# The Juridification of Individual Sanctions and the Politics of EU Law

Eva Nanopoulos

• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

1385 Broadway, New York, NY 10018, USA

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2019



A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Nanopoulos, Eva, author.

Title: The juridification of individual sanctions and the politics of EU law / Eva Nanopoulos.

Description: Chicago : Hart Publishing, an imprint of Bloomsbury Publishing, 2019. | Series: Modern studies in European law ; volume 96 | Includes bibliographical references and index.

Identifiers: LCCN 2019036983 (print) | LCCN 2019036984 (ebook) | ISBN 9781509909797 (hardback) | ISBN 9781509909803 (Epub)

Subjects: LCSH: Economic sanctions—European Union countries. | Economic sanctions—Political aspects—European Union countries. | Sanctions (Law)—European Union countries.

Classification: LCC KJE6791 .N36 2019 (print) | LCC KJE6791 (ebook) | DDC 341.5/82094—dc23

LC record available at https://lccn.loc.gov/2019036983

LC ebook record available at https://lccn.loc.gov/2019036984

ISBN: HB: 978-1-50990-979-7
ePDF: 978-1-50990-981-0
ePub: 978-1-50990-980-3

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

# Introduction

On 25 October 1993, the then European Community (EC) imposed for the first time a set of economic restrictions, not against a state, but against a specific entity operating within a national territory, namely the National Union for the Total Independence of Angola (UNITA). UNITA was one of the many movements that fought for Angola's independence from Portugal. The EC sanctions gave effect to a series of resolutions adopted by the United Nations Security Council (UNSC), which were designed to pressure UNITA to comply with the Angolan peace agreement. Once a strong ally of the US in its campaign against communism, by the end of the Angolan civil war, UNITA was seen as the major source of instability in the country and a threat to international peace and security, triggering international condemnation and intervention. The 'Community and its Member States' expressed 'strong support'[1] for the measures. This sanitised, non-committal form of intervention no doubt provided much needed respite from, and yielded much stronger consensus than, the dilemmas generated by the unfolding wars in the Balkans, Europe's own domestic 'other'[2] and yet most vulnerable 'self'.

Since then, the sanctions landscape has undergone significant changes, in the European Union (EU) and beyond. The individualisation of sanctions, by which I mean the shift from comprehensive sanctions imposed against states to sanctions imposed against named individuals, entities or groups,[3] has become entrenched. These typically include a set of travel bans and financial economic restrictions (eg freezing the assets of the relevant target and prohibiting others from providing them with economic resources). Individual sanctions, whether adopted by the EU to give effect to UNSC resolutions or autonomously as part of its Common Foreign and Security Policy (CFSP), have proliferated. They are deployed in a variety of situations and against a diverse range of figures: banks allegedly supporting nuclear proliferation; individuals associated with international terrorism; national liberation movements; toppled ruling elites involved in the misappropriation of state funds; and now potentially even human rights abusers more generally. Some of the names listed have included historical public figures

[1] Council Regulation (EEC) No 2967/93 prohibiting the supply of certain goods to Unita [1993] OJ L268/1 implementing UNSC Res 864 (15 September 1993) UN Doc S/RES/864.

[2] D Zolo, *Invoking Humanity: War, Law and Global Order* (London, Continuum, 2002).

[3] See L van den Herik (eds) *Research Handbook on UN Sanctions and International Law* (Cheltenham, Edward Elgar, 2017) 5. More generally, I will be using the term individualisation to refer to the 'process by which we have taken the black box of the state and made it gradually transparent to focus on individuals rather than states as unitary political entities'. See AM Slaughter, 'Rogue Regimes and the Individualization of International Law' (2001–2002) 36 *New England Law Review* 815, 815.

like Slobodan Milosevic, Saddam Hussein, as well as their families. But many included on those lists will be unknown to the public. Empirically, in other words, this individualisation has involved an increased proliferation, diversification and normalisation of sanctions.[4]

Particularly in the EU, these changes have also been accompanied by a marked process of juridification, characterised by the growing importance of law in the operation of individual sanctions, in conflict resolution and in the framing of debates concerning sanctions. As we shall see in Chapter 1, for example, individual sanctions have raised considerable concerns from the perspective of the rule of law and human rights, calling for greater legal accountability and a system of legal remedies for those upon whom sanctions are imposed. The subjection of individual sanctions to legal regulation and legal discourse is not unique to the EU but follows a wider trend at the international level. At the UN level, too, the individualisation of sanctions has been accompanied by various processes of formalisation and juridification understood as a 'careful move towards rules-based sanctions regimes'.[5] Still, empirically, the shift to law has been particularly pronounced in the EU context.

This book aims to shed light on and explain these developments, with a focus on the juridification of individual sanctions at the European level. It does so by tracing the broader structural transformations in which the juridification of individual sanctions is embedded and unpacking what this tells us specifically about the juridification process at the European level, including its causes and constitutive dynamics. To that end, the book asks a series of questions about the shift to law: Why has the law come to play an increased role in this field? Is the juridification of sanctions merely driven by a concern to protect human rights and ensure compliance with the rule of law? If not, what other factors can account for the law's role in this area? Why has the shift to law been more pronounced in the EU than it has been at the UN level? How can we explain more recent developments that do not quite align with the aim of ensuring compliance with liberal values like human rights?

Looking at the structural changes in which the juridification of individual sanctions is embedded, however, also necessarily entails asking a series of questions about the changes to the sanctions landscape. Individual sanctions supposedly emerged to make sanctions more humane and effective, which is also why they have come to be known as 'smart sanctions'.[6] Are these really the only factors? The end of the Cold War and the 9/11 attacks clearly played a role. As several

[4] For references and a more detailed description of these trends see ch 1.

[5] van den Herik, *Research Handbook* (n 3) 9.

[6] I use the terms individual sanctions, smart sanctions, blacklisting and restrictive measures (which is the official terminology in the EU) interchangeably. This differs from some works where the first two terms are used to refer specifically to sanctions adopted to fight terrorism. The concept of targeted sanctions is also sometimes used to refer to sanctions against named individuals and groups.

scholars have noted, UN sanctions were almost non-existent[7] during the Cold War, which in turn impacted on the rate of sanctions at the EU level. Can other historical events, like decolonisation, inform our understanding of this field? Are factors beyond the political realm, like the advent of neoliberalism, relevant? What is the significance of and what are the interconnections between the empirical trends outlined above? How are we to understand this polyvalent figure of the 'blacklisted', namely the person whose name appears on the list of those who shall be subject to sanctions whether the list is drawn up by the UN or the EU in its own autonomous capacity. Is she a law breaker? Is she an enemy? Is she a threat? If so, what kind of threat? How are these ambiguities significant to our understanding of juridification? What tensions do they create? Is there a single logic that cuts across the figure of the blacklisted that might help us to make sense of the field of sanctions as a whole?

A contextual rereading of the phenomena of individual sanctions and juridification is important for at least three sets of reasons. First, whilst individual sanctions have generated a considerable amount of scholarship in both political science[8] and law, contextual analyses are somewhat lacking. This is particularly pronounced in the EU. EU lawyers have made invaluable contributions to navigating the dense body of law that has emerged in this field.[9] From that perspective, the book aims to further advance our understanding of the evolution of EU law in this area. They have remained, however, primarily, if not exclusively, focused on legal doctrine.

