Council of the European Union
General Secretariat

Brussels, 13 July 2022

WK 10275/2022 INIT

LIMITE

COJUR

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

INFORMATION

From:	Presidency
To:	Working Party on Public International Law
Subject:	Informal COJUR, Prague, 15 July 2022 - paper on third party countermeasures

Dear Colleagues,

Please find attached a research paper, prepared by the EEAS, on third party countermeasures under international law. (The document should be presented under agenda item 3 of the informal meeting of COJUR WP in Prague.)

Best regards,

Czech Presidency Team

EUROPEAN EXTERNAL ACTION SERVICE

Third Party Countermeasures under International Law

A. Introduction

Triggered by a reflection paper from the French Presidency[1], the question of countermeasures under international law triggered a broad debate in COJUR of 9 June 2022. Against the background of the Russian invasion of Ukraine, delegations felt the need to clarify in how the concept has evolved over time and asked the EEAS for input.

In the present paper, the EEAS starts from the generally accepted assessment that Russia's use of force was an act of aggression[2]. It breached a peremptory norm of international law (*ius cogens*) from which no derogation is permitted. The obligation not to use force is not only owed towards Ukraine, but towards the international community as a whole (*erga omnes*) and all States have legal interest in the protection of that rule. However, it is less clear, how non-directly affected States, such as EU Member States and the EU itself may react towards these breaches.

Some reactions may be qualified as retorsions, i.e. "unfriendly" acts not interfering with the responsible State's rights. Other reactions may infringe on certain treaty or customary law obligations owed to Russia, and hence require either justification under the applicable treaty regime itself or under general international law (including the law of treaties and the law of State responsibility).

We therefore present first a summary of the different European responses to the Russian invasion and present how they relate to international law (under **A.**). Second, we dwell on the ILC-Articles on countermeasures and pertinent recent State practice (**B.**), before offering our thoughts how such practice may have influenced customary international law on countermeasures (under **C.**). A conclusion (under **D.**) is supposed to guide further debate between Member States.

---

1 WK 8174/2022 INIT, COJUR, of 7 June 2022.

2 United Nations General Assembly Resolution ES-11/1, '*Aggression against Ukraine*', adopted on 2 March 2022, para. 2.

B. EU practice

In the aftermath of the Russian invasion of Ukraine, the EU and its Member States responded with an unprecedented set of action in support of Ukraine and sanctions against Russia. While they respond to an imperative political need, they also need to be in line with the EU's treaty obligations and customary international law, which is binding on the Union[3]. This chapter will briefly examine to what extent they require justification under international law.

I. Military Assistance – European Peace Facility

On 28 February, 23 March, 13 April and 23 May, the Council adopted four successive decisions under the European Peace Facility on the delivery of lethal weapons[4] and other assistance[5] to the Ukrainian army. Under this scheme the EU will reimburse up to 2 billion € of costs for the delivery of heavy weapons and other material by Member States.

From the *ius ad bellum* point of view, such action falls within the range of allowed military cooperation between States. As Ukraine did not launch an armed attack on Russian territory and did not invoke its right to self-defence under Article 51 UN-Charter, there is also no need to invoke collective self-defence.

A different matter arises under the *ius in bello*. Since the adoption of The Hague Conventions in 1907[6] international humanitarian law has evolved. While the supply of war material is prohibited under the strict reading of Article 6 of Hague XIII, it is of importance that the aggressor State, Russia, prevents the Chapter VII enforcement mechanism from functioning by exercising its veto in the UN Security Council. In such a situation, neutral States (or international organisations) cannot be obliged to observe a strict impartiality, in particular there should be flexibility as regards supplying military materials directly or indirectly to the victim belligerent power.

According to NATO Secretary-General Stoltenberg non-forcible responses should ensure that the helping states do not become co-belligerents themselves.[7] Despite some initial hesitation

---

3 Article 3 (5) and 21 (1) TEU; ECJ, Case C-162/96 Racke (1998), ECR I-3688, paras. 45-46.

4 For the latest decision see Council Decision (CFSP) 2022/809 of 23 May 2022, OJ 2022, L 145/40, amending the three previous decisions.

