 4–5. For more sources contemplating the coverage of jus cogens norms, see Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), *supra* note 119, ¶¶ 33–34; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16 (June 21); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), *supra* note 82; Roach v. U.S., Case 9647, Inter-Am. Comm. H.R., Report No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev. 1 (1986–1987); Case Concerning East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 77 (June 30); Victims of the Tugboat “13 de Marzo” v. Cuba, Case 11.436, Inter-Am. Comm. H.R., Report No. 47/96, OEA/Ser.L/V/II.95, doc. 7 rev. (1996); Prosecutor v. Furundzija, *supra* note 58; Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion, Inter-Am. Ct. H.R., Report No. OC-18/03 (Sept. 17, 2003); Domingues v. United States, Case 12.285, Inter-Am. Comm. H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1. (2002); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 77; Armed Activities on the Territory of the Congo (D.R.C. v. Rwanda), Judgment, 2006 I.C.J. Rep. 6 (Feb. 3); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43 (Feb. 26).

The 1987 Restatement of Foreign Relations Law of the United States similarly listed under the heading ‘customary international law of human rights’ genocide, slavery and the slave trade, torture and systemic racial discrimination, while also referencing murder or disappearance, cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, and consistent patterns of gross violations of internationally recognized human rights. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 (1987). The definition of gross rights violations in United States law, the terms of which were mostly supplied in the mid-1970s, encompasses “torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of the person.” 22 U.S.C. § 2304(d)(1) (2014).

Complicity, in a general sense, was already addressed by the Draft Articles in Article 16.¹²³ The key question relative to peremptory norms, therefore, was what additional obligations might be understood to flow from their violation, above and beyond the obligation to avoid complicity in international law violations generally. The ILC answered this question by stipulating that states must not “render aid or assistance in maintaining [the] situation” in question, recognizing implicitly that serious violations generally constitute states of affairs extended in time.¹²⁴ In addition, the ILC stipulated that all states must take the proactive, future-oriented measure of “cooperat[ing] to bring to an end through lawful means any serious breach.”¹²⁵

While the Articles do not mention crimes against humanity as a specific category under the heading of peremptory norms, the inclusion of such a category has been suggested in several important sources. See ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.702, ¶ 33 (July 18, 2006); JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 594–97 (8th ed., 2012).

123. Article 16 states that:

A state which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: [a] that state does so with knowledge of the circumstances of the internationally wrongful act; and [b] the act would be internationally wrongful if committed by that state.

Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 2, at 65, art. 16. There has been some discussion, as discussed above, as to whether a knowledge standard, as stipulated by Article 16, or an intent standard, as stipulated within some of the notes following Article 16, is more appropriate. For more, see, e.g., Lowe, *supra* note 100; AUST, *supra* note 100; Goodman & Jackson, *supra* note 100. The weight of contemporary opinion, however, is more behind a knowledge standard, which is also the position adopted by a compelling 2016 study, which highlights that legal understandings of intent have often encompassed knowledge that certain consequences will occur in the ordinary course of events. See Moynihan, *supra* note 100, ¶¶ 65–70. It is also worth noting that Article 16 was recognized as reflecting customary international law in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), *supra* note 122, ¶ 419.

124. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 2, at 113–14, art. 41(2).

125. *Id.* art. 41(1).

The ICJ has continued to underscore the existence and significance of jus cogens norms since 2001, including in the *Legal Consequences of the Construction of a Wall* case¹²⁶ as well as in

126. The ICJ observed that:

[T]he obligations violated by Israel include certain obligations *erga omnes*. . . . The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law. . . . Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognise the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance with international humanitarian law as embodied in that Convention. . . . [T]he Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime. . . .

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 77, ¶¶ 155, 159–60. Crawford has observed,

Consistent with its earlier reticence about preemptory norms, the Court appears to have treated the legal consequences of the breaches of the right to self-determination and international humanitarian law as deriving from the *erga omnes* character of the obligations breached. However, the Opinion is not entirely clear in this respect. Although the Court made no express reference to Articles 40 and 41 it did use, unacknowledged, actual words drawn from Article 41. Moreover the Court's reference to the "character and importance of the rights and obligations involved" can be read

Democratic Republic of the Congo v. Rwanda, otherwise known as the *Armed Activities on the Territory of the Congo* case, in which the ICJ unequivocally affirmed the concept of *jus cogens*, while recognizing genocide as amongst the clear examples of a violation belonging in such a category.¹²⁷

At the time of its inclusion in the Vienna Convention the idea of *jus cogens* obligations was greeted with skepticism from some quarters.¹²⁸ Since then, however, “most of the initial skepticism around the notion itself has tended to vanish,”¹²⁹ since “[t]he concept of peremptory norms of general international law [has come to be] recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.”¹³⁰ In 2015, the ILC appointed Dire Tladi as a Special Rapporteur charged with considering the nature of *jus cogens* norms. Tladi’s first report, issued in 2016, summarized the strong support for the idea of *jus cogens* that had emerged over the last several decades:

Since the adoption of the Vienna Convention . . . references to *jus cogens* by States and in judicial decisions have increased manifold. The explicit references to *jus cogens* in the judicial practice of the International Court of Justice alone have been telling. Since the adoption in 1969 of the Vienna Convention, there have been 11 explicit references to *jus cogens* in majority judgments or orders of the International Court of Justice, all of which have assumed (or at least appear to assume) the existence of *jus cogens* as part of modern international law.¹³¹

as an elliptical reference to the peremptory character of the norms in question rather than their *erga omnes* character.

Crawford, *supra* note 119, at 475.

127. *Armed Activities on the Territory of the Congo (D.R.C. v. Rwanda)*, *supra* note 122, ¶ 64. The Separate Opinion of Judge Dugard affirms the importance of this statement. *See id.* (separate opinion of Dugard, J.).

128. *See, e.g.*, Georg Schwartzenberger, *International Jus Cogens?*, 43 *TEX. L. REV.* 455 (1965).

129. *Fragmentation Report*, *supra* note 107, ¶ 363.

130. ILC, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 112 (2001). *See also* Ulf Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?*, 18 *EUR. J. INT’L L.* 853, 855 (2008).

131. Tladi, *supra* note 107, at ¶ 46. The report continued by observing

In addition to express mentions in the majority decisions or opinions of the International Court of Justice, there have

The fact that *jus cogens* is now a well-recognized category of international law does not mean it will no longer be challenged. Rather, as Christian Tomuschat, a respected German jurist and former member of the ILC, has frankly observed, “powerful states have never been friends of *jus cogens*. They realize that the consequences of *jus cogens* may lead to a shift in the power balance in favour of the international judiciary.”¹³² Growing recognition of the category within international law, however, suggests such a position is on the defensive.

The recognition of *jus cogens* norms is one matter, of course; agreement about the necessary consequences of such recognition is another. As one commentator has put it, there has been “a tendency by some authors and, to a growing extent also by domestic courts, to deduce wide-ranging legal consequences out of these rules and obligations.”¹³³ Such a tendency has led to pushback, including relative to the effects of *jus cogens* obligations on foreign sovereign immunity, for instance.¹³⁴ The consequences suggested by the ILC’s Draft Articles, however, are well

been, in total, 78 express mentions of *jus cogens* in individual opinions of the members of the Court. It has also been explicitly recognized in the jurisprudence of other international courts and tribunals. . . . States too have routinely relied on *jus cogens* or peremptory norms in a variety of forums. . . .

Id. ¶¶ 47–48. For a similar recognition of the growing attention being paid to *jus cogens* norms, see Thomas Kleinlein, *Jus Cogens Re-Examined: Value Formalism in International Law*, 28 EUR. J. INT’L L. 295, 296 (2017).

132. Christian Tomuschat, *The Security Council and Jus Cogens*, in THE PRESENT AND FUTURE OF JUS COGENS 20 (Enzo Cannizzaro ed., 2015).

133. AUST, *supra* note 100, at 36. For one case relied upon by Aust, which draw wide-ranging conclusions, see Multi-Member Court of Levadia, Case No. 137/1997, Judgment (Oct. 30, 1997).

134. The European Court of Human Rights ruled in *Al-Adsani v. United Kingdom* against the proposition that, where credible *jus cogens* violations are alleged, foreign sovereign immunity should not apply. *Al-Adsani v. United Kingdom*, App. No. 35763/97, 34 Eur. Ct. H.R. 273 (2001). That decision was close, however, demonstrating the presence of sentiments on both sides of the issue. For commentary on this issue, see Jordan J. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FISA and the Act of State Doctrine*, 23 VA. J. INT’L L. 191 (1983); Lee Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT’L L. 741 (2003); Thomas Giegerich, *Do Damage Claims Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts?*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER — JUS COGENS AND

supported. Perhaps the most progressive suggestion made by the ILC is that states have a positive obligation to bring serious breaches to an end. The idea of such a positive obligation is not to be found in the ILC's Draft Articles alone, however, but rather can also be seen in several other sources as well. As we have seen above, Common Article 1 of the Geneva conventions has been widely interpreted as requiring states to take positive steps to ensure compliance with humanitarian law by all parties to conflict. The Genocide Convention too imposes a specific obligation on states to bring genocides, wherever and by whatever party committed, to an end.¹³⁵ Human rights law generally, moreover, requires not only that states respect, protect and fulfil the rights of those subject to their jurisdiction, but also that they take steps to ensure the success of the relevant rights regimes generally.¹³⁶ Finally, in concluding that states have an obligation to bring serious breaches to an end, the ILC was also relying upon Security Council sanctions practice.¹³⁷ Since the time the ILC's Draft Ar-

OBLIGATIONS ERGA OMNES (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006); Andrew Clapham, *The Jus Cogens Prohibition of Torture and the Importance of Sovereign State Immunity*, in PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW — LIBER AMICORUM LUCIUS CAFLISCH (Marcelo G. Kohen ed., 2007); *all cited in* AUST, *supra* note 100, at 37–39.