The debate has been far more productive at the international level[10] where changes in the area of sanctions have been linked to broader transformations of the UN and international law.[11] Yet, even here, other than instances where

But, to avoid confusion, here, it refers only to sanctions imposed on particular sectors of the economy. Chapter 1 offers a topology of the objectives EU sanctions seek to pursue.

[7] Sanctions were imposed only twice: against Rhodesia in 1966 and against South Africa in 1977. See discussion in ch 4.

[8] In relation to EU sanctions see in particular F Giumelli, *The Success of Sanctions: Lessons Learned from the EU Experience* (Ashgate, 2013); C Portella, *European Union Sanctions and Foreign Policy* (Abingdon, Routledge, 2011); F Giumelli, *Coercing, Constraining and Signalling: Explaining UN and EU Sanctions After the Cold War* (Colchester, ECPR Press, 2011). In relation to sanctions more generally, see among others K Alexander, *Economic Sanctions: Law and Public Policy* (Basingstoke, Palgrave MacMillan, 2009); GC Hufbauer, JJ Schott, KA Elliot & B Oegg, *Economic Sanctions Reconsidered* 3rd edn (Washington DC, Peterson Institute, 2008).

[9] Early treatments of individual sanctions focused primarily on sanctions imposed to fight international terrorism, the so-called 'terrorist lists'. See, eg, C Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual* Sanctions (Oxford, Oxford University Press 2010); I Cameron (eds), *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures* (Cambridge, Intersentia, 2012). For a treatment of individual sanctions more generally see C Beaucillon, *Les Mesures Restrictives de l'Union Européenne* (Brussels, Bruylant-Larcier, 2013).

[10] See, eg, D Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (Oxford, Oxford University Press, 2016); JM Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge, Cambridge University Press, 2007). For other references see chs 1 and 4.

[11] See, eg, N Krisch, *Beyond Constitutionalism: The Pluralistic Structure of Postnational Law* (Oxford, Oxford University Press 2010). For further references see ch 4.

they are entangled with the global War on Terror, individual sanctions have remained relatively immune from the kind of more sweeping critiques that have emerged in other areas. For example, in instances implicating military force, many of the ideas that tend to be taken for granted in debates about sanctions – humanitarianism,[12] individualisation, smartness and precision in warfare[13] – have been met with considerable suspicion. Similarly, if the juridification of politics,[14] particularly after the Cold War,[15] was for a long time taken as a hallmark of progress, in more recent years, it has also come to be associated with the emergence of a 'de facto neo-liberal new constitutional structure' on a world scale.[16]

Second, individual sanctions may appear as technical instruments that somewhat operate outside politics. Yet, not only do they have far-reaching effects on the blacklisted and society more generally, they also do not operate in a vacuum. Sometimes they are precursors to war, such as the military intervention in Kosovo. At other times, they set the stage for far-reaching state reforms as in the case of Angola and other African countries. In the context of the War on Terror, they have become the medium through which the repressive apparatus of the state has been radically transformed. Today, they are also entangled in growing geo-political antagonism, as demonstrated by the sanctions imposed against officials and individuals associated with the Russian Federation by the EU.

Finally, a rereading and repoliticisation of our understanding of this field is gaining increased urgency. A number of commentators have observed that the juridification of individual sanctions in the EU is prompting a move away from a policy of 'smart targeting',[17] forecasting a possible return to more comprehensive sanctions, the very instrument that individual sanctions were meant to replace. This creates a paradox: if individual sanctions were meant to make sanctions more humane, and if the shift to law is concerned with upholding the rule of law and human rights, how is it that they may, together, be prompting a return to practices that entail massive human suffering? There is therefore a need to better understand where sanctions fit in the production of world order and what exactly is producing these counter-movements and contradictions.

The book's overall argument is twofold. First, that contemporary individual sanctions should be seen as a form of policing, not in the classic sense of law

[12] See, eg, D Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton NJ, Princeton University Press, 2004).

[13] See, eg, M Neocleous, 'Air Power as Police Power' (2013) 31 *Environment and Planning D: Society and Space* 578.

[14] The literature on the juridification of politics is vast. See among others A Sinclair, *International Relations Theory and International Law: A Critical Approach* (Cambridge, Cambridge University Press, 2010).

[15] K Alter, *The European Court's Political Power* (Oxford, Oxford University Press, 2009) 40.

[16] S Gill and AC Cutter (eds), *New Constitutionalism and World Order* (Cambridge, Cambridge University Press, 2014) 5.

[17] C Portela, 'Are European Union Sanctions "Targeted"?' (2016) 29 *Cambridge Review of International Affairs* 912.

enforcement, but as tools implicated in the fabrication and management of the capitalist order in its present post-colonial and neoliberal form. The figure of the blacklisted is thus best conceived, not as law-breaker or classical enemy, but as an 'enemy of order'.[18] This, as I shall argue, helps us explain not only the polyvalence of the blacklisted, but also the complexity of the sanctions landscape and contradictions in the law. Secondly, that the trend towards juridification is intimately linked to the role of law in the production of capitalist order. As such, the fact that the law plays a greater role at the EU level, than it does at the UN level, should be linked to the specific form that the relationship between law and capitalism takes in the EU.

Both strands of the argument depart radically from previous readings of individual sanctions, even those that have been more critical of the phenomenon. As a result, to advance these sets of claims, the book proceeds in three distinct steps: it first unearths established narratives and some of their limitations; it then offers an alternative reading of changes to the sanctions landscape and the phenomenon of juridification; and finally, it seeks to explain these changes, placing them in their wider socio-economic and political context. In that sense, the book seeks to re-describe,[19] as much as it seeks to theorise.

This introduction first explains the theoretical outlook of the book. It explores the concept of juridification and shows why it should be approached as a process that both constitutes and reflects structural changes in the socio-economic and geopolitical spheres. Section II moves on to outline the methodological implications of this perspective for the present inquiry. I introduce three 'links' that need to be reconstructed and three 'myths' that need to be overcome as part of the overall aim of reconstructing a 'politics' of individual sanctions and of legal developments in this field. It should be said that the term 'politics' refers to the structures of power and domination that underpin EU law. The book is not concerned with how governments or other actors may be influencing or instrumentalising the law.[20] Notwithstanding this emphasis on structures, however, a number of figures occupy a central position in the analysis, from the policy makers and academics who pushed for the turn to 'smart' sanctions, to the demands of the Non-Aligned Movement and the role of the US, to the blacklisted individuals and entities themselves, who, particularly through litigation, both (paradoxically) enabled and imposed constraints on the operation and reach of individual sanctions, and, of course, to the EU courts, where individual sanctions have been constructed, contested, and legitimised. This introduction closes with an outline of the structure of the book.

[18] Much of this argument builds on the work of Mark Neocleous. See M Neocleous, *The Universal Adversary: Security, Capital and 'The Enemies of All Mankind* (Abingdon, Routledge, 2016) and further references in ch 7.