5 For the latest decision see Council Decision (CFSP) 2022/810 of 23 May 2022, OJ 2022, L 145/42.

6 See, in particular Article 6 of the Convention concerning the Rights and Duties of Neutral Powers in Naval War. The Hague, 18 October 1907 (Hague XIII); as well as Articles 5, 9 and 10 of the Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague, 18 October 1907 (Hague V).

7 NATO Secretary General Jens Stoltenberg, 24 March 2022, Doorstep statement at the start of the extraordinary Summit of NATO Heads of State and Government, available at: https://www.nato.int/cps/en/natohq/opinions_193611.htm.

whether training Ukrainian soldiers on new weapons might cross the line[8], legal scholars mostly reject this view as unfounded[9]. States would become parties to the international armed conflict between Russia and Ukraine only if they resort to armed force against Russia, for example by[10]:

> (1) Any direct military engagement in hostilities in a collective manner, i.e. as a result of a decision taken by the organs of the State;
>
> (2) Any indirect military engagement that would consist of taking part in the planning and supervision of military operations of another State; or
>
> (3) Making available its own military bases to allow foreign troops to enter the territory of the State in conflict (hypothesis of Belarus), or making available its air bases to allow planes to take off to bomb troops on that territory, or implementing a no-fly zone.

As this is not the case, questions of compliance with IHL by the EU or its Member States do not arise either for the time being.

II. Economic Sanctions – Embargos and transit restrictions

So far the Council adopted six packages of restrictive measures ("sanctions"), based on Article 29 TEU (Council Decisions) and Article 215 TFEU (Council Regulations). Sanctions may provide "for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries" (Article 215 para. 1 TFEU). Leaving aside the Russian rhetoric that economic sanctions would be "akin to an act of war"[11], they generally do not pose questions under international law as there is no general duty to entertain economic or financial relations with Russia. Similarly, the longstanding practice of the General Assembly to complain against "unilateral economic coercion against developing countries" is

---

8 See e.g. the opinion of the scientific service to the German Parliament (Wissenschaftlicher Dienst des Deutschen Bundestags), *Rechtsfragen der militärischen Unterstützung der Ukraine durch NATO-Staaten zwischen Neutralität und Konfliktteilnahme*, WD 2 - 3000 - 019/22, published 16 March 2022, p. 6: „*One would only leave the safe area of non-belligerency, when besides the supply of arms, also the instruction or training to use those arms of one of the conflict parties were in question").*

9 Oona Hathaway/Scott Shapiro, *Supplying Arms to Ukraine is Not an Act of War* in Lawfare, 12 March 2022, https://www.lawfareblog.com/supplying-arms-ukraine-not-act-war; Stefan Talmon, *Kriegspartei oder nicht Kriegspartei? Das ist nicht die Frage* in VerfBlog, 4 May 2022, https://verfassungsblog.de/kriegspartei-oder-nicht-kriegspartei-das-ist-nicht-die-frage/, DOI: 10.17176/20220505-062322-0; and Michael N. Schmitt, *Providing Arms and Materiel to Ukraine: Neutrality, Co-belligerency, and the Use of Force*, 7 March 2022, available at: https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/.

10 Julia Grignon, *« Co-belligerency » or when does a State become a party to an armed conflict?*, 6 May 2022, available at: https://www.irsem.fr/media/sb-39-grignon-cobelligerency.pdf.

11 Luke Harding, *Defiant Putin warns the west: your sanctions are akin to an act of war*, 5 March 2022 in The Guardian, https://www.theguardian.com/world/2022/mar/05/defiant-putin-warns-the-west-your-sanctions-are-akin-to-an-act-of-war.

not pertinent, as Russia is not a developing country[12] and the threshold of "coercion"[13] is not automatically surpassed by an embargo[14]. Rather, as argued by the Commission in its recent proposal on the protection of the Union and its Member States from economic coercion by third countries, several cumulative criteria need to be fulfilled before qualifying economic pressure as coercion[15].

The situation changes, however, if certain treaty commitments are touched upon.