The ICJ ruled similarly on the sovereign immunity question. See Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶¶ 87, 92–97 (Feb. 3). The ICJ, however, took pains to distinguish its preservation of the doctrine of state immunity in foreign courts from recognition that individual immunity might fold in cases of serious jus cogens violation. In this context, it is worth highlighting that the divergence in the rules somewhat mirrors the move from general to targeted sanctions.

135. See Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 114, art. 1. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), *supra* note 122, ¶¶ 430–38.

136. For more on this point generally, see, e.g., Austria v. Italy, App. No. 788/60, 4 Y.B. Eur. Conv. on H.R. 116 (Eur. Ct. H.R. 1961); Ireland v. United Kingdom, App. No. 5310/71, 25 Eur. Ct. H.R. (ser. A) at ¶ 239 (1978); Soering v. United Kingdom, *supra* note 69, ¶ 87; Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217 (1994); The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, *supra* note 67.

137. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 2, at 113–14, art. 41, explanatory ¶ 12.

articles were prepared, the support within Security Council practice for the ILC's position has only continued to grow, as detailed in the following section.

In sum, therefore, general international law contains a well-developed notion of *jus cogens* obligations. States must of course not commit *jus cogens* violations. In addition, they must not provide aid and assistance to the commission and perpetuation of such violations—implying already an obligation to impose appropriate sanctions. Over and above such a negative obligation not to be complicit, public international law suggests states have a positive obligation as well—to take whatever steps they can to bring situations of *jus cogens* violation to an end. This positive obligation suggests an even stronger and wider understanding of the sorts of sanctions states are required to impose, in the context of the most serious violations.

E. Conclusion

The discussion above has considered the ways in which, within various areas of international law—human rights law, international humanitarian law, international criminal law and general international law—the scope of international and transnational responsibility has gradually extended over time.¹³⁸ This gradual development has been somewhat obscured by at least two factors. First, this development has been obscured by the fragmentation of the relevant obligations across four different substantive fields, each of which has its own community of experts and distinct body of academic and practitioner work. When the evolutions of standards in all four of these bodies of law are considered side-by-side, however, the evidence that an obligation to impose sanctions in the context of the most serious forms of violation has been developing in public international law is hard to ignore.

III. RIGHTS-BASED SANCTIONS IN PRACTICE

A growing sense that it may be necessary to impose sanctions, of one sort or another, relative to the worst instances of harm is attested to by the various international legal sources explored above. Such a development may also be discerned by observing

138. For some further reflections on a similar theme, see Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT'L L. 341 (2010).

unilateral and multilateral state practice, within which sanctions have increasingly been imposed on the basis of, and shaped in accordance with, rights-based concerns. This section turns to consider the recent evolution of such practice. Given the breadth of relevant material, the following account cannot claim to be exhaustive. A concerted effort has been made, however, to capture the majority of the most significant instances of rights-based sanction.

The developments surveyed in the following sections are of several different types. In particular, they encompass moments in which: (1) sanctions were implemented in response to serious rights violations; (2) rights were explicitly referenced as a justification for the implementation of sanctions; (3) law or policy of a more general nature was passed, stipulating the necessity that certain forms of sanction be imposed relative to certain sorts of rights violation; and (4) rights violations were listed as a grounds on the basis of which targeted sanctions should be imposed.

While all such developments reflect the growing interrelationship between sanctions and rights-based concerns, the precise significance of each type of development is different. The imposition of sanctions in the face of serious rights violations, the passage of laws requiring sanctions in cases of serious rights violations, and the tailoring of targeted sanctions to effect rights violators all provide evidence of the manner in which the sense of legal obligation to respond to rights violations with sanctions, described in the last section, has gradually grown in practice as well. In contrast, references to rights-based concerns as a justification for sanctions provide a weaker form of evidence for such developments, because such references may be hypocritical or merely intended as window-dressing. Even where hypocritically invoked, however, the fact that rights *are* invoked as justification testifies to a sense on the part of the invokers that they may obtain more legitimacy for their actions by invoking rights-based rationales. It is apparent that in practice, therefore, rights-based concerns are increasingly seen as appropriate grounds upon which to impose and target sanctions.

A. United States Sanctions

There is a long history to the United States' imposition of sanctions relative to rights violations, tracing back at least as far as

the 1890 prohibition of the import of goods manufactured by convict laborers.¹³⁹ The first major push to incorporate human rights in a systemic way into U.S. foreign policy came in the 1970s.¹⁴⁰ In the mid-1970s, the U.S. Congress passed several laws aimed at limiting military support to governments engaged in gross rights violations, including multiple amendments to the Foreign Assistance Act and the Arms Export Control Act.¹⁴¹ The 1974 amendments to the Foreign Assistance Act, which still stand, stipulate that “no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights,”¹⁴² though the U.S. executive branch has never complied with this legal obligation.¹⁴³ Several more targeted prohibitions on military assistance were passed in the 1970s and 1980s as well, targeting at various times countries such as Argentina, Brazil, Chile, El Salvador, Guatemala, Nicaragua, Paraguay, the Philippines, South Korea, Uganda, Uruguay and Zaire.¹⁴⁴

139. See Sarah Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 31 (2001), citing 26 Stat. 624 (1890).

140. Key to the developments of the 1970s was the work of Donald Fraser, a Democratic Congressman from Minnesota.

141. Foreign Assistance Act of 1961, Pub. L. No. 87–195, 75 Stat. 424; Arms Export Control Act of 1976, Title II of Pub. L. No. 94–329, 90 Stat. 729.

142. 22 U.S.C. § 2304(a)(2) (2014). The law provides for an exception when the President certifies that extraordinary circumstances exist.

143. See Nina Serafino, June Beittel, Lauren Ploch Blanchard & Liana Rosen, “Leahy Law” Human Rights Provisions and Security Assistance: Issue Overview, CONG. RES. SERV. 3 (Jan. 29, 2014), <https://fas.org/sgp/crs/row/R43361.pdf>, which observes that Section 502B “has been rarely if ever invoked” and that “[i]n response to CRS request, the State Department did not report any instances in which Section 502B was invoked. State Department officials stated that this provision has not been used because it is ‘overly broad.’” See also Daniel Mahanty, *The “Leahy Law” Prohibiting US Assistance to Human Rights Abusers: Pulling Back the Curtain*, JUST SECURITY (June 27, 2017), <https://www.justsecurity.org/42578/leahy-law-prohibiting-assistance-human-rights-abusers-pulling-curtain/>.

1976 Amendments to Section 502B of the Foreign Assistance Act introduced the requirement that the State Department report human rights violations in foreign countries, a requirement that was, in contrast, immediately implemented.

144. See, e.g., Foreign Assistance Act of 1974, Pub. L. No. 93–559, § 25, 88 Stat. 1795, 1802; International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94–329, § 406, 90 Stat. 729, 758; Foreign Assistance and Related Programs Appropriations Act, 1977, Pub. L. No. 94–441, § 505, 90

Starting in 1986, and recurring regularly thereafter, the U.S. Congress began inserting a clause into foreign assistance appropriation bills requiring that the government not provide funding to governments established by military coup.¹⁴⁵ Also in 1986, the Comprehensive Anti-Apartheid Act was adopted in the United States, limiting investments in and trade with South Africa.¹⁴⁶ In 1988 and 1989, the United States imposed a de facto arms embargo on Myanmar, suspended financial assistance and revoked Myanmar's preferred trading status, while the 1990 Customs and Trade Act required the U.S. President to impose sanctions on Myanmar if specific conditions, including progress on human rights, were not met.¹⁴⁷ In the 1990s, several countries'

Stat. 1465, 1473 (1976); Foreign Assistance and Related Programs Appropriations Act, 1978, Pub. L. No. 95-148, § 503, 91 Stat. 1230, 1239 (1977); International Security Assistance and Arms Export Control Act of 1977, Pub. L. No. 95-92, § 11, 91 Stat. 619, 620 (1977); Uganda Embargo Act, Section 5(b), 22 U.S.C. § 2151 (1978); International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, 95 Stat. 1519, 1556 (concerning El Salvador). For more on the rights-based restrictions on U.S. government funding to foreign states in the 1970s and the challenges these statutes faced in terms of implementation, see Stephen Cohen, *Conditioning U.S. Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246 (1982); Paul Albert, *The Undermining of the Legal Standards for Human Rights Violations in United States Foreign Policy: The Case of 'Improvement' in Guatemala*, 14 COLUM. HUM. RTS. L. REV. 231 (1983); Richard Nash, *Certifying Human Rights: Military Assistance to El Salvador and the International Security and Development Cooperation Act of 1981*, 14 COLUM. HUM. RTS. L. REV. 275 (1983); Tanya Broder & Bernard Lambek, *Military Aid to Guatemala: The Failure of U.S. Human Rights Legislation*, 13 YALE J. INT'L L. 111 (1988).

145. For more on this topic, see Notes, *Congressional Control of Foreign Assistance to Post-Coup States*, 127 HARV. L. REV. 2499 (2014), observing, inter alia, "increasingly, the U.S. government complies either fully or partially with the coup provision's requirements in situations that implicate the statute, but does so only after asserting that it is not required to make a determination as to whether the coup provision applies." *Id.* at 2500.

146. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086. The Act, passed despite an attempted veto by President Ronald Reagan, imposed broad sanctions on South Africa, and specified a range of measures South Africa would have to take to have those sanctions ended.