[19] A Orford, 'In Praise of Description' (2012) 25 *Leiden Journal of International Law* 609.

[20] The concept of 'lawfare' has been used in this context too. See I Kovač and K Praček 'Sanctioning Iran: The Case of Latent Blowback for the European Union', forthcoming.

# I. Outlook: Conceptions of Juridification

## A. From Quantitative Phenomenon to Qualitative Process

As a descriptive device, juridification is often used to express an increase or intensification of law, 'an overall sense of a shift towards law as the basis for governance of an activity'.[21] Habermas, for example, uses the term to refer 'to the tendency towards an increase in formal (or positive, written) law that can be observed in modern society'[22] and distinguishes 'between the *expansion* of law, that is the legal regulation of new, hitherto informally regulated social matters, from the *increasing density* of law, that is, the specialised breakdown of global statements of the legally relevant facts [Rechtstatbestände] into more detailed statements'.[23]

This shift to law can take various forms. Blichner and Molande,[24] for example, identify five dimensions of juridification: 'constitutive juridification', which they refer to as a 'process where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system'; the subjection of an activity 'to legal regulation or more detailed legal regulation';[25] the legal resolution of conflicts, which often takes the form of the related concept of judicialisation; an increase in the power of the legal system and the legal profession; and finally 'juridification as legal framing' meaning 'the process by which people increasingly tend to think of themselves and others as legal subjects'.[26]

All these dimensions of juridification are present in the field of individual sanctions. Quantitatively, there has been an increase in formal law in the Habermasian sense, characterised by the application of EU law principles and rules to the field of individual sanctions (expansion), as well as the adaptation, redefinition and specification of these principles and rules to the field of individual sanctions in general, and specific sanctions regimes in particular (density). These could be understood in terms of Blichner and Molande's analytical categories: individual sanctions were gradually absorbed into EU law, constituting the field as a subset of the EU law of sanctions; this was followed by greater regulation of the adoption, operation or termination of individual sanctions; disputes over blacklisting began to be solved increasingly in the legal arena; the 'academic cottage industry'[27] that economic sanctions first produced in the field of international relations (IR) in the 1980s and 1990s migrated to the realm of law, enhancing the role of lawyers,

[21] P Cane and J Conaglan, *The New Oxford Companion to Law* (Oxford, Oxford University Press, 2008).

[22] The term was first used by radical German labour lawyers. See E Christodoulis, *Law and Reflexive Politics* (New York, Springer, 2001) 97.

[23] J Habermas, *The Theory of Communicative Action*, Vol 2, (Boston, Beacon Press, 1987) 357.

[24] LC Blichner and A Molander, 'Mapping Juridification' (2008) 14 *European Law Journal* 36.

[25] ibid 42.

[26] ibid 39.

[27] L Jones, *Societies Under Siege: Exploring How International Economic Sanctions (Do Not) Work* (Oxford, Oxford University Press, 2015).

practitioners, and legal academics in the shaping of the field; and finally, the increase in litigation suggests blacklisted individuals and entities see themselves increasingly as 'legal subjects' of the EU legal order.

Even if sanctions retain a political and discretionary element, in some respects, the shift to law has been dramatic. Four new cases were brought before the General Court (GC) in 2005, 59 in 2012, 41 in 2013, 69 in 2014, 55 in 2015 and 28 in 2016.[28] This accelerated the judicialisation of the field: 2 judgments were delivered in 2005; 3 in 2006; 6 in 2007; 5 in 2008; 6 in 2009; 6 in 2010; 6 in 2012[29] – many of which not only decided the case at hand, but contributed sometimes quite significantly to the development of the law in this area. After that initial period, the rise in the case law was even more dramatic: the GC decided 42 cases in 2012, 40 in 2013, 68 in 2014, 60 in 2015 and 70 in 2016. Around 100 cases were pending each year, 60 in 2016. In 2017, the total number of cases reached 181.[30] A further 31 cases were decided in 2018 and another 7 in 2019. According to one commentator, between 2010 and 2014, sanctions became the third most recurrent issue among the cases heard by EU courts, after intellectual property law and competition law.[31]

The book uses the notion of juridification to describe this general shift to law. This is also partly why the term juridification is preferred to the concept of legalisation or constitutionalisation. As a concept derived from international relations,[32] particularly in the EU context,[33] legalisation[34] tends to place the focus on the juridification of inter-state relations. The notion of constitutionalisation is similarly restrictive, in that it does not generally include phenomena that do not bear the constitutional label. Juridification, by contrast, can capture a variety of legal phenomena.

[28] Court of Justice of the European Union, 'Annual Report 2016', 208. A recent empirical study concludes that, in total, 280 actions for annulment were brought before the EU courts since the Treaty of Lisbon (TL): 220 were actions before the GC, and 40 appeals to the Court of Justice. G Gentile and L Lonardo, 'An Empirical Study of the Actions for Annulment of EU Restrictive Measures before the Court of Justice of the European Union', forthcoming.

[29] The data up to 2013 comes from Beaucillon (n 9) 47 and ft 1429.

[30] C Eckes, 'The Law and Practice of EU Sanctions' in S Blockmans and P Koutrakos (eds), *Research Handbook on CFSP/CSDP* (Cheltenham, Edward Elgar Publishing, 2018).

[31] C Portella, 'Targeted Sanctions Against Individuals on Grounds of Grave Human Rights Violations – Impact, Trends and Prospects at EU Level' (2018) Study requested by the DROI Committee, 12.

[32] See, eg, KW Abbott, RO Keohnae, A Moravcsik, A-M Slaughter and D Snidal 'The Concept of Legalization' (2000) 54 *International Organisations* 401; L Bélanger and K Kim Fontaine-Skronski, '"Legalization" in International Relations: A Conceptual Analysis' (2012) 51 *Social Science Information* 238. This is part of wider efforts to bridge the gap between international law and international relations. See AM Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *AJIL* 205.

[33] In the context of the CFSP see P Carwell, 'The Legalisation of European Union Foreign Policy and the Use of Sanctions' (2015) 15 *Cambridge Yearbook of European Legal Studies* 287; M Smith, *Europe's Foreign and Security Policy: The Institutionalisation of Cooperation* (Cambridge, Cambridge University Press, 2004).

[34] The notion of legalisation has also been criticised for not taking seriously the normativity of the legal form, which the book also sees as an important dimension of juridification. See M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, Cambridge University Press, 2001) 483–84.

Yet, such an understanding of juridification is overtly reductive. A mere diagnosis of a shift to law tells us nothing about the causes, effects or desirability of juridification. The colonisation of politics and social relations by law may itself be problematic. But an appraisal of juridification can hardly be disaggregated from the political or social reality in which it is embedded. What is being juridically constituted and why? Viewed from that perspective, the desirability of juridification will necessarily be shaped by the observer's normative perspective and political outlook. Many critiques of juridification have a progressive bent, but those of legal hyperinflation have also come from more conservative elements of the political spectrum. Particularly in the areas of foreign policy or 'high politics', they are often deployed by governments to sideline judicial scrutiny and to diminish rights protection. Indeed, in this context, the US government has been critical of a series of cases where the EU courts annulled sanctions imposed on Iranian companies because of insufficient evidence to back up the claim that they contributed to nuclear proliferation.