In that respect, three aspects of the EU's economic sanctions need further scrutiny. First, the EU imposed an embargo on Russia in relation to, amongst others, coal and other solid fuels, on 8 April. It justified this sanction as follows: "[i]*n view of the gravity of the situation, and in response to Russia's military aggression against Ukraine, it is appropriate to introduce further restrictive measure."*[16] In the sixth package, the EU extended the embargo to cover oil products[17]. Accordingly, such products cannot enter into the Union market anymore. Second, sanctioned goods can also not cross the transit route from Kaliningrad (via

---

12 Following GA Resolution 68/200 the UN-Secretary General prepared a report on "unilateral economic measures as a means of economic and political coercion against developing countries (A/70/172) of 16 July 2015. Only 20 UN Member States participated in the survey. From the EU, Latvia stated: "Latvia does not agree with the imposition of unilateral economic measures as instruments of political and economic coercion against developing countries"; and criticised the Russian food embargo against the European Union from 2012-2014, which also affected Latvia.

13 According to the ICJ, *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. USA)*, Judgment of 27 June 1986, ICJ Reports 1986, pp. 14-150, at para. 205: "the element of coercion defines, and indeed forms the very essence of, prohibited intervention".

14 See ICJ, *Nicaragua* (note 13), at paras. 244-245; ILC, Draft Articles on the responsibility of States for internationally wrongful acts, YBILC 1991 (2) Part Two, Commentary on Chapter Two (Countermeasures), point (3), at p. 128: "Acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes.

15 COM(2021) 775 final of 8.12.2021, pp. 14.15: Article 2 of the proposed regulation lists five criteria and Recital 11 explains: "Coercion is prohibited under international law when a country deploys measures such as trade or investment restrictions in order to obtain from another country an action or inaction which that country is not internationally obliged to perform and which falls within its sovereignty, when the coercion reaches a certain qualitative or quantitative threshold, depending on both the ends pursued and the means deployed. The Commission should examine the third-country action on the basis of qualitative and quantitative criteria that help in determining whether the third country interferes in the legitimate sovereign choices of the Union or a Member State and whether its action constitutes economic coercion which requires a Union response."

16 Council Regulation (EU) 2022/576 of 8 April 2022, amending Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, preamble para. 6, (OJ L 111 of 8.4.2022 p. 1).

17 Council Decision (CFSP) 2022/884 of 3 June 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 153/128 of 3.6.2022 p.128) and Council Regulation (EU) 2022/879 of 3 June 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 153 of 3.6.2022, p.53).

Lithuania) to other parts of Russia anymore. Third, the EU has imposed a couple of export restrictions towards Russia. They concern arms, dual-use goods and goods and technology which might contribute to Russia's military and technological enhancement, or the development of the defence and security sector[18].

These measures raise questions under the GATT and the EU-Russia Partnership and Cooperation Agreement.

1. GATT

Prima facie, the three quoted EU restrictions violate Articles XI GATT (import and export embargoes are the most severe form of a quantitative restriction) and Article V GATT (freedom of transit). However, they are justified under Article XXI GATT, which reads:

> Article XXI - Security Exceptions
>
> *Nothing in this Agreement shall be construed*
>
> […] *(b) to prevent any contracting party from* ***taking any action*** *which it considers necessary for the protection* ***of its essential security interests***
>
> […] *(iii) taken* ***in time of war*** *or* ***other emergency in international relations****; or*
>
> *(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*[19] [emphasis added]

On April 5, 2019, a WTO panel issued a landmark ruling in a dispute between Russia and Ukraine in which it affirmed its jurisdiction over Article XXI GATT. In that case, Russia had invoked the exception to justify measures that blocked trade between Ukraine, Kazakhstan, and the Kyrgyz Republic that transited through Russia. Russia had claimed it had adopted those measures in response to escalating events in Ukraine after political turmoil there in 2014.

Russia and the United States emphasized the phrase that the WTO agreements should not prevent any member "from taking actions which ***it*** considers necessary for the protection of its essential security interests." According to them, the wording "it considers necessary" makes clear that only the member invoking the national security exception can determine whether the measure taken is in its own national security interests ("self-judging norm"). The US also argued that judgment by another body of what is in the U.S. national security interest or

---

18 Articles 2, 3 and 3a of Council Decision (CFSP) 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (consolidated version of 4 June 2022) and Articles 2 and 2a of Council Regulation (EU) No. 883/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (consolidated version of 4 June 2022).