147. Customs and Trade Act of 1990, Pub. L. 101-382, § 139, 104 Stat. 629, 653. The law followed a 1988 decision by the United States to revoke Myanmar's benefits under the Generalized System of Preferences. The law was later followed up on by the mandatory prohibition of all aid except humanitarian and anti-drug trafficking aid by Congress in 1996. Foreign Operations, Export Financing and Related Programs Appropriations Act, 1997, Pub. L. 104-208, § 570, 110 Stat. 3009-121, 3009-166. The law also gave the U.S. President the

military aid was limited. For instance, in 1990 the United States cut off a great deal of its aid to Guatemala, following the killing of U.S. citizen, Michael DeVine, by members of the Guatemalan military.¹⁴⁸ In 1992, the United States terminated military aid to Indonesia after the involvement of United States-trained security units in human rights violations in East Timor was revealed.¹⁴⁹ In 1995, the United States barred military sales to Nigeria, following the execution of human rights defender and activist Ken Saro-Wiwa.¹⁵⁰

The first incarnation of the 'Leahy laws,' which prohibited military assistance to foreign forces involved in committing gross rights violations, came in 1997. The 1997 version of the Leahy laws was limited to the counter-narcotics context, but the laws were expanded to have general applicability relative to foreign aid the following year.¹⁵¹ As they evolved, the Leahy laws came

power to prohibit new investments in Myanmar if Myanmar acted against Aung San Suu Kyi or committed large-scale repression. President Clinton invoked this authorization to prohibit new investments in 1997. See Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (May 22, 1997).

The legislation was further followed up on by the 2003 Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, §§ 1-9, 117 Stat. 864, which inter alia banned the import of goods from Myanmar, required the U.S. Treasury to freeze the assets of individuals in the US holding senior positions within the Myanmar government, and expanded a visa ban on those officials. The legislation stipulated it would remain in effect until the Myanmar government has achieved "substantial and measurable progress to end violations of internationally recognized human rights including rape" and "no longer systematically violates workers' rights, including the use of forced and child labor, and conscription of child soldiers." *Id.* at § 3(a)(3)(A) & (B), 866. In renewing the legislation in 2006, the United States administration observed that among their purposes was "denying [Burmese] rulers the hard currency they use to fund their repression, [thereby] providing strong incentives for democratic change and human rights." Press Release, White House, Statement on Burmese Democracy Act (July 28, 2003). For more, see Ewing-Chow, *supra* note 19.

148. See Intelligence Oversight Board, *Report on the Guatemala Review*, CLINTON PRESIDENTIAL LIBR. (June 28, 1996), <https://clinton.presidentiallibraries.us/items/show/36167>.

149. See Larry Niksch, *Indonesia: U.S. Relations with the Indonesian Military*, CONG. RES. SERV. (Aug. 10, 1998), https://www.everycrsreport.com/files/19980810_98-677_ccc717c388e29caae32d5e71103fe52381077691.pdf.

150. See *Nigeria: The Role of the International Community*, HUM. RTS. WATCH (1997), https://www.hrw.org/reports/1997/nigeria/Nigeria-10.htm#P657_174476.

151. See Serafino et al., *supra* note 143.

to apply in slightly different form to Department of State and Department of Defense-provided foreign assistance.¹⁵² The essential aim and content, however, is the same in both contexts, prohibiting assistance to military units involved in committing gross rights violations.¹⁵³

More recent United States sanctions have relied explicitly on 'human rights' as grounds for their imposition. While sanctions imposed by the United States against Zimbabwe in 2003 did not refer to human rights explicitly, they came close to doing so.¹⁵⁴ Three years later, in 2006, the justification of sanctions against Belarus included explicit reference to human rights. Specifically, the introduction to Executive Order 13,405 observed that:

[A]ctions and policies of certain members of the Government of Belarus and other persons to undermine Belarus' democratic processes or institutions, manifested most recently in the fun-

152. The component of the Leahy laws addressing the State Department has been incorporated into the Foreign Assistance Act; *inter alia*, it requires that "[n]o assistance shall be furnished . . . to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights." 22 U.S.C. § 3728d(a) (2017). The Department of Defense portion of the Leahy laws meanwhile stipulates that "[o]f the amounts made available to the Department of Defense, none may be used for any training, equipment, or other assistance for a unit of a foreign security force if the Secretary of Defense has credible information that the unit has committed a gross violation of human rights." 10 U.S.C. § 362(a)(1) (2017). The State Department's definition of gross violations includes: extrajudicial killings; enforced disappearances; rape and torture as constituting gross violations; cruel, inhuman, or degrading treatment or punishment; prolonged detention without charges and trial; and other fragrant denials of the right to life, liberty, or the security of person. 22 U.S.C. § 2304(d) (2014).

153. *See Serafino et al., supra* note 143.

154. Specifically, Executive Order 13288 observed that the sanctions it imposed were motivated by:

the actions and policies of certain members of the Government of Zimbabwe and other persons to undermine Zimbabwe's democratic processes or institutions, contributing to the deliberate breakdown in the rule of law in Zimbabwe, to politically motivated violence and intimidation in that country, and to political and economic instability in the southern African region, constitute an unusual and extraordinary threat to the foreign policy of the United States. . . .

Exec. Order No. 13,288, 68 Fed. Reg. 11,457 (Mar. 6, 2003).

damentally undemocratic March 2006 elections, to commit human rights abuses related to political repression, including detentions and disappearances, and to engage in public corruption . . . constitute an unusual and extraordinary threat to the national security and foreign policy of the United States. . . .¹⁵⁵

United States-imposed sanctions in subsequent years continued to include such explicit references.¹⁵⁶

Starting in 2010, United States sanctions took another step towards greater attention to rights-based concerns, by specifying rights violations as a basis for targeting. Executive Order 13,553, titled “Blocking Property of Certain Persons With Respect to Serious Human Rights Abuses by the Government of Iran and Taking Certain Other Actions,” included a list of persons against whom targeted sanctions were to be applied, while also allowing for future inclusions on the list of persons affiliated with the Iranian government determined to be “responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, the commission of serious human rights abuses.”¹⁵⁷ Targeted sanctions imposed in subsequent years

155. Exec. Order No. 13,405, 71 Fed. Reg. 35,485 (June 20, 2006).

156. See Exec. Order No. 13,412, 71 Fed. Reg. 61,369 (Oct. 17, 2006) (concerning Sudan); Exec. Order No. 13,448, 72 Fed. Reg. 60,223 (Oct. 23, 2007) (concerning Burma); Exec. Order No. 13,469, 73 Fed. Reg. 43,841 (July 29, 2008) (concerning Zimbabwe). Traditionally, such sanctions always included a reference to the existence of an ‘extraordinary threat’, in order to invoke the powers conveyed to the President under the International Emergency Powers Act and the National Emergencies Act. With an Executive Order issued in late 2017, this language was somewhat amended (thanks to the passage of the Global Magnitsky Act). The preamble to Executive Order 12818 observed that

the prevalence and severity of human rights abuse and corruption . . . have reached such scope and gravity that they threaten the stability of international political and economic systems. . . . [S]erious human rights abuse and corruption around the world constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. . . .

Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption, Exec. Order No. 13,818, 82 Fed. Reg. 60,839 (Dec. 20, 2017). For more, see Rob Berschinski, *Trump Administration Notches a Serious Human Rights Win. No, Really.*, JUST SECURITY (Jan. 10, 2018), <https://www.justsecurity.org/50846/trump-administration-notches-human-rights-win-no-really/>.

157. Exec. Order No. 13,553, 75 Fed. Reg. 60,567 (Oct. 1, 2010) (concerning Iran).

have continued to follow this model.¹⁵⁸ In other words, human rights concerns have provided not only a reason for the application of sanctions, but also a criterion on the basis of which targeted sanctions are applied.

The growing attention to rights-based concerns on the part of sanctions implemented through executive orders would come to be reflected in legislation as well. In 2008, the United States Congress passed the Child Soldier Prevention Act, prohibiting military assistance to the governments of countries employing child soldiers.¹⁵⁹ In 2012, Congress passed the Sergei Magnitsky Rule of Law Accountability Act, sanctioning various Russian officials, following their involvement in the death of Russian lawyer Sergei Magnitsky.¹⁶⁰ Congress followed up on the Sergei Magnitsky Act with the Global Magnitsky Human Rights Accountability Act in December 2016.¹⁶¹ In essence, the Global Magnitsky Act authorized the President to impose sanctions on foreign persons *inter alia* on the basis of their having committed gross human rights violations, subject to certain restrictions.¹⁶²

B. European Union Sanctions

Even before the European Union began to develop a sanctions policy, European states often imposed sanctions on the basis of rights-based concerns. Events in Chile in the early 1970s were particularly important in this context. On September 11, 1973,

158. See Exec. Order No. 13,566, 76 Fed. Reg. 11,315 (Apr. 21, 2011) (concerning Libya); Exec. Order No. 13,572, 76 Fed. Reg. 24,787 (May 3, 2011) (concerning Syria); Exec. Order No. 13,606, 77 Fed. Reg. 24,571 (Apr. 24, 2012) (concerning Syria and Iran); Exec. Order No. 13,619, 77 Fed. Reg. 41,243 (July 13, 2012) (concerning Burma); Exec. Order No. 13,664, 79 Fed. Reg. 19,283 (Apr. 7, 2014) (concerning South Sudan); Exec. Order No. 13,667, 79 Fed. Reg. 28,387 (May 15, 2014) (concerning the Central African Republic); and Exec. Order No. 13,692, 80 Fed. Reg. 12,747 (Mar. 11, 2015) (concerning Venezuela).

159. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, 122 Stat. 5044.