For that reason, the book rests on the premise that juridification does not involve merely a 'flood of norms'[35] but implicates a series of more substantive changes[36] that require further excavation. Juridification, in other words, is understood not only as a quantitative phenomenon in the here and now but as a longer-term qualitative process. This is also why, ultimately, an examination of juridification cannot be divorced from a parallel inquiry into the changes that have shaped the field of economic sanctions over the last few decades. From that perspective, a study of juridification should seek not only to uncover the various dimensions of juridification, but also trace them to a series of more 'qualitative' structural changes.

## B. From Idealism to Materialism

This, in turn, begs the question. How are we to understand these broader qualitative changes?[37] Legal developments may reflect or indeed constitute changes in ideas or values. The juridification of international politics, for example, is often attributed to the realisation of ideals such as the rule of law or the protection of human rights. From that perspective, EU law has been seen as the 'paradigmatic case of juridification at the international level.'[38] As we shall see in Part I, this has also largely been the view in this area.

[35] G Teubner, *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Berlin, De Gruyter, 1987) 7.

[36] S Simitis, 'Juridification of Labor Relations' (1986) 7 *Comparative Labour Law* 93.

[37] For an overview of different theories see P Brett, 'A Critical Introduction to the 'Legalisation of World Politics' *E-IR* (March 2012). Available at: www.e-ir.info/2012/03/08/a-critical-introduction-to-the-legalisation-of-world-politics/.

[38] Blichner and Molander (n 24) 36. See also Alter (n 15) 185.

Changes at the level of ideas, however, can hardly be disaggregated from changes in the socio-economic sphere.[39] Materialist theories of law, including international law,[40] have long emphasised the inter-connection between the law and the economic base of society, namely the forces and social relations of production. As Marx highlighted, 'neither legal relations nor political forms [can] be comprehended whether by themselves or on the basis of a so-called general development of the human mind but … on the contrary [originate] in the material conditions of life'.[41] This is not to say that the law, as part of the super-structure of society, merely reflects economic relations.[42] Rather, it is to highlight that legal processes evolve in 'active and dialectical interaction'[43] with the economic base of society, calling for analyses of legal developments to be rooted in their historical and material context.

Habermas, for example, linked different waves of juridification to various stages and configurations in the development of the capitalist state from the bourgeois state, to the bourgeois constitutional state (Rechtsstaat), the democratic constitutional state (demokratischer Rechtsstaat) and finally the democratic welfare state (soziale und demokratische Rechtsstaat). Each of these phases corresponded to a distinct set of legal arrangements: the differentiation of the economic and political system and the emergence of two distinct bodies of law, one regulating the relationship between commodity owners (civil law), the other actualising sovereign state power (public law); 'legal constitutionalisation' characterised by the 'constitutional regulation of administrative authority' where the right to life, liberty and property became constitutionally entrenched and legally enforceable rights; 'democratic constitutionalisation' where citizens were provided with 'rights of political participation', such that 'constitutionalised state power was democratised' and laws began to reflect the supposed 'general interest'; and finally 'social democratisation' was used by Habermas to refer to the institutionalisation of class relations, through laws regulating the workplace and recognising a set of workers' rights.[44]

Recent processes of both juridification and de-juridification could also be linked to the emergence of the neoliberal state, which is characterised both by 'less law', reflecting a retreat of the state from the provision of core social functions

[39] On law and political economy see more generally D Kennedy, 'Law and the Political Economy of the World' (2013) 26 *Leiden Journal of International Law* 7; MA Wilkinson and H Lokdam, 'Law and Political Economy' (2018) LSE, Society and Economy Working Papers 7/2018.

[40] For an overview see R Knox, 'Marxist Approaches to International Law' in A Orford and F Hoffmann (eds) *The Oxford Handbook of the Theory of International Law* (Oxford, Oxford University Press, 2016).

[41] K Marx, *Preface to A Contribution to the Critique of Political Economy* in R Tucker (eds), *The Marx-Engels Reader* (New York, Norton and Company, 1978)

[42] See for an extensive discussion H Collins, *Marxism and Law* (Oxford, Oxford University Press, 1984).

[43] B Chimni, *International Law and World Order: A Critique of Contemporary Approaches* 2nd edn (Cambridge, Cambridge University Press, 2017).

[44] Habermas (n 23) 357–362.

and gradual privatisation of the economy, and 'more law', reflecting greater state involvement in the construction, policing and enforcement of the neoliberal order, from ensuring the conditions for market competition to developing 'the subjectivities required for neoliberal social order'.[45] This also shows that the notion of juridification is not fixed. For Teubner, juridification denoted a turn to regulatory law as a way for the law and legal structures 'to keep pace with the growth of the welfare state'.[46] For those who use the concept as a feature of neoliberalism,[47] juridification is associated with more formal conceptions of the law as a way precisely to de-politicise, and de-materialise the content of the law.

At the international level too, scholars have traced different phases in the juridification of international relations to changing configurations of capitalism. Best known, perhaps, is Chimni's chronology rooted in a materialist theory of international law,[48] which distinguishes between five stages of imperialism: 'old colonialism' (1500–1760); 'new colonialism' (1760–1875); 'imperialism' (1875–1945); 'neo-colonialism' (1945–1980); and finally, the present phase of 'global imperialism'. Each of these epochs mapped onto different configurations of capitalism: primitive accumulation and mercantilist expansion; the penetration of capitalism into the colonies; monopoly capitalism and the increased acquisition of territory for the purposes of capitalist exploitation; the abolition of colonialism but the continuation of economic dependency; and the emergence of transnational capitalism and a transnational capitalist class. And each corresponded to different configurations of international law: 'bourgeois international law', characterised by the consolidation of the Westphalian territorial state; 'bourgeois (colonial) international law', characterised by its transformation into a positivist Christian law of nations; 'bourgeois (imperial) international law' where the 'European law of nations metamorphosed into a [positivist] law of "civilized" nations'; 'bourgeois democratic (liberal) international law', characterised by the co-existence of a universal international law based on the sovereign equality of states and the subsistence of material inequalities and exploitation; and finally 'global imperial international law', characterised by the emergence of a global imperial state designed to transform,[49] though not displace, the state, with a view to realising the 'interests of transnational capital and powerful states in the international system to the disadvantage of third world states and people'.

Materialist histories of law are still lacking in EU legal studies, but patterns of juridification at the EU level could be similarly mapped onto different

[45] H Brabazon (ed) *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Abingdon, Routledge, 2017).

[46] Teubner (n 35).

[47] Brabazon (n 45) 7–8. See also B Golder and D McLoughlin (eds) *The Politics of Legality in a Neoliberal Age* (Abingdon, Routledge, 2017).

[48] Chimni (n 43) 477–98.