19 Article XXI, GATT.

whether a measure is necessary to protect U.S. national security would be an inappropriate breach of national sovereignty[20].

The WTO panel rejected the Russian (and US) arguments. It determined that actions taken under Article XXI(b) GATT are reviewable, as the discretion of a Member to define its essential security interest is limited to circumstances that objectively fall within the scope of the three subparagraphs of Article XXI(b)[21]. Turning to the latter, it affirmed that there was (at least) an emergency in international relations and a link to the measures. Russia had therefore met the requirements for invoking Article XXI(b)(iii) in relation to the measures at issue. Accordingly, the Russian transit bans and restrictions were covered by Article XXI(b)(iii) of the GATT 1994.

If follows that the security exception can be invoked in a time of war or emergency in international relations to justify measures that have a plausible connection to the national security interest cited by the respondent in a dispute.

This test is met here: The EU import embargoes and transit restrictions are taken in a situation of war or international emergency; they also protect an essential security interest of the EU as they are designed to stop the Russian aggression against Ukraine, which breaches a *jus cogens* norm and destabilises the security situation on the entire continent.

This view is shared by the EU's main trading partners. On March 15, 2022, a group of States said: "*We will take any actions, as WTO members, that we each consider necessary to protect our essential security interests. These may include actions in support of Ukraine, or actions to suspend concessions or other obligations with respect to the Russian Federation, such as the suspension of most-favoured-nation treatment to products and services of the Russian Federation*."[22]

On the same day, Russia protested[23], arguing that the WTO does not provide for the ability to suspend its membership rights or to expel it from the WTO. Second, Russia called the withdrawal of MFN treatment for Russian goods and services "unilateral" and "unjustified," and stated that it violates the WTO principle of non-discrimination. However, it did not start any dispute settlement procedure so far.

---

20 William Reinsch, *The WTO's First Ruling on National Security: What Does It Mean for the United States?* in Center for Strategic & International Studies, 5 April 2019, https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states.

21 WTO Report of the Panel, 5 April 2019, '*Russia – Measures concerning Traffic in Transit'*, WT/DS512/R, p. 50, paras 7.53-7.101.

22 Joint Statement on Aggression by the Russian Federation against Ukraine with the support of Belarus; Communication from Albania, Australia, Canada, European Union, Iceland, Japan, Republic of Korea, Republic of Moldova, Montenegro, New Zealand, North Macedonia, Norway, United Kingdom, and United States of 15 March 2022. WTO General Council Document WT/GC 244.

23 *US and Multilateral Russia-related Trade Policy and Import Restrictions*, Akin Gump, 22 March 2022, https://www.akingump.com/en/news-insights/us-and-multilateral-russia-related-trade-policy-and-import-restrictions.html.

2. EU-Russia Partnership Agreement

A similar line of reasoning can also be applied under the EU-Russia Partnership and Cooperation Agreement of 1994[24]. Any violation of Articles 10 (quantitative restrictions) or Article 12 (freedom of transit) of the PCA is justified by Article 99 (1) PCA (national security). Article 99 reads:

> *'Nothing in this Agreement shall prevent a Party from taking any measures:*
>
> *(1) which it considers necessary for the protection of its **essential security interests**:*
>
> *[...]*
>
> *(d) in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security;'*

The European Court of Justice has already pronounced on the relationship between EU sanctions (taken in response of the Russian annexation of Crimea and Russian action in eastern Ukraine) and that provision. In the Rosneft case it found that the adoption of restrictive measures by the Council "*was necessary for the protection of essential European Union security interests and for the maintenance of peace and international security, within the meaning of Article 99 of the EU-Russia Partnership Agreement*".[25]

Both the 2014 and the present EU sanctions are a reaction to a severe Russian breach of international law, which created an emergency in international relations. They serve the protection of the EU's essential security interests among which figures the maintenance of peace and security in its vicinity. Therefore, the EU can also invoke Article 99 PCA in the present context.