160. Sergei Magnitsky Rule of Law Accountability Act, Pub. L. No. 112–208, 126 Stat. 1496 (Dec. 14, 2012).

161. Global Magnitsky Human Rights Accountability Act, Pub. L. No. 114–328, 130 Stat. 2000, 2534 (2016).

162. The language of the statute poses certain complications relative to this overly simple read; for an excellent overview of some of those issues, which also highlights how the practice has been more expansive than the language might have suggested, see Berschinski, *supra* note 156.

a military coup led by Augusto Pinochet overthrew the government of democratically-elected socialist president Salvador Allende in Chile. In response, several European states imposed sanctions, including an arms ban imposed by the United Kingdom and the halting of financial support by the United Kingdom, Germany, Italy, the Netherlands and Norway.¹⁶³ In 1982, the Netherlands suspended aid to Suriname, the former Dutch colony on the northeastern coast of South America, following serious human rights violations committed by the military government there.¹⁶⁴

More recently, the European Union has begun to advance a common sanctions policy. In numerous instances, such sanctions have been imposed on the basis of rights violations. Following the military coup in Sudan that brought Omar al-Bashir to power in 1989, the European Union suspended aid to Sudan in 1990, and imposed an arms embargo in 1994.¹⁶⁵ The European Union similarly suspended aid and imposed an arms embargo on Myanmar in 1990, a position confirmed by the adoption of a common European Union position¹⁶⁶ in 1996, which highlighted “the absence of [democratization] and . . . the continuing violation of human rights” as grounds for the sanctions measures in question.¹⁶⁷ The European Union suspended aid to Zaire in 1992, and imposed an arms embargo and travel bans in 1993, following Mobutu’s dissolution of the government of Prime Minister Tshisekedi and ensuing violence.¹⁶⁸ Following a 1993 coup in Nigeria, the European Union suspended military cooperation and imposed a partial arms embargo and travel restrictions, which

163. See AUST, *supra* note 100, at 145–46.

164. See *id.* at 132. For more on the context of rights violations in Suriname at the time, see Marc Bossuyt & John Griffiths, *Human Rights in Suriname*, INT'L COMM'N JURISTS (1983).

165. See Council Decision 94/165/CFSP, 1994 O.J. (L 75) 1.

166. A ‘common position’ is a mutually-agreed and binding foreign policy position of European Union states.

167. Council Common Position No. 1996/635/CFSP of 28 October 1996, 1996 O.J. (L 287) 1. The 1996 Common Position added a visa ban to the arms and aid embargoes. This would be complemented by the revocation of Burma’s benefits under the Generalized System of Preferences in 1997 and a freeze on assets in 2000. For more, see Ewing-Chow, *supra* note 19. See also Council Decision 2010/232/CFSP, 2010 O.J. (L 105) 22.

168. See Council Common Position No. 2002/829/CFSP of 21 October 2002, 2002 O.J. (L 285) ¶ 1.

were escalated in 1995 following the Nigerian government's execution of Ken Saro-Wiwa, a human rights defender and activist.¹⁶⁹ The European Union imposed an arms embargo on the Federal Republic of Yugoslavia in 1996, followed by further targeted sanctions in 1998, which it justified in part on the basis that Yugoslavia's attacks constituted "an unacceptable violation of human rights".¹⁷⁰

More recently, European Union sanctions have begun to be more specifically targeted on the basis of rights violations as well. In 2002, the European Union imposed targeted sanctions—referred to as 'restrictive measures' in the European Union context—on Zimbabwe. In general, the European Union justified these measures on the grounds of Zimbabwe's imposition of limitations on democracy and violations of human rights.¹⁷¹ The sanctions specifically targeted "persons . . . [engaged in] activities [that] seriously undermine democracy, respect for human rights and the rule of law."¹⁷² The European Union also imposed sanctions on Belarus in 2002, following Belarus's hostile response to an Organization for Security and Cooperation in Europe report criticizing the lack of democracy in the country.¹⁷³ While the European Union suspended those sanctions following a reversal of position by the Belarusian government, it imposed new sanctions in 2004, justified on the grounds of concerns with the poor state of democracy and a lack of respect for the rule of law and human rights in Belarus.¹⁷⁴ The European Union justified sanctions it imposed on Uzbekistan in 2005 on similar grounds.¹⁷⁵

169. See Council Common Position No. 95/515/CFSP of 20 November 1995, 1995 O.J. (L 298) 1.

170. See Council Common Position No. 96/184/CFSP of 7 March 1996, 1996 O.J. (L 58) 1; Council Common Position No. 1998/240/CFSP of 19 March 1998, 1998 O.J. (L 095) 1.

171. See Council Common Position No. 2002/145/CFSP of 18 February 2002, 2002 O.J. (L 50) 1; see also Council Regulation 314/2004, 2004 O.J. (L 55) 1; Council Decision 2011/101/CFSP, 2011 O.J. (L 42) 6.

172. Council Decision 2011/101/CFSP, *supra* note 171, at 7, art. 4(1).

173. See Mikael Eriksson, *EU Sanctions: Three Cases of Targeted Sanctions*, in *INTERNATIONAL SANCTIONS: BETWEEN WORDS AND WARS IN THE GLOBAL SYSTEM* (Peter Wallersteen & Carina Staibano eds., 2005).

174. See Council Common Position No. 2004/661/CFSP of 24 September 2004, 2004 O.J. (L 301) 67. See also Council Regulation 765/2006, 2006 O.J. (L 134) 1; Council Decision 2012/642/CFSP, 2012 O.J. (L 285) 1.

175. See Council Common Position No. 2005/792/CFSP of 14 November 2005, 2005 O.J. (L 299) 72.

The European Union's sanctions policy took a significant step towards greater consistency through the agreement of basic principles governing the use and deployment of sanctions in 2004.¹⁷⁶ The principles highlight that sanctions will be used "to maintain and restore international peace and security" and that the European Union will work to ensure that United Nations sanctions are made effective.¹⁷⁷ The principles also allow for autonomous European Union use of sanctions, "in support of efforts to fight terrorism and the proliferation of weapons of mass destruction and as a restrictive measure to uphold respect for human rights, democracy, the rule of law and good governance," while requiring that sanctions be carried out with "full respect of human rights and the rule of law."¹⁷⁸

The Lisbon Treaty, a major agreement on reform of the European Union aimed primarily at the generation of a consistent and coherent foreign policy on the part of the union, entered into force on December 1, 2009.¹⁷⁹ Amongst other things, the Lisbon Treaty laid out a new common foreign and security policy framework for the European Union. In particular, Article 21 of the Lisbon Treaty adopted an explicitly norm-based approach to foreign policy, requiring that the shared foreign policy of the Union be formed on the basis of the principles of "democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."¹⁸⁰

176. Council of the European Union, *Basic Principles on the Use of Restrictive Measures (Sanctions)*, 10198/1/04 Rev. 1 (June 7, 2004).

177. *Id.* ¶ 1.

178. *Id.* ¶¶ 3, 7. In 2005, the Basic Principles were complemented by the "Best Practices for the Effective Implementation of Restrictive Measures" and "Guidelines on Implementation and Evaluation of Restrictive Measures." Both texts have been updated several times since. See Council of the European Union, *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy*, 11205/12 (June 15, 2012); Council of the European Union, *Restrictive Measures (Sanctions) — Update of the EU Best Practices for the Effective Implementation of Restrictive Measures*, 15530/16 (Dec. 14, 2016).

179. For more, see Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

180. *Id.* art 21(1).

In 2012, the European Parliament called on the European Council to adopt a more consistent policy on sanctions.¹⁸¹ The European Parliament urged that sanctions be brought more fully within a rule of law framework, highlighted the connection between sanctions and international criminal law, stressed the need to be sensitive to unintended consequences, and emphasized the importance of ensuring that sanctions target breakdowns of democracy and rights-based concerns.¹⁸²

Recent European Union restrictive measures have continued both to justify themselves in relation to rights violations and to target rights violators. For example, following the introduction of Security Council sanctions, the European Union imposed restrictive measures on Libya in 2011.¹⁸³ Like United Nations sanctions, the European Union's sanctions targeted individuals

181. See Consistent Policy Towards Regimes Against Which the European Union Applies Restrictive Measures, EUR. PARL. DOC. 2011/2187(INI) (2012).

182. In particular, the European Parliament urged the following from the Council:

- (a) to develop clear criteria for when restrictive measures are to be applied . . . ;
- (c) to inscribe the sanctions in a comprehensive policy context, establishing short-term and long-term objectives for a sustainable democratization process . . . ;
- (e) to systematically support the work of the International Criminal Court by ensuring that the procedures and the judgments of the court are duly regarded in EU sanctions policy;
- (f) to urge EU Member States to apply the principle of universal jurisdiction in tackling impunity and crimes against humanity . . . ;
- (p) to ensure that, in countries on which restrictive measures are imposed, the main actors championing democracy and human rights are closely involved in the process of designing, implementing and evaluating restrictive measures; [and]
- (q) to commit the existing structures within the EEAS and Commission to conduct an in-depth situation analysis of the economic and societal structure of the country in question, prior to and after the adoption of sanctions, thus examining the direct and indirect effects of all specific measures on the political and socioeconomic realms of the society in question, as well as taking into account their impact on business elites, civil society groups, the political opposition and even reform-oriented elements within the government.

Id.