[49] See also S Hameiri and L Jones, 'Global Governance as State Transformation' (2016) 64 *Political Studies* 793.

configurations of capitalism. Ryner and Cafruny, for example distinguish between three broad epochs of European integration, namely the Fordist period of the 1960s and early 1970s, the ascendency of neoliberalism in the 1980s and the present moment of authoritarian neoliberalism.[50] Although the law has always occupied a central role in the European project, these phases also correspond to different legal arrangements.[51] The neoliberal turn of the organisation from the 1980s onwards is often associated with more disciplinary legal mechanisms and tight legal constraints, in contradistinction to the regulatory space that Member States were left during the Fordist period of capital accumulation.[52] The crisis of 2008, moreover, is often taken to have ushered in a new 'constitutional mutation',[53] whether this is characterised as a form of emergency rule, involving the suspension of existing substantive and procedural rules[54] or a turn towards authoritarian forms of constitutionalism.[55]

As a result, the book understands juridification as a process that constitutes and reflects changes not only in the sphere of ideas but also in the socio-economic arena. This is important because even concepts like the rule of law or human rights are inherently contested. Outside the liberal legal tradition, the consolidation of a formal conception of the rule of law, for example, has been linked to the consolidation of the neoliberal project at both the domestic[56] and international level.[57] The same is true of international human rights. If the project has long been criticised for its complicity with imperial practices, more recently, a debate has also begun about the interconnections between human rights and the global neoliberal project.[58] Therefore, a finding that individual sanctions are meant to promote peace and that the juridification of individual sanctions is in turn designed to ensure the compatibility of sanctions with ideals like the rule of law and human rights standards, for example, can only be the beginning, not the endpoint, of the inquiry, for this tells us very little about the underlying material changes that, in that process, may be constituted or legitimised.

[50] M Ryner and A Cafruny, *The European Union and Global Capitalism: Origins, Development, Crisis* (London, Palgrave Macmillan, 2017) 31 and ch 2 more generally.

[51] Although far more research would be needed mapping the constitutional and legal structures of European integration to different configurations of capitalism.

[52] Ryner and Cafruny (n 50).

[53] R Pye, 'The EU and the Absence of Fundamental Rights in the Eurozone: A Critical Perspective' (2017) 24 *European Journal of International Relations* 567.

[54] See, eg, C Joerges and M Weimer, 'A Crisis of Executive Managerialism in the EU: No Alternative?' in G de Búrca, C Kilpatrick and J Scott (eds), *Critical Legal Perspectives on Global Governance: Liber Amicorum David M Trubek* (Oxford, Hart Publishing, 2015).

[55] See, eg, M Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?' (2015) 21 *European Law Journal* 313; L Oberndorfer, 'From New Constitutionalism to Authoritarian Constitutionalism: New Economic Governance and the State of European Democracy in J Jäger and E Springler (eds) *Asymmetric Crisis in Europe and Possible Futures: Critical Political Economy and Post-Keynesian Perspectives* (Abingdon, Routledge, 2016).

[56] Brabazon (n 45) 7–8.

[57] See, eg, C May, 'The Rule of Law as the Grundnorm of the New Constitutionalism' in Gill and Cutter (n 16).

[58] See, eg, P O'Connell, 'The Death of Socio-Economic Rights' (2011) 74 *MLR* 532.

This materialist approach to juridification is another reason why the concept is preferred to notions of 'constitutionalisation'.[59] The latter is sometimes used to refer merely to a shift to law. As Brown observes,[60] the language has been deployed to describe the 'growth of international law',[61] 'the enlargement of and saliency of legal regimes'[62] and the expansion of international organisations.[63] The concept of 'new constitutionalism' has also been deployed to link processes of constitutionalisation at the international level with changing configurations of capitalism.[64] Yet, for the most part, the language of constitutionalism tends to be associated with a particular set of beliefs and liberal theories of limited government.[65] This is not to say that juridification is devoid of ideological connotations. The concept, for example, is often 'associated with progress'.[66] Still, its normative baggage is somewhat lighter. To the extent that it has been used to describe various processes of depoliticisation,[67] moreover, the concept of juridification also places a productive emphasis on the structural and ideological power of the law.

# II. Methodology: Uncovering the Politics of Juridification

## A. Reconstructing Links

This theoretical outlook has several methodological implications,[68] some of which have informed the focus, structure and general argument of the book. Tracing the structural material changes in which the juridification of individual sanctions is embedded requires us to reconstruct at least three sets of links between: the form and content of sanctions; developments at the international level and developments at the European level, and changes in the law and practice of sanctions and developments in the geopolitical and economic spheres.

[59] The book does, however, use the term 'constitutional' to refer to EU primary law (ie the Treaties and the EU Charter of Fundamental Rights). The term 'constitutionalisation' also occasionally appears in the book as a means to describe a particular facet and reading of juridification, which aligns with processes that commentators have tended to capture in that language.

[60] G W Brown, 'The Constitutionalization of What? (2012) 2 *Global Constitutionalism* 201.

[61] Which Brown associates with A Hurrell, *On Global Order: Power, Values, and the Constitutional of International Society* (Oxford, Oxford University Press, 2007).

[62] Which Brown associates with J Weiler, 'The Geology of International Law: Governance, Democracy, and Legitimacy' (2004) 64 *Heidelberg Journal of International Law* 547.

[63] Which Brown associates with J Alvarez, 'International Organizations: Then and Now' (2006) 100 *AJIL* 324.

[64] Gill and Cutter (n 16).

[65] N Walker, 'European Constitutionalism and European integration' (1996) *PL* 266, 267.

[66] T Altwicker and O Diggelmann, 'How is Progress Constructed in International Legal Scholarship? (2014) 25 *EJIL* 425, 339.

[67] See, eg, S Veitch, 'Juridification, Integration and Depoliticization' in D Augenstein (eds) *Integration through Law Revisited – The Making of the European Polity* (Farnham, Ashgate, 2012).

[68] See, in particular, D Kivotidis, 'Principles for a Dialectical Materialist Analysis of Law and the State' in P O'Connell and U Özsu (eds) *Research Handbook on Law and Marxism* (Edward Elgar, forthcoming).

## *Form and Content of Sanctions*

The first link that needs to be reconstructed is the relationship between the form and substantive content of sanctions, namely between the phenomenon of individualisation on the one hand, and the increased diversification, proliferation and entrenchment of individual sanctions on the other. From a materialist viewpoint, different configurations of capitalism will bring out changes to *both* the content and character of international law, the two being inextricably linked. During the phase of imperialism, for example, the form of (bourgeois) international law was a law between civilised states. Non-European societies were denied legal sovereignty and excluded from participation in the making of international law, on the basis that they had not reached the required 'stage' of civilisation. With non-European societies essentially 'considered as a simple object of their completed transactions',[69] the content of international law, according to Pashukanis, essentially reflected the 'struggle between capitalist states' competing for the acquisition of colonies. With decolonisation, the legal form was universalised[70] and international law took on its present character as a law between formal sovereign equals. In that constellation, the content of international law will continue to reflect struggles between advanced economies but also, for example, the international division of labour, as well as core-periphery relations. Today, global imperial law is putting those basic structures increasingly under strain. But to the extent that this involves a change in the legal form, challenging the state-centric character of international law, this cannot be divorced from the changing socio-economic content of the law. The same should be assumed in this context. The individualisation of sanctions challenged the state-centric character of both UN law and CFSP law: the idea that states, rather than individuals, are or should be the only subjects of international law. This, however, begs the question: what changing socio-economic reality does that shift express? How are the two connected? The general argument of this book is that the individualisation of sanctions is part of changing conceptions of war, peace and security.