Russia is entitled to bring "any dispute relating to the application or interpretation" of the agreement to the Cooperation Council under Article 101 PCA and initiate a conciliation procedure. However, as this Council did not meet since 2001, that scenario seems unlikely.

III. Financial Sanctions – Restrictions on the Russian Central Bank

On 28 February 2022, the EU enacted a prohibition of transactions with assets of the Central Bank of Russia as part of its sectoral sanctions, effectively freezing their assets deposited in Member States until August 2022:

---

[24] The Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, signed in Corfu on 24 June 1994 and approved in the name of the European Communities by Council and Commission Decision 97/800/ECSC, EC, Euratom of 30 October 1997 (OJ 1997 L 327, p. 1).

[25] ECJ judgment in case C-72/15, *Rosneft* [ECLI:EU:C:2017:236], paras. 113-116.

"*Transactions related to the management of reserves as well as of assets of the Central Bank of Russia, including transactions with any legal person, entity or body acting on behalf of, or at the direction of, the Central Bank of Russia, are prohibited.*"[26]

According to the Russian constitution, the Russian Central Bank is an independent entity with the primary responsibility of protecting the stability of the national currency. The question therefore arises whether rules of State immunity may play a role.

Under general international law, States enjoy prescriptive, adjudication and enforcement jurisdiction. The former includes the power to legislate with respect to its territory (territorial principle), and to its nationals (nationality principle). States may also regulate situations in order to protect essential security interests (protective principle) or universal values (universal jurisdiction). Within the realm of these accepted boundaries of jurisdiction, States may regulate also the behaviour of other States and impose obligations on their citizens how to deal (or refrain from dealing) with other State organs. Accordingly, the above legislative prescription to impose temporary obligations on the management of assets of the Russian Central Bank in EU Member States are in line with international law.

Turning to adjudication and enforcement jurisdiction, international rules on immunity need to be complied with. These are laid down in the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property ('UN Immunity Convention'), which is not yet in force but increasingly agreed upon to reflect customary international law.[27]

Under Article 2 (1) of the UN Immunity Convention, immunity does not only refer to state organs. Rather, Article 2(1)(b)(iii) of the Convention includes the agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State. This definition covers a central bank of a State, even if it may engage in commercial conduct[28]. Accordingly, the property of the Russian Central Bank is covered by its rules. Under Article 5, a State enjoys immunity for its property before foreign courts as a general principle ("jurisdictional immunity"). However, Article 12 stipulates that State immunity cannot be invoked in cases of personal injuries and damage to property occurring on the territory of the other State. That means Russia cannot invoke State immunity in cases of claims against Russia for the

---

26 Article 1(1) of Council Decision (CFSP) 2022/335 of 28 February 2022, amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine and Article 5a(4) of Regulation 833/2014, (OJ L 57 of 28.2.2022, p.4).

27 See inter alia Lord Bingham in *Jones v. Ministry of Interior of Saudi Arabia* [2006] UKHL 26; [2007] 1 AC 270, at 26: "Despite its embryonic status, this Convention is the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases"; Lord Hoffmann (ibid at 47) saw the 2004 Convention as a codification of the law of state immunity; this was also the opinion of Advocate General Szupnar, Case C-641/18, *LG and Others v Rina SpA and Ente Registro Italiano Navale*, Opinion of, 14 January 2020, para. 38.

28 Ingrid Wuerth, *Immunity from Execution: Central Bank Assets* in Tom Ruys/Nicolas Angelet (ed.), Cambridge Handbook on Immunities and International Law, 2019, p. 278.

destruction of Ukrainian property and the loss of Ukrainian life since 24 February 2022 before Ukrainian courts, with the possible exception of damage arising from cross-border shootings[29].

Under Article 19 of the UN Immunity Convention, "enforcement immunity" (also referred to as immunity from execution) does not contain similar exceptions. Accordingly, no post-judgment measures of constraint, arrest or execution may be taken against property of another State, unless it is used for commercial purposes (Article 19 (c)). However, with respect to central bank assets Article 21 (1) (c) of the Convention clarifies that they do not fall within the remit of this exception. It can hence be concluded that the assets of a central bank enjoy an absolute enforcement immunity under the UN Immunity Convention from judicial and post-judicial measures.[30].