183. See Council Decision 2011/137/CFSP, arts. 5–6, 2011 O.J. (L 58) 53, 54–55.

accused of human rights abuses.¹⁸⁴ The same was the case in the 2014 restrictive measures on the Central African Republic¹⁸⁵ and Yemen¹⁸⁶ and the 2015 sanctions on South Sudan.¹⁸⁷ The European Union's restrictive measures on Egypt and Tunisia in 2011 were justified in rights terms, while specifically targeting corrupt government officials and those standing in the way of democratic development.¹⁸⁸ The measures the European Union took concerning Syria specifically referred to "the violent repression, including through the use of live ammunition, of peaceful protest in various locations across Syria, resulting in the death of several demonstrators, wounded persons and arbitrary detentions."¹⁸⁹ The European Union's restrictive measures on Burundi, imposed in 2015, were similarly themselves in terms of rights violations, and specifically directed against individuals "involved in planning, directing, or committing acts that violate international human rights law or international humanitarian law, as applicable, or that constitute serious human rights abuses."¹⁹⁰

C. United Nations Sanctions

Finally, and most importantly from the point of view of global legal standards, United Nations sanctions, too, have been increasingly shaped by rights-based concerns over time. Between the 1960s and the 1980s, the United Nations imposed sanctions against the settler minority government in Southern Rhodesia and against the apartheid government in South Africa.¹⁹¹ The Security Council recommended sanctions against Portugal as well, following its refusal to relinquish its colonies in Africa.¹⁹²

184. *See id.*

185. *See* Council Regulation 224/2014, art. 5, 2014 O.J. (L 70) 1, 3.

186. *See* Council Decision 2014/932/CFSP, art. 1, 2014 O.J. (L 365) 147; Council Regulation 1352/2014, art. 3, 2014 O.J. (L 365) 60, 62.

187. *See* Council Decision 2015/740, arts. 3–6, 2015 O.J. (L 117) 52, 53–54; Council Regulation 2015/735, ¶ 1, 2015 O.J. (L 1) 1, 2.

188. *See* Council Decision 2011/172/CFSP, ¶ 2, 2011 O.J. (L 76) 63; Council Decision 2011/72/CFSP, ¶ 2, 2011 O.J. (L 28) 62.

189. *See* Council Decision 2011/273/CFSP, ¶ 2, 2011 O.J. (L 121) 11.

190. *See* Council Decision 2015/1763/CFSP, art. 1(1)(b), 2015 O.J. (L 257) 37, 38.

191. *See* S.C. Res. 217 (Nov. 20, 1965); S.C. Res. 232, *supra* note 11; S.C. Res. 277 (Mar. 18, 1970); S.C. Res. 418, *supra* note 11; S.C. Res. 569 (July 26, 1985).

192. *See* S.C. Res. 218 (Nov. 23, 1965).

In every case, the sanctions were motivated by rights-based concerns.¹⁹³ In short, while sanctions practice was sparse in the Cold War years, when sanctions were applied, it was in the context of rights, self-determination and democratic governance.¹⁹⁴

As observed above, the Security Council was reinvigorated after the end of the Cold War. In the early 1990s, the Security Council imposed arms embargoes on both Somalia and Liberia.¹⁹⁵ Both sanctions regimes were justified on the basis of the human suffering in the countries in question, though neither explicitly invoked rights violations.¹⁹⁶

The sanctions imposed on Haiti and Rwanda were a little more explicit in terms of their grounding on rights-based concerns. Following President Jean-Bertrand Aristide's removal from power, the Organization of American States called for a trade

193. Sanctions were imposed and called for on bases such as: "usurpation of power by a racist settler minority" (S.C. Res. 217, *supra* note 191, ¶ 3); "the continued refusal of Portugal to" decolonize, and its "intensifying its measures of repression and military operations against the African population with a view to defeating their legitimate hopes of achieving self-determination" (S.C. Res. 218, *supra* note 192); the "resort[ing] to massive violence against and killings of the African people, including schoolchildren and students and others opposing racial discrimination, . . . violence against the African people . . . [and] *apartheid* and racial discrimination" (S.C. Res. 418, *supra* note 11); and "the continuance of the human suffering that the *apartheid* system . . . is causing." S.C. Res. 569, *supra* note 191. The sanctions imposed included calls for: "the people of Southern Rhodesia to determine their own future" (S.C. Res. 217, *supra* note 191); "the immediate recognition of the right of the peoples of the Territories under its administration to self-determination," "the immediate cessation of all acts of repression" and "the establishment of conditions that will allow the free functioning of political parties" (S.C. Res. 218, *supra* note 192, ¶ 5(a)–(c)); and "the total elimination of *apartheid* and the establishment in South Africa of a free, united and democratic society on the basis of universal suffrage." S.C. Res. 569, *supra* note 191, ¶ 5.

194. Following the 1973 overthrow of the Allende regime in Chile, moreover, the United Nations Commission on Human Rights commissioned a report on the situation. The report, conducted by Antonio Cassese, found that support to Chile helped to maintain a situation of serious rights violations—implying the appropriateness of sanctions, in the form of a limitation of such support, in such a context. Antonio Cassese (Special Rapporteur on the Situation of Human Rights in Chile), *Study of the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile*, U.N. Doc. E/CN.4/Sub.2/412 (Vols. I to IV) (1978).

195. S.C. Res. 733 (Jan. 23, 1992); S.C. Res. 788, *supra* note 23.

196. *See id.*

embargo on Haiti and the freezing of Haitian government assets.¹⁹⁷ In 1993, the Security Council called for sanctions as well.¹⁹⁸ When renewing the sanctions on Haiti in 1994, the Council was clear that its aim was “the restoration of democracy,” while highlighting concern with “the numerous instances of extra-judicial killings, arbitrary arrests, illegal detentions, abductions, rape and enforced disappearances, the continued denial of freedom of expression, and the impunity with which armed civilians have been able to operate.”¹⁹⁹ In its imposition of sanctions on Rwanda in 1994, the Security Council highlighted “the ongoing violence and particularly . . . the very numerous killings of civilians” and “systematic, widespread and flagrant violations of international humanitarian law . . . as well as other violations of the rights to life and property.”²⁰⁰

The International Labour Organization (ILO), the United Nations agency responsible for setting labor standards and promoting social protections, contributed to the ongoing development of violation-based sanctioning as well. In 1999, the ILO effectively expelled Myanmar, prohibiting it from participation in ILO activities and from receiving ILO technical assistance.²⁰¹ In 2000, the ILO Conference, for the first time in its history, invoked Article 33 of the ILO Charter in order to recommend that ILO members review their relations with Myanmar, and that they take measures in order to bring Myanmar into compliance with its obligation to fight against the widespread and systematic use of forced labor in the country.²⁰²

More recently, United Nations sanctions regimes have incorporated reference to rights violations far more extensively and explicitly, including as a basis upon which to target sanctions.²⁰³

197. See OAS Res. 1/91, OAS Doc. OEA/Ser.F/V.1, MRE/RES.1/91 (Oct. 2, 1991); OAS Res. 2/91, OAS Doc. OEA/Ser.F/V.1, MRE/RES.2/91 (Oct. 8, 1991).

198. See S.C. Res. 841, *supra* note 17, strengthened by S.C. Res. 917 (May 6, 1994).

199. S.C. Res. 917, *supra* note 198.

200. S.C. Res. 918, *supra* note 23.

201. See Int'l Labour Org. Res. 1999/87 (June 1999). This followed up on the appointment of a commission of inquiry by the ILO in 1997, the 1998 report of which documented extensive rights violation in Myanmar.

202. Press Release, Int'l Labour Org., International Labour Conference Adopts Resolution Targeting Forced Labour in Myanmar (Burma), ILO Press Release ILO/00/27 (June 14, 2000).

203. In this context, the idea of the Responsibility to Protect, which developed in the early 2000s, is also worth a mention. The idea of the Responsibility to

Sanctions imposed on Côte d'Ivoire in 2004 targeted those "responsible for serious violations of human rights and international humanitarian law."²⁰⁴ The next year, the United Nations imposed sanctions on Sudan, targeting inter alia "[t]hose who impede the peace process, constitute a threat to stability in Darfur and the region, commit violations of international humanitarian or human rights law or other atrocities. . . ."²⁰⁵ Later, the 2006 sanctions on the Democratic Republic of Congo specifically targeted "political and military leaders recruiting or using children in armed conflict in violation of international law," as well as "individuals committing serious violations of international

Protect grew out of the work of the International Commission for Intervention and State Sovereignty, established by the Canadian government in response to the United Nations Secretary-General's foregrounding of the problem of humanitarian intervention in the wake of events in Rwanda, Srebrenica and Kosovo (see U.N. Secretary-General, *Report of the Secretary-General on the Work of the Organization*, ¶ 37, U.N. Doc. A/55/1 (Aug. 30, 2000)). The initial idea, advanced in the 2001 report of the International Commission, was assertive, suggesting a duty of intervention even outside of the Security Council framework (see INTERNATIONAL COMMISSION ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (Int'l Dev. Research Ctr., 2001)). The idea of the Responsibility to Protect was endorsed by the High-level Panel on Threats, Challenges and Change set up by the Secretary-General in 2004, which emphasized that the responsibility to protect attached to the Security Council in particular (see Anand Panyarachun (Chairman of the High-Level Panel of Threats, Challenges and Change), *Report of the High-Level Panel on Threats, Challenges and Change*, ¶ 203, U.N. Doc. A/59/565 (Dec. 2, 2004)). This approach was then further endorsed by the Secretary-General and the General Assembly in 2005, and by the Security Council in 2006. See U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005); G.A. Res. 60/1, ¶ 138–39 (Oct. 24, 2005); S.C. Res. 1674, ¶ 4 (Apr. 28, 2006). In the process, however, the idea was watered down, with the sense of obligation, in particular, being removed. For more, see, e.g., Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99 (2007); Jose Alvarez, *The Schizophrenias of R2P*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE (Philip Alston & Euan Macdonald eds., 2008).