## *UN Sanctions and EU Sanctions*

The second link is between UN sanctions and EU sanctions. Whether one subscribes to Chimni's theory of the global imperial state or not, the character of capitalism as a global system means that transformations at different scales of authority are necessarily interlinked. Critical political economists, in particular, have emphasised how European integration is a 'regional expression of the changing nature of global capitalism'.[71] Irrespective of the formal legal

[69] E Pashukanis, 'International Law' in P Beirne and R Sharlet (eds) *Selected Writings on Marxism and Law* (London, Academy Press, 1980).

[70] C Miéville, *Between Equal Rights: A Marxist Theory of International Law* (London, Pluto Press, 2005) 161.

[71] I Bache, Si Bulmer S George and O Parker (eds) *Politics in the European Union* 3rd edn (Oxford, Oxford University Press, 2011) 46.

relationship between UN law and EU law,[72] in other words, there are structural connections between developments at the international level and developments at the European level. This symbiotic relationship is obvious when the EU adopts sanctions to implement resolutions of the UNSC. But it cannot be reduced to those instances alone. Sanctions adopted by the EU autonomously are linked to the international order in a variety of ways. They may reflect political paralysis at the global level, such as the sanctions imposed on the Syrian leadership, or, as we saw with the Russian example, increased geopolitical rivalry.

At the same time, particularly in capitalist systems, 'social, economic, and political integration evolve at different speeds'.[73] The law and practice of EU sanctions will take on characteristics that are peculiar to the configuration and needs of European capital[74] and the political and juridical edifice that has grown to support it. Traditional conceptions of war and peace constructed around notions of territory and sovereignty, for example, do not necessarily find a straightforward equivalent at the EU level. As a result, we should link developments in the field of EU sanctions to developments at the UN level. But we should also pay attention to the specific ways in which the latter are translated and internalised in the EU legal order (ie the specific expression they receive in the EU).

## *Law and Context of Sanctions*

The final link is the relationship between changes in the legal sphere and transformations in the socio-economic and political spheres. As has been remarked, the juridical, 'political and economic domains cannot be separated in any meaningful sense'.[75] Individual sanctions may have appeared in the international arena at the end of the Cold War, but they can hardly be divorced from longer-term changes to the world economy and the political and juridical structures that have evolved to support it. It should be seen as no coincidence that individual sanctions emerged on the back of the process of decolonisation or the gradual neoliberalisation of the global economy, as a project that was aimed to restore conditions of profitability. Internally, the further commodification of social relations entailed a

[72] The question attracted considerable scholarly debate in the context of the *Kadi* litigation. See among others, A Sauri, 'The Relationship between Community Law and International Law after Kadi: Did the ECJ Slam the Door on Effective Multilateralism?' in M Happold (eds) *International Law in a Multipolar World* (Abingdon, Routledge, 2011); T Tridimas, 'Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order' (2009) 46 *European Law Review* 103; L van den Herik and N Schrijver, 'Eroding the Primacy of the UN System of Collective Security: the Judgment of the Court of Justice in the Cases of Kadi and Al Barakaat' (2008) 5 *International Organizations Law Review* 329. More references can be found in ch 2. Formally speaking, the EU is not a member of the UN and hence under no obligation to give effect to UNSC resolutions.

[73] P Cocks, 'Towards a Marxist Theory of European Integration' (1980) 34 *International Organizations* 1, 35.

[74] Although 'European capital' is not itself a fully unified bloc.

[75] R Stubbs and GRD Underhill (eds), *Political Economy and the Changing Global Order* (Oxford, Oxford University Press, 2011) 4.

radical transformation of the state and, indeed, of law. At the international level, the consolidation of the global neoliberal order may likewise necessitate new legal arrangements that reflect the changing demands of capital accumulation. The individualisation of sanctions, as well as the changing conceptions of war and peace that they reflect, in other words, should be traced to the specific socio-economic and political conditions of the contemporary moment and to changing imperatives of producing and maintaining capitalist order.

## B. Overcoming 'Myths'

Like any other field of law, individual sanctions operate within several well-established ideas and preconceptions. Indeed, law and legal discourse fulfil important ideological functions, shaping the reality that we inhabit. As a result, tracing the material changes in which the juridification of individual sanctions is embedded requires us to overcome a number of ideas that have shaped the field of international sanctions in general and EU sanctions in particular: the '(smart) sanctions myth', the 'EU myth', and the 'legal myth', all of which are woven into the 'myth of liberal peace'.

### *The (Smart) Sanctions Myth*

The first idea that the book seeks to displace is the 'smart sanctions myth'. As we will see in Chapter 1, the dominant view is that individual sanctions emerged on the international (and European) scene to make sanctions more humane and effective. This, in turn, builds on another assumption, namely that UN sanctions (and the collective system of security more generally) are intended to deliver on common 'public goods'.[76] The two assumptions, moreover, are interlinked. The humanitarian effects of the UN sanctions against Iraq put in jeopardy the post-Second World War Wilsonian conception of sanctions as peaceful alternatives to war.[77] By the end of the 1990s, a number of commentators[78] referred to UN sanctions as 'weapons of mass destruction',[79] a 'genocidal tool'[80] or a form

[76] N Tsagourias and N D White, *Collective Security: Theory, Law and Practice* (Cambridge, Cambridge University Press, 2013) 21.

[77] The idea of 'peaceful sanctions' was introduced by Henry La Fontaine. See U Friedman, 'Smart Sanctions: A Short History' *Foreign Policy* (23 April 2012). Available at: https://foreignpolicy.com/2012/04/23/smart-sanctions-a-short-history/.

[78] See J Farrall, 'Sanctions' in JK Cogan, I Hurd, I Johnstone (eds) *The Oxford Handbook of International Organizations* (Oxford, Oxford University Press, 2016) 617.

[79] D Halliday, 'Iraq and the UN's Weapon of Mass Destruction' (1999) *Current History* 98.

[80] G Simons, *Imposing Economic Sanctions: Legal Remedy or Genocidal Tool?* (London, Pluto Press, 1999); GE Bisharat, 'Sanctions as Genocide' (2001) 11 *Transnational Law and Contemporary Problems* 379.

of 'modern siege warfare'.[81] But the emergence of smart sanctions somewhat served to stabilise the notion that sanctions were ultimately a good thing, working for the common benefit of the international community as a whole.