When it comes to enforcement immunity, it is controversial to what extent the measure needs to be linked to a judicial proceeding. Drawing from the concept of sovereign equality, some scholars argue that immunity from execution comprises any kind of measure of constraint, such as administrative or legislative measures.[31] Therefore, the freezing of central bank assets would infringe *per se* State immunity.

However, this broad understanding of enforcement immunity is not justified under the UN Immunity Convention and customary international law. Based on the wording of Art. 19, the scope of application is limited to measures taken in connection with a proceeding before a court.[32] The judgment of the ICJ in the case of Iran vs. the US concerning certain Iranian assets cannot, unlike some scholars argue, be referred to as an example of the infringement of immunity by freezing assets.[33] The ICJ's decision had a direct link to a judicial proceeding.[34]

---

29 Compare the ILC Commentary to the Draft Articles on the UN Convention, Yearbook of the ILC 1991 II (Part Two), Article 12, p. 45, para. 7: "It is also clear that cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of an armed conflict are excluded from the areas covered by article 12."

30 Ingrid Wuerth (note 28), p. 269.

31 See, e.g., Jean-Marc Thouvenin/Victor Grandaubert, *Material Scope of State Immunity from Execution* in Tom Ruys/Nicolas Angelet (ed.), Cambridge Handbook on Immunities and International Law, 2019, p. 247: arguing in the same direction using the example of EU sanctions against the Iranian central bank P.-E. Dupont, Countermeasures and Collective Security, The Case of EU Sanctions Against Iran, Journal of Conflict and Security Law, 17 (2012), pp. 301-336 (manuscript online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2086415; pp. 1- 35, at p. 14): Martin Dawidowicz, Third Party Countermeasures in International Law, 2017, mentions the asset freezes of central banks as examples for countermeasures (pp. 112-113) and applies this notion in the cases of Libya and Syria pp. 220; 222-223.

32 See also ILC Commentary to the Draft Articles on the UN Convention, Yearbook of the ILC 1991 II (Part Two), Article 18, para 1, "Article 18 concerns immunity from measures of constraint only to the extent that they are linked to a judicial proceeding".

33 See for example Jean-Marc Thouvenin/Victor Grandaubert (note 31), p. 251.

34 Ingrid Wuerth, *Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?* in Lawfare, 07 March 22, www.lawfareblog.com/does-foreign-sovereign-immunity-apply-sanctions-central-banks.

Furthermore Art. 5i of the EU Regulation 2022/345[35], which inter alia prohibits to "sell, supply, transfer or export" banknotes to the Central Bank of Russia, does not subject central bank assets to attachment or execution. Based upon the underlying convincing narrow understanding of the term execution, immunity does not apply to administrative or legislative measures.[36] Freezing assets of the central bank in Russia did therefore not infringe any immunity rule and does not have to be justified as a countermeasure.

IV. Targeted sanctions – Freezing of Assets

Under Article 215 (2) TFEU, the EU also regularly targets "natural or legal persons and groups or non-State entities". They are prohibited from using their funds as a temporary and preventive measure ("freezing"). On 10 March 2022, the EU extended existing restrictive measures first enacted on 17 March 2014 and prolonged on 10 September 2021 both in time until 15 September 2022. They cover now over 1000 individuals and more than 50 entities.

Such action interferes with the right to property of private and legal persons, protected under the European Charter on Fundamental Rights and Article 1 of the First Additional Protocol to the ECHR. However, such interference may be justified by overriding public interests. In the *Bosphorus* case (the impounding of an aircraft by Irish authorities in application of EC Regulation 990/93/EC), the ECJ held

> *'25. It is in the light of those circumstances that the aim pursued by the sanctions assumes especial importance, which is, in particular, in terms of Regulation No 990/93 and more especially the eighth recital in the preamble thereto, to dissuade the Federal Republic of Yugoslavia from 'further violating the integrity and security of the Republic of Bosnia-Herzegovina and to induce the Bosnian Serb party to cooperate in the restoration of peace in this Republic.*
>
> *'26. As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate*.'[37]

The applicant later brought the case against Ireland to the European Court of Human Rights ('ECtHR'). The Strasburg Court noted that Ireland implemented EU law. As the EU provided

---

35 Article 5(i) of Council Regulation (EU) 2022/345 of 1 March 2022, amending Regulation No. 833/2014/EU concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 63/1 of 2.3.2022).