Ultimately, while the process did not mark a major shift in itself, it provided one further piece of evidence testifying to the gradually growing emphasis on rights, human suffering and serious violations within the international community in general and the work of the Security Council in particular. The failure of the Responsibility to Protect idea to gain more traction was largely due to the extent to which it came to be closely associated with the use of transnational force, and the 2003 intervention in Iraq in particular.

204. S.C. Res. 1572, ¶ 9 (Nov. 15, 2004).

205. S.C. Res. 1591, ¶ 3(c) (Mar. 29, 2005).

law involving the targeting of children in situations of armed conflict, including killing and maiming, sexual violence, abduction and forced disappearance.”²⁰⁶ In strengthening the sanctions on the Democratic Republic of Congo in 2008, violations against women were also recognized as grounds for targeting.²⁰⁷ Since 2011, responsibility for committing violations of human rights and humanitarian law has been relied upon as a grounds for targeting in sanctions imposed on Libya, Somalia, Eritrea, Yemen, South Sudan and the Central African Republic.²⁰⁸ In short, rights-based concerns have come to increasingly shape the imposition and targeting of United Nations sanctions regimes, a development that is likely to continue in future.²⁰⁹

206. S.C. Res. 1698, ¶ 13 (July 31, 2006).

207. S.C. Res. 1807, ¶ 13(e) (Mar. 31, 2008).

208. See S.C. Res. 1970, ¶ 22(a) (Feb. 26, 2011); S.C. Res. 2002, ¶ 1(e) (July 29, 2011); S.C. Res. 2174, ¶ 4(a) (Aug. 27, 2014); S.C. Res. 2140, ¶ 18(c) (Feb. 26, 2014); S.C. Res. 2206, ¶ 7(c)–(d) (Mar. 3, 2015); S.C. Res. 2262, ¶ 13(b)–(c) (Jan. 27, 2016). The use of children in armed conflict has been emphasized as a key form of violation relative to the process of selecting targets in particular. The deployment of sanctions based on violations of children’s rights developed out of an extended history of advocacy. Particular milestones included: the report of the Special Rapporteur’s expert on Children in Armed Conflict in 1996; a Security Council statement on children in armed conflict in 1998; and a thematic resolution by the Security Council in 1999 requesting what would be the first in an ongoing series of annual reports by the Secretary-General on the theme. See Graca Machel, *Impact of Armed Conflict on Children*, ¶ 135, U.N. Doc A/51/306 (Aug. 26, 1998); U.N. SCOR, 53rd Sess., 3896th mtg. at 5, U.N. Doc. S/PV.3896 (June 29, 1998); S.C. Res. 1261, ¶¶ 15–16 (Aug. 30, 1999). In 2001, the Security Council went a step further, requesting the Secretary-General to attach an annex to his reports, listing all those parties employing children in armed conflict. See S.C. Res. 1379, ¶ 16 (Nov. 21, 2001). In 2004 the Security Council for the first time floated the possibility of applying sanctions to those responsible for the recruitment and use of children in armed conflict, a resolution expanded to focus on a broader range of violations the following year. See S.C. Res. 1539, ¶ 5(c) (Apr. 22, 2004); S.C. Res. 1612, ¶ 9 (July 26, 2005)). The targeting of those violating the rights of children was put in place for the first time in the sanctions imposed on the Democratic Republic of Congo in 2006, as detailed above. For more, see David Koller & Miriam Eckenfels-Garcia, *Using Targeted Sanctions to End Violations Against Children in Armed Conflict*, 33 B.U. INT’L L.J. 1, 11 (2015).

209. As one observer has put it, “One notable trend recently has been the increasing use of designation criteria related to human rights and the protection of civilians in armed conflict, including women and children.” *UN Sanctions*, *supra* note 29.

D. Conclusion

While the previous section contemplated the relationship between sanctions and rights-based concerns as a matter of legality, this section has considered that relationship as a matter of practice. This investigation has revealed that there is a long-standing, close relationship between sanctions and rights-based concerns. Early United Nations sanctions on Rhodesia and South Africa had a clear link to rights-based concerns, though of course they were more overtly framed in relationship to the struggles for decolonization and national sovereignty. The overthrow of the Pinochet regime in Chile also had an important effect on the development of rights-based sanctions.²¹⁰ It has been since the end of the Cold War, however, that the relationship between rights-based concerns and sanctions has most extensively developed, as rights violations have come to be relied upon both as a justification for the imposition of sanctions and as a basis upon which to target them.

The fact that there has been an increasingly close relationship between sanctions and rights-based concerns does not mean that all sanctions measures that have been imposed have been motivated by and designed with sensitivity to such concerns. Sanctions are imposed on a wide variety of bases and are fundamentally shaped by political as well as normative concerns. What the above investigation testifies to, however, is that in contradiction to what single-minded exponents of realpolitik visions of international affairs would suggest, rights-based concerns have come to play an increasingly significant role in practice—shaping both when sanctions are deployed in general, and against which individuals and entities in particular. Considered side-by-side with the development in the law explored above, the evolution of practice examined here provides further evidence of a growing sense that sanctions are obligatory relative to the most severe instances of rights violation.

210. On the importance of the response to the 1973 coup in Chile to the history of human rights, see Jan Eckel, “*Under a Magnifying Glass*”: *The International Human Rights Campaign Against Chile in the Seventies*, in *HUMAN RIGHTS IN THE TWENTIETH CENTURY* (Stefan-Ludwig Hoffmann ed., 2011); Patrick William Kelly, *The Chilean Coup and the Origins of Transnational Human Rights Activism*, 8 *J. GLOBAL HIST.* 178 (2013).

IV. FROM DISCRETION TO LAW

The previous sections have detailed the manner in which sanctions, a quintessential component of international power politics, have become increasingly bound by rights-based concerns on all sides, over the course of the last three decades in particular. In order to map out that development, it was necessary to pay close attention to numerous details, in order to trace the often gradual, step-by-step manner in which such evolution has occurred. Having produced such a fine-grained account, it is possible to take a step back, and to consider the bigger-picture significance of the development that has occurred.

Most fundamentally, this development impacts on the manner and extent to which the international legal order may be understood as bounded by law. The extent to which the international order should be understood as so bounded—as opposed to understood as a space fundamentally characterized by discretion—is a matter of long-standing dispute. On the one hand, the ICJ famously suggested in *S.S. Lotus (France v. Turkey)* that states are free to do whatever has not been explicitly prohibited.²¹¹ Since that 1927 decision, however, the nature of the international legal system has evolved, as both the scope and the content of international law have gradually extended.²¹²

211. *S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A), No. 10 (Sept. 7). The decision was perhaps never meant to be read as broadly as it in fact was. For more, see Max Huber, *Observations*, 31 ANNUAIRE DE L'INSTITUT DE DROIT INT'L 79 (1936).

212. On the gradual evolution of the scope and content of international law, and its relationship to understandings of the fundamental nature of the international legal order, see HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *supra* note 120, at 270–71, ¶¶ 13–15; Ole Spiermann, *Lotus and the Double Structure of International Legal Argument*, in *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS* (Laurence Boisson de Chazournes & Philippe Sands eds., 1999). While this article considers certain themes in public international law, the evolution of international trade law also has implications relative to sanctions. In particular, the international trade regime may be understood to have robbed states of the discretion to impose sanctions without just cause, as should they do so. Those sanctions would constitute violations of various obligations imposed by the international trade law regime. Rights-based rationales, of course, should be understood as providing just grounds for abrogating trade law obligations. On such a point, see Robert Howse & Jared Genser, *Are EU Trade Sanctions on Burma Compatible with WTO Law?*, 29 MICH. J. INT'L L. 165 (2008).

The creation of the Security Council at the end of World War II constituted amongst the most momentous changes to the international legal order ever undertaken. On the one hand, the creation of the Council could be taken as increasing the order in the system, insofar as the Council was set up with an authority exceeding that of any individual state. On the other hand, within the Council discretionary power of decision was preserved—or at least, so it seemed at first.

The tensions between discretion and a regularized, universalized, 'legal' frame, that have played out in the context of debates concerning Security Council power, may be seen as clearly in the context of sanctions as anywhere else. Significantly, what have come to be known as 'sanctions' were not referred to as such in the United Nations Charter. Instead, the Charter used vaguer and more general terms, with Article 39 stipulating that the Security Council has discretionary power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to "decide what measures shall be taken" in response, though Article 41 highlighted the "complete or partial interruption of economic relations" as a particular example of such a measure.²¹³ As the prominent Austrian jurist and theorist Hans Kelsen observed at the time, the purpose of Security Council enforcement action was "not to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law."²¹⁴ As another distinguished jurist, Vera Gowlland-Debbas, has put it more recently,

The mandatory decisions of the Security Council under Chapter VII, which are triggered by a determination under Article 39 that there is either a threat to or a breach of the peace, or an act of aggression, are the outcome of political considerations, not legal reasoning, and nor are its proceedings judicial procedures.²¹⁵

In short, the Security Council's decisions are fundamentally political acts, not attempts to interpret and apply the rules of international law.

213. U.N. Charter arts. 39, 41.

214. HANS KELSEN, *LAW OF THE UNITED NATIONS* 294 (1951). See also Hans Kelsen, *Collective Security and Collective Self-Defense under the Charter of the United Nations*, 42 *AM. J. INT'L L.* 783, 788 (1948).

215. Vera Gowlland-Debbas, *The Functions of the United Nations Security Council in the International Legal System*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 287 (Michael Byers ed., 2000).