## *The 'EUropean' Myth*

The second is the 'EU myth', namely the assumption that the EU, and hence by extension EU sanctions, is ultimately a 'force for good'. From the perspective of international law, the legality of sanctions adopted by the EU unilaterally has not been uncontested.[82] For the most part, however, EU sanctions operate within, and feed into, a wider set of discourses about the character of the EU as a civilian, normative, soft or post-modern power.[83] These labels partly describe the means the EU uses in its external action and were developed to account for the EU's lack of military capacity. But they also tend to reflect and project a series of assumptions about the goals and objectives of the EU as a global actor, particularly when compared to the US. This is notwithstanding the influence of the US on the process of European integration and the fact that, in this field at least, their policies are often aligned. On this view, EU sanctions are not imposed to pursue European interests, but to promote global values like democracy or human rights. In more recent years, the discourse of the EU in the field of external relations has begun to shift. In a foreword to the 2016 EU Global Security Strategy, the current High Representative, Federica Mogherini, emphasised that the idea of Europe as 'an exclusively "civilian power" does not do justice to an evolving reality' where 'soft and hard power go hand in hand' and where the promotion of European values needs to be balanced against the EU's own interests.[84] Still, this shift in rhetoric has done little to destabilise the overall perception that the EU marks a decisive break from Europe's imperial past and stands somewhat outside the power structures and relations of the international order.

## *The Legal Myth*

The final is the 'legal myth', according to which law and legal processes are disentangled from questions of power and politics. As has been remarked, juridification is linked to 'basic questions in legal theory, such as what is law, what is a legal order and how developments of law and legal orders may be understood'.[85]

[81] J Gordon, 'Sanctions as Siege Warfare' (*The Nation*, 22 March 1999). Available at: www.thenation.com/article/sanctions-siege-warfare/.

[82] See, eg, PE Dupont, 'Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran' (2012) 17 *Journal of Conflict and Security Law* 31.

[83] See references in ch 9.

[84] For a discussion that EU sanctions do not support a view of the EU as a soft power see J Kreutz, 'Hard Measures by a Soft Power? Sanctions Policy of the European Union. Sanctions Policy of the European Union 1981–2004' (2004) Paper 45 Bonn International Centre for Conversion.

[85] Blichner and Molander (n 24) 37.

Much of the legal analyses of EU sanctions and even UN sanctions tend to be based on positivist conceptions of the law, where law is essentially viewed as a distinct and largely autonomous system of rules. Thus separated from politics, but also from the material conditions of society, the law of sanctions comes to be 'viewed as essentially – rather than contingently – a good thing'.[86]

## *Three Myths or One?*

These myths not only feed into one another, they also converge around what Neocleous calls the 'myth of liberal peace', namely the idea that the fundamental focal dynamic of the state, and the inter-state system, is the maintenance and reproduction of peace.[87] This myth also builds on functionalist premises of international cooperation, international organisations and international law,[88] which are not only seen as a means to pursue common goals but also to guarantee and further peaceful relations.[89] This image of law as a 'pacifying force',[90] as we shall see, is particularly strong in the European context.[91] As a result, a critical examination of individual sanctions and juridification ultimately involves displacing the idea that individual sanctions, whether imposed by the UN or the EU, are fundamentally about building peace and that legal processes are fundamentally concerned with actualising that reality.

The book is not the first work to question some of these myths. Hakimdavar, for example, has called attention to the need for the sanctions debate to 'provide an understanding of the interplay between power, politics, and legal institutions'.[92] In particular, she highlights how legitimation of the status quo is 'key to understanding why sanctions are imposed against Third World states along geographical lines all too often resembling former colonial maps'[93] and how 'the practice of UN sanctions forces us to look at the possibly racist, discriminatory, or at the least unreflective way Western ethics and law operate to perpetuate longstanding patterns of colonial exploitation.'[94] These kinds of observations build on a growing body of research, working broadly from within the post-colonial and Marxist

[86] R Buchanan and S Pahuja, 'Legal Imperialism: Empire's Invisible Hand?' in PA Passavant and J Dean (eds) *Empire's New Clothes: Reading Hardt and Negri* (London, Routledge, 2004) 87.

[87] See ch 7.

[88] M O Hudson, *Progress in International Organisations* (Redwood, CA, Stanford University Press, 1932).

[89] A Peters, 'International Organizations and International Law' in Cogan, Hurd and Johnstone (n 78).

[90] T Krever, 'Ending Impunity? Eliding Political Economy in International Criminal Law' in *Research Handbook on Political Economy and Law* (Cheltenham, Edward Elgar, 2015) 298.

[91] See, eg, P Eleftheriadis, 'The Idea of a European Constitution' (2007) 27 *Oxford Journal of Legal Studies* 1. For a further discussion see ch 9.

[92] G Hakimdavar, *A Strategic Understanding of UN Economic Sanctions: International Relations, Law, and Development* (New York, Routledge, 2014) 10.

[93] ibid.

[94] ibid 10–11.

traditions that have sought to excavate the inter-relationship between international law and imperialism. This work has not only challenged the autonomy or neutrality of law, but also the basic assumption that international law is fundamentally about realising peace between states.[95] Similarly, within political science, there has been a growing interest in critical approaches to European integration.[96] Still, these various myths have never been examined alongside one another, opening the kind of debate that Hakimdavar has in mind whether in relation to UN sanctions or EU sanctions.

That task is not necessarily straightforward. In the context of international criminal law (ICL), Tallgren notes that an 'important particularity of being critical of ICL is the challenge of swimming in counter-flow to what is currently considered among the noblest goals to fight for'. After all, she continues, 'being critical of ICL differs from being critical of the role of multinational corporations in global liberalism or the nuclear arms race'.[97] This is only partially true of individual sanctions. To the extent that individual sanctions have been integrated in the global War on Terror and have redefined national criminal justice systems, for example, they have (rightly) attracted considerable criticism. But in other respects, the foundational myths on which the law and practice of EU sanctions are based are much harder to destabilise. The book takes a first step in this direction on the premise that an understanding of how the unequal character of the global order is produced and sustained needs to include an appreciation of the totality of techniques through which capitalist order is created and capitalist disorder managed. There is indeed no reason to assume that individual sanctions, whether deployed by the EU to give effect to UNSC resolutions or of its own initiative, are not part of these processes.

## III. Structure: Form, Content, Context

The book is divided into three parts, each with an introduction that includes a more elaborate outline of the different chapters. The order is neither chronological nor purely thematic. Instead, each part covers roughly similar terrain. But they differ in several important respects. Each part takes as its starting point a different interpretation of the individual sanctions phenomenon and the underlying structural changes in which it is embedded. This is done by bringing into focus

[95] See one of the founding texts A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, Cambridge University Press, 2005).

[96] For an overview, see I Manners, 'Another Europe is Possible: Critical Perspectives on European Union Politics' in KN Jørgensen, M Pollack and B Rosamond (eds), *Handbook of European Union Politics* (London, SAGE Publications Ltd, 2007).

[97] I Tallgren, 'Who are "We" in International Criminal Law? On Critics and Membership' in C Schwöbel (eds), *Critical Approaches to International Criminal Law: An Introduction* (New York, Routledge, 2014) 75.

different dimensions of individual sanctions: Part I focuses on the (individualised) form of sanctions; Part II examines their substantive content; and Part III engages with the context and politics of individual sanctions. Each of these perspectives in turn brings to light different facets and produces different understandings of the juridification phenomenon. As a result, each part offers different explanations for the characteristics of juridification at the EU level when compared to the international level. And each part also ultimately produces different takes on more recent tendencies towards de-juridification and legal transformation.