To cease the consideration of the matter at this point would, however, be to cease contemplation too soon. As Gowlland-Debbas has observed, Kelsen himself also advanced what might be taken as a rival hypothesis, stipulating that Security Council action might be understood as only permitted in case of violation of the law.²¹⁶ Contemplating the matter more generally, two sources of limitations on Security Council action are immediately apparent. First, it is hard to contest that the Security Council's power must be understood as limited by the provisions of the United Nations Charter. Such a limitation flows from the manner in which Chapter VII delimits the parameters under which the Council may take action. It also stems from the references to human rights in the Preamble and Article 1(3), which should also be understood as shaping and limiting Council power.²¹⁷ In addition, insofar as *jus cogens* obligations generally apply higher-order binding obligations upon states, they are presumably binding relative to the Security Council as well.²¹⁸

216. See KELSEN, *supra* note 214, at 735–37, *quoted in* Gowlland-Debbas, *supra* note 215, at 286 n.33.

217. On the manner in which the human rights obligations in the United Nations Charter should be understood as limiting the discretion of the Security Council, see, among innumerable sources, Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. Rep. 57 (May 28); THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL (Rene-Jean Dupuy ed., 1992); MOHAMMED BEDJAOU, THE NEW WORLD ORDER AND THE SECURITY COUNCIL: TESTING THE LEGALITY OF ITS ACTS (1994); Derek Bowett, *The Impact of Security Council Decisions on Dispute Settlement Procedures*, 5 EUR. J. INT'L L. 89, 92–93 (1994); THOMAS FRANK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995); Gowlland-Debbas, *supra* note 215, at 304–06; ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 230 (2007); Marko Milanović, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J. COMP. & INT'L L. 69 (2010).

218. The power of *jus cogens* obligations to bind the Security Council has been recognized in numerous instances. See, e.g., Case No. T-315/01, *Kadi v. Council*, 2005 E.C.R. II–3724; Bundesgericht [BGer] [Federal Supreme Court] Nov. 14, 2007, 133 Entscheidungen Des Schweizerischen Bundesgerichts [BGE] II 450 (Switz.). For academic contemplation, see Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under the U.N. Charter*, 3 SANTA CLARA J. INT'L L. 72 (2005); Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EUR. J. INT'L L. 59 (2005); Alexander Orakhelashvili, PEREMPTORY NORMS IN INTERNATIONAL LAW 423–38 (2006); Antonios Tzanakopoulos, *Collective Security and Human Rights, in* NORMATIVE HIERARCHY IN INTERNATIONAL LAW 42, 54 (Erika de Wet & Jure Vidmar eds., 2012); Tomuschat, *supra* note 132.

To speak of limitations on this level, of course, is to engage in a sort of formalist legal argument—an attempt to understand how to conceptualize Security Council powers as a matter of law, rather than as a matter of practice. In order to obtain a fuller understanding of the relationship between the Security Council and international legal obligations, it is necessary to go beyond the formal level, and to attempt to understand the way in which Security Council decisions have in fact interacted with evolving legal standards over time.

It is helpful in the first place, in such a context, to reverse the direction of inquiry, and instead of asking whether the Security Council is bounded by law, to consider whether or not it functions as a law-maker. The question of the Security Council's law-making power in fact arose during the ILC's work on the Draft Articles, in the course of the ILC's contemplation of appropriate responses to the most serious violations of international law. As James Crawford observed in that context:

Another problem with State crimes was its relation to the provisions of the Charter relating to the maintenance of international peace and security. Under the Charter the Security Council has a primary role with respect to the maintenance of international peace and security. In that context it has dealt with many of the most serious examples of what draft Article 19 defined as State crimes: for example, Iraq's aggression

In addition to these more readily apparent and accepted sources of limitations, other arguments for limitation can be made. First, Security Council member states may be understood as remaining bound by their various obligations even when sitting on the Security Council—a position in fact suggested by the Draft Articles on the Responsibility of International Organizations. See ILC, Draft Articles on the Responsibility of International Organizations, *in* Rep. on the Work of Its Sixty-Third Session, U.N. GAOR, 63rd Sess., Supp. No. 10, at 67, U.N. Doc. A/66/10 (2011). Second, certain principles, such as general principles of due process, might be understood as “applicable to international organizations as subjects of international law when they exercise ‘governmental’ authority over individuals.” Fassbender, *supra* note 37, at 5.

For further contemplations of limitations on Security Council action, see DAVID SCHWEIGMAN, *THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER — LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE* (Peter Malanczuk ed., 2001); Nicolas Angelet, *International Law Limits to the Security Council*, *in* UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW (Vera Gowlland-Debbas ed., 2001). ERIKA DE WET, *THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL* (2004); ANTONIOS TZANAKOPOULOS, *DISOBEYING THE SECURITY COUNCIL: COUNTERMEASURES AGAINST WRONGFUL SANCTIONS* (2011).

against Kuwait; the maintenance of colonial domination in Namibia and Rhodesia; ethnic conflict and war crimes in former Yugoslavia, apartheid in South Africa. Its role has been central in coordinating the international response to such egregious breaches.²¹⁹

While the reference to state crimes was removed from the final Draft Articles, the ILC cited to similar examples of Security Council practice in the context of Articles 40 and 41, pertaining to breaches of peremptory norms.²²⁰ By relying upon Security Council practice in crafting its statement of the rules of international responsibility in the context of the most serious violations of international law, the ILC suggested that such practice plays an important role in shaping international law. As Gowlland-Debbas has put it elsewhere:

a legal construction can be made of the Council's discretionary determinations . . . Although the Council is not *required* to react to violations of international law, its practice—in the form of contingency decisions which are the outcomes of political activity—produces recognizable legal patterns which change the legal positions not only of States, but also of individuals, engendering legal consequences and making possible new normative expectations.²²¹

In short, it appears that Security Council decisions, whatever their origins, help to shape international law going forward.

Not all Security Council decisions, however, will make an equal contribution to shaping the law. Instead, the extent to which a particular Security Council determination contributes to the formation of international law depends upon the extent to which that decision fits into the preexisting international legal framework. In reality, this process depends not only on the nature of the decision itself, but also on the manner in which it is

219. Crawford, *supra* note 119, at 458.

220. See S.C. Res. 217, *supra* note 191; S.C. Res. 218, *supra* note 192; S.C. Res. 232, *supra* note 11; S.C. Res. 277, *supra* note 191; S.C. Res. 418, *supra* note 11; S.C. Res. 569, *supra* note 191; Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 2, at 115, art. 41, cmt. 12.

221. Gowlland-Debbas, *supra* note 215, at 287–88. See also VERA GOWLLAND-DEBBAS, COLLECTIVE RESPONSE TO ILLEGAL ACTS IN INTERNATIONAL LAW (1990); Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT'L & COMP. L.Q. 55 (1994).

dealt with afterwards by the broader international legal community.²²² Should that community favor a rule advanced by a particular Security Council decision, it may pick it up, highlight it, advocate on its behalf and disseminate it. Should a decision be deemed problematic, it may be criticized or simply ignored, diminishing the impact of that decision on the future formation of the law.²²³

222. Often known as the “invisible college of international lawyers.” The reference comes from Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977). For some more recent reflections on the functioning of the invisible college, see Santiago Villalpando, *The “Invisible College of International Lawyers” Forty Years Later*, (ESIL 2013 5th Research Forum: International law as a Profession Conference Paper No. 5/2013).

223. Examples of the ‘invisible college’ at work in such a direction are numerous. Lori Fisler Damrosch is one jurist who has worked in such a manner. As she has put it, testifying to her belief in the project of an international sanctions policy bounded by law:

Selectivity in the adoption of sanctions may be inevitable for the foreseeable future, as key international actors set the agenda in accordance with their own perceptions of interests and resource constraints . . . but over the longer term, as the international community matures, elaboration of normative criteria for the application of sanctions will be a critical step, leading to the eventual goal of treating like cases alike.

Lori Fisler Damrosch, *The Civilian Impact of Economic Sanctions, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS* 274, 277 (Lori Fisler Damrosch ed., 1993). For other articles which help to advance a similar project, see, e.g., Lori Fisler Damrosch, *The Collective Enforcement of International Norms Through Economic Sanctions*, 8 ETHICS & INT’L AFF. 59 (1994); W. Michael Reisman & Douglas Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT’L L. 86 (1998); M. Shervin Majlessi, *Use of Economic Sanctions under International Law: A Contemporary Assessment*, 39 CAN. Y.B. INT’L L. 253 (2001); Eugenia Lopez-Jacoiste, *The UN Collective Security System and its Relationship with Economic Sanctions and Human Rights*, 14 MAX PLANCK Y.B. U.N. L. 273 (2010).

The ‘invisible college’ has diversified and expanded over recent decades (on which point see Jose Alvarez, *The Democratization of the Invisible College*, ASIL PRESIDENTIAL COLUMN (2007)). If anything, this has likely increased the strength of normative voices in international affairs, as the comparative predominance of those linked, formally or informally, to the foreign affairs officers of major state powers has diminished. For a similar recognition that at least a relative opening up of access to international law has occurred, and that it has been positive, see BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* 96

Having recognized that Security Council resolutions can shape the law, but also that the extent to which they do so is not absolute, but rather dependent upon the manner in which they are received and interpreted, it is possible to turn to another part of the relevant equation—how the Security Council makes its decisions in practice. In this context, a brief digression into theory concerning the development of legal precedent will be helpful. As Martin Shapiro and Alex Stone Sweet, perhaps the best known theorists of the evolution of judicial processes, have observed, adjudicatory bodies, when called upon to resolve disputes, face a double bind.²²⁴ On the one hand, they must produce some sort of resolution; on the other hand, they must attempt to maintain a good reputation, in order to preserve their authority.²²⁵ Therefore, such bodies seek to deploy a variety of strategies in order to maintain and promote their legitimacy, including employing reasoned systems of judgment, and attempting to develop consistent frameworks through which to make their decisions.²²⁶ Over time, adjudicative bodies tend to develop a system of precedential law, in order to enhance their legitimacy and authority.²²⁷

Shapiro and Stone Sweet's theory was developed relative to nascent judicial decisions-makers. In many ways, however, and perhaps surprisingly, given that the Security Council is not a judicial body, the underlying structural situation faced by the Security Council is similar. As the 1992 United Nations Agenda for Peace observed, "the principles of the Charter must be applied consistently, not selectively, for if the perception should be of the latter, trust will wane and with it the moral authority

(2003); Christine Chinkin, *Jus Cogens, Article 103 of the UN Charter and Other Hierarchical Techniques of Conflict Solution*, 17 FINNISH Y.B. INT'L L. 63, 64 (2006). For arguments in favor of a pluralistic, contested international space, see Bruno Simma, *Fragmentation in a Positive Light*, 25 MICH. J. INT'L L. 845 (2004); William Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963 (2004); Nico Krisch, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (2010).