## A. Part I: The Form of Sanctions: Juridification and Individualisation

Part I begins the analysis of individual sanctions and juridification with conventional explanations for the emergence of individual sanctions, namely that these were designed to make sanctions more humane and effective. It explores the effect of this consensus on our understanding of the individual sanctions phenomenon. Part I focuses on the legal form of sanctions, because, it is argued, these explanations place the emphasis primarily, if not only, on the formal target of sanctions. That is to say that, under this view, the significance of individual sanctions is primarily that sanctions now target named individuals rather than states.

Part I explores how this emphasis on the form of sanctions is reflected in the law and how this, in turn, has shaped interpretations of the main causes and dynamics of juridification. Although there is no comprehensive study of the juridification of individual sanctions in the EU as such, Part I argues that the emphasis on the legal form of sanctions tends to produce a particular positive reading of juridification as a process concerned with the increased visibility of the individual in a field that was originally dominated by states. As van den Herik puts it: 'traditional procedures and accountability mechanisms that controlled the comprehensive sanctions against states were overall political and diplomatic in nature and not considered fit for the new sanctions paradigm which had the individual rather than the state as its core focus'.[98] From that perspective, the shift to law would be more pronounced in the EU largely because of its supranational form and the place of the individual in the EU's legal and institutional structures.

## B. Part II: The Content of Sanctions: Juridification and Reconfiguration

Part II builds on the observation that individual sanctions were first imposed against UNITA before a clear consensus crystallised about the perceived deficiencies of

[98] L van den Herik, 'Peripheral Hegemony in the Quest to Ensure Security Council Accountability for Its Individualized UN Sanctions Regimes' (2014) 19 *Journal of Conflict and Security Law* 427, 428.

state sanctions. This suggests that individual sanctions cannot have appeared on the international level merely to make sanctions more humane and effective and that a different explanation is instead required. Part II lays down the ground for an alternative reading of individual sanctions to become possible by exploring the substantive changes in which this supposedly smarter form of coercion are embedded. This requires paying attention not only to the legal form of sanctions but also to their legal content. How, in particular, are we to understand the increased diversity of objectives that sanctions seek to pursue and the range of individuals and entities that they target?

I use the term 'reconfiguration' to describe these changes. The notion of reconfiguration gives a thicker conceptual frame to the inter-relationship between the form and content of sanctions (ie between the trends of individualisation and diversification). It sees the two as inexorably linked. Reconfiguration, in that sense, denotes the unity between the individualised form of sanctions and their changing content. It embodies the idea of individualisation *as* reconfiguration. The notion of reconfiguration, however, also denotes the fact that these changes do not necessarily entail a radical transformation of UN sanctions or EU sanctions, as these were traditionally conceived and defined, but their reconstitution in contradictory formations.

The core idea that runs through the three chapters is that individual sanctions not only involve a change in the formal target of sanctions, but also reflect changing conceptions of war, peace and security. Changes to the sanctions landscape, however, do not reflect a blurring so much as a reconstitution of the divide between war and peace. As we will see, individual sanctions shifted sanctions towards a paradigm of law enforcement, but also reintroduced various elements that are reminiscent of a warfare paradigm. In that sense, the blacklisted is a polyvalent ambiguous figure: sometimes a lawbreaker, sometimes an enemy, often somewhere in between. Part II explores how these different elements of sanctions are reflected into the law and how they complicate our understanding of juridification: the juridical modalities that that they require, the contradictions that they create, and the legal transformations that they are prompting. In doing so, it pays attention to the way in which EU law specifically mediates the socio-political content of the law, as a way of explaining the specificity of the juridification process that we observe at the European level.

## C. Part III: The Context of Sanctions: Juridification and Pacification

Part III, finally, begins to theorise this reconfiguration and juridification of UN and EU sanctions, by placing them in their wider socio-economic and political context. This entails moving beyond the level of ideas, rooting changes to the sanctions landscape (and the changing conceptions of peace, war and security

that they reflect) in socio-economic and political changes. The inquiry is pursued through the notion of policing and 'pacification', understood in the sense developed by critical sociologists,[99] namely as the ensemble of practices and processes, including legal processes, that are implicated in the fabrication of capitalism, not as a thing, but as an economic and socio-political order. Pacification enables us to root the reconfiguration and juridification of sanctions in material changes, including, for example, the neoliberalisation of the economy. But it also allows us to overcome the foundational myth of liberal peace and read the aim of (capitalist) order building into the aims of the collective system of security and the EU's CFSP. To the extent that individual sanctions are deployed in furtherance of various objectives that are ultimately designed to restore or promote peace, in other words, they cannot be divorced from the maintenance and construction of the socio-economic order of society.

Against this background, Part III seeks to unpack what this emphasis on capitalist (dis)order might tell us about changes to the sanctions landscape and how it might help explain various characteristics of juridification. Viewed from that perspective, it is argued, the changing form and content of modern sanctions and their oscillation between a paradigm of war and a paradigm of law enforcement must be linked to their character as tools for the policing of the capitalist order. Part III explores further what the implications are for our understanding of juridification in the EU, which must be taken as a specific expression of the relationship between law and capitalist order in the EU.

******

In a way, the three Parts examine quite different dimensions of individual sanctions and might therefore appeal to different audiences. Those interested in legal doctrine, for example, might want to focus on Part I, which analyses the evolution of EU law in the specific area of individual sanctions. Part II will appeal to those interested in how legal developments in the field of sanctions fit in longer-term changes to our conception of war, peace and security. Part III, by contrast, will be of particular interest to those engaged in critical approaches to international law (and EU law), including Third World Approaches to International Law (TWAIL) and Marxist theories, both of which have been deployed to unearth the connections, past and present, between international law, imperialism and capitalism.

At the same time, the three parts can only really be read alongside one another. Far from offering three separate narratives, they build up to a richer explanation of the structural changes in which the juridification of individual is embedded. A chronological account constructed around the idea that changes to the sanctions landscape can be explained by the role of sanctions in the management and

[99] M Neocleous, G Rigakos and T Wall, 'On Pacification: Introduction to the Special Issue' (2013) 9 *Socialist Studies* 1.

building of the global capitalist order may have proved easier to navigate. But, particularly given the general outlook of the field, the argument unfolds through an engagement with existing scholarship and ways of seeing. The book works from the bottom-up, trying to identify contradictions and limitations in how changes to the sanctions landscape have been apprehended. Its conclusion that the law and practice of individual sanctions much be seen through the lenses of pacification, policing and capitalist order is thus rooted not only on their explanatory power, but on the inadequacy of other conceptual frames to make sense of the complexity and contradictions of the field. Capitalism is an inherently unstable and contradictory system of social organisation and this will be necessarily mirrored in contemporary security practices and laws.[100] The conclusion aims to remedy any difficulties caused by the structure by pulling the core elements of the argument back together.

[100] M Neocleous, 'A Brighter and Nicer New Life': Security as Pacification' (2011) 20 *Social & Legal Studies* 191.