224. See Alec Stone Sweet, *Judicialization and the Construction of Governance*, in ON LAW, POLITICS, & JUDICIALIZATION 62 (2002). See also Martin Shapiro, *Towards a Theory of Stare Decisis*, 1 J. LEGAL STUD. 125 (1972); MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981).

225. See Sweet, *supra* note 224.

226. *Id.* at 62–65.

227. *Id.*

which is the greatest and most unique quality of that instrument.”²²⁸ Given the Security Council’s desire to make its sanctions regimes effective—and the fact that, since it lacks its own enforcement arm, it must rely upon state compliance in order to achieve such effectiveness—it has a strong incentive to shape its actions in such a way as to promote its legitimacy and authority.²²⁹ As with the arbitral bodies considered by Shapiro and Stone Sweet, the best way for it to do that is by acting ‘consistently, not selectively’—in short, in compliance with background international legal rules.

The Security Council, therefore, has a strong rationale to reach decisions and issue resolutions justified in terms of, and broadly in compliance with, the pre-existing international legal frame. This process is, moreover, self-reinforcing. Security Council resolutions which are carefully and consistently presented, in compliance with existing legal standards, will serve to further strengthen the norms upon which they rely, prompting the Security Council, in turn, to continue down similar lines in future.²³⁰

228. U.N. Secretary-General, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-Keeping*, ¶ 82, U.N. Doc. A/47/277 (June 17, 1992).

229. Perhaps the most influential study on the effectiveness of sanctions identifies three different ways in which sanctions may influence actors: (1) through coercion; (2) through constraining freedom of action; and (3) through signaling. See THOMAS BIERSTEKER, SUE ECKERT & MARCOS TOURINHO, *DESIGNING UNITED NATIONS TARGETED SANCTIONS: INITIAL FINDINGS OF THE TARGETED SANCTIONS CONSORTIUM* (2012). Amongst these three modalities, signaling is found to be the most effective approach. If signaling is to be maximally effective, however, it is important that the signals put out be somewhat consistent. Relative to the question of signaling effectiveness too, therefore, there are grounds for preferring a more ‘legal’ framework to a more discretionary one.

230. A simple sociological explanation has resonance here, too. Security Council resolutions are typically prepared by trained international lawyers. Such individuals are likely to work to shape the resolutions in accordance, to the extent possible, with their understandings of international legality. In doing so, they will likely often rely upon the text of past sanctions as examples. Past sanctions resolutions which are clearer, more specific, and rely upon universal rather than particular logics and categorizations, are most likely to provide helpful models. The most legalistic and law-compliant models are likely, therefore, to be picked up, serving to further entrench the standards advanced by those models. Such a process can be seen, amongst other places, in the gradual incorporation of rights language into sanctions, considered in Section III above. See *supra* Part III.

In exploring the question of the tension between discretion and constraint in international affairs, this section has focused on the Security Council, for the simple reason that it is the entity with the greatest degree of discretionary power in the current international order. If the discretion of the Security Council is at least somewhat bounded by law, then so must be that of all other international actors. As this section has highlighted, there are a variety of formal reasons to understand the Security Council as so bound. Over and beyond those formal reasons, there are also more practical reasons, which constantly push the Security Council in the direction of more extensive compliance with law in practice. These more abstract contemplations are illustrated, of course, by the manner in which international sanctions regimes have been increasingly influenced by public international law and rights-based concerns over time, both in the context of the Security Council and beyond.

CONCLUSION

This article has highlighted various ways in which public international law and rights-based concerns have come to shape the scope, targeting, functioning and framing of international sanctions regimes over the past several decades. It began by exploring a pair of well-recognized developments—the move from general to targeted sanctions and the incorporation of due process protections into targeted sanctions procedures. Between them, these developments have limited the manner in which sanctions may be deployed, by considering the effects overly broad and loosely targeted sanctions have on the rights of those targeted. The article then turned to explore a third, less-recognized development—the gradual evolution of a potential obligation to sanction, relative to the most serious violations of international law. This development was explored at length due to the fact that it has not been widely-recognized before, such that it was necessary to pull all the relevant evidence together in order to demonstrate the extent to which such an evolution has in fact occurred. Finally, the article took a step back, in order to consider the relationship between discretion and law in international affairs from a broader angle. In doing so, the article highlighted the various factors that push the Security Council towards compliance with law, providing a more general framework through which to assess the evolutions that have occurred in the context of sanctions in particular.

In the broadest terms, this article has been concerned with the increasing strength of public law norms within the international legal order. This is not the first piece of scholarship to recognize the growing strength of such norms. There are, in fact, at least three different frames through which international lawyers have attempted to describe that development in the past. The first has been advanced most prominently by the German jurist, Bruno Simma, in his description of the movement “from bilateralism to community interest.”²³¹ The second describes the development in question as an advancement of the international rule of law.²³² The third sees an emphasis on humanity as responsible for the growing strength of public international law.²³³ All three characterizations capture elements—contested, to be sure—of international law in the modern era.²³⁴ The evolutions in sanctions practice considered in this article lend support, moreover, to all three of the above framings. At times, the developments in question have had a great deal to do with the idea of communal interests.²³⁵ At other times they have pertained to the idea of the

231. See Simma, *From Bilateralism to Community Interest in International Law*, *supra* note 136.

232. This approach has been forcefully advanced by Aust, among others; see AUST, *supra* note 100, ch. 3.

233. This approach has been advanced in different ways by figures such as Lauterpacht, Meron, Trindade and Teitel. See THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* (2006); ANTONIO CANCADO TRINDADE, *INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM* (2010); RUIT TEITEL, *HUMANITY'S LAW* (2011); ANTONIO CANCADO TRINDADE, *JUDGE ANTONIO A. CANCADO TRINDADE: THE CONSTRUCTION OF A HUMANIZED INTERNATIONAL LAW* (2015).

234. For some other works highlighting the extent to which contemporary international law can best be understood as shaped by the tension between these new ideas and more traditional approaches to international law, see Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, 281 RECUEIL DES COURS 11 (1999); Santiago Villalpando, *The Legal Dimension of the International Community: How Community Interests Are Protected in International Law*, 21 EUR. J. INT'L L. 387 (2010).

235. The evolution of jus cogens norms, especially when advanced under the label of erga omnes norms, was particularly closely linked to the idea of community interest.

rule of law.²³⁶ At other moments, they have been primarily motivated by humanist concerns.²³⁷ In the end, therefore, all three framings are perhaps best thought of as three different ways of characterizing the same underlying development.

One might have expected that evolutions in international law and international affairs would follow a simple sequential pattern: first the law would evolve, and then, in order to comply with the law, states would amend their practice. The reality in the context of the evolution of international sanctions, however, has been more complex. Contrary to what one might have expected, ideas of legal obligation have rarely influenced state action directly. Rather, the gradual development of a sense of legal obligation to impose sanctions relative to the worst instances of violation has occurred, for the most part, in parallel to the manner in which sanctions have increasingly come to be targeted against the worst rights violators, and without express reference to a sense of legal obligation. Changes in both law and practice, that is, seem to occur side-by-side.

The puzzle relative to such a development starts to fade when one shifts to think about the relevant actors. Most fundamentally, changes in both law and practice are produced by the hard work of communities of concerned actors. These communities include humanist advocates, who have pushed back against and criticized overly broad sanctions; lawyers who have fought for the due process rights of their clients, and judges who have heeded those calls; practitioners and bureaucrats, who have shaped the language and conceptual framing of those sanctions that have been implemented; and scholars and international jurists, who have worked to clarify and develop the law, and to highlight its implications in the sanctions context. These communities do not only focus their efforts on the law, or on practice—rather, they focus on both simultaneously. Recognizing the primary significance of such actors, therefore, helps to explain why developments in the law and practice of sanctions have tended to parallel one another, rather than one exerting a clear precedence over and influence on the other.

The overarching aim of this article has been to demonstrate that, contrary to the expectations of realist theorists, rights-

236. The emphasis on the importance of due process guarantees is clearly closely linked to the idea of the rule of law.

237. The limitation of overly broad sanctions, due to the harms they inflicted, was most clearly motivated by humanist concerns.

based concerns have exerted substantial influence in the realm of high-stakes international affairs. The typical juxtaposition between realists and idealists tends to obscure the extent to which norms operate as a significant force in the world, with distinct practical consequences. A clear-eyed examination of the last several decades, however, reveals that rights-based concerns have substantially influenced and shaped sanctions practice over the past several decades. The result has been a movement from a field generally defined by political discretion, to one that has been brought increasingly within the frame of law. Such a trend is only likely to continue in years to come.