36 See Tom Ruys, *Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions,* in Tom Ruys/Nicolas Angelet (ed.), Cambridge Handbook on Immunities and International Law, 2019, p. 685.

37 Case C-84/95, Bosphorus, [1996] ECR I-3953, paras. 25, 26.

an 'equivalent protection' in its legal order, there was a presumption that Ireland did not violate its obligations under Art. 1 of the First Additional Protocol and the case was dismissed.[38]

At the same time, implementing UN sanctions does not absolve the EU from complying with its due process obligations. Targeted persons therefore must be heard and receive a proper statement of reasons so that both the ECJ and the ECtHR can review targeted sanctions.[39]

Since then, the Court has repeated such reasoning also with respect to EU autonomous sanctions.[40] It can be concluded, that human rights law in Europe is unlikely to impede temporary targeted sanctions as a reaction to massive violations of international law, as long as due process rights of the targeted persons[41] are observed.

V. Criminal sanctions – Seizing of Assets

The situation is different when it comes to expropriations, which would serve the reconstruction of Ukraine. Even though expropriations can be lawful when they fulfil a public purpose, are non-discriminatory and are carried out under a due process, they normally require prompt, adequate and effective compensation at market rate under the European Convention on Human Rights[42].

The same is true under international investment rules[43]. While Russia stopped its provisional application of the Energy Treaty Charter in August 2009 and cannot avail itself of Article 13 thereof anymore[44], the legal basis for Russian compensation claims can still be found in

---

38 ECtHR, *Bosphorus v. Ireland*, 30.6.2005, application no. 45036/98.

39 See for the ECJ: Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, '*Kadi I'*, CJEU Judgment 3 September 2008, paras. 321-322; Joined cases C-584/10 P, C-593/10 P and C-595/10 *P European Commission and Council of the European Union v Yassin Abdullah Kadi*, '*Kadi II*', CJEU Judgment 18 July 2013, . 133-134; see for the ECtHR: *Al-Dulimi and Montana Management Inc v Switzerland* App no 5809/08, ECtHR Judgment 26 November 2013.

40 See *inter alia*: T-160/13 *Bank Mellat* / Council, Judgment of 2 June 2016 (cf. 231-240); T-715/14 *NK Rosneft* e.a. / Council, Judgement of 13 September 2018 (cf. p. 133); T-286/18 *Azarov* / Council, Judgement of 11 September 2019 (cf. 58-62) ; C-58/19 P *Azarov* / Council, Order of 22 October 2019 (cf. 28-32, 36-38, 42, 43); T-286/19 *Azarov* / Council, Judgement of 16 December 2020.

41 In C-872/19 P, Venezuela, judgment of 22 June 2021, the ECJ also allowed a third State itself to challenge EU targeted measures in specific circumstances.

42 See the judgment of the ECtHR of 13 July 2021 in cases *Todorov and others v Bulgaria* (applications nos. 50705/11 and 6 others), pp 179-199 and the case law referred to therein.

43 See K. Nadakavukaren Schefer, International Investment Law, 2nd ed. 2016, pp. 190 et seq.

44 Under Article 47 (3) ECT, the protections offered under the Energy Charter continue to apply for 20 years after a withdrawal of a State from the Charter. Since the ECT never entered into force for the Russian Federation and there was never a withdrawal from the ECT, its conditions are not met to invoke the Charter. For the pending Yukos dispute on pre-2009 investments see *Supreme Court quashes Court of Appeal's Judgement in arbitration case Yukos*, 5 November 2021, Hogeraad, https://www.hogeraad.nl/actueel/nieuwsoverzicht/2021/november/supreme-court-quashes-court-appeal-judgement-arbitration-case-yukos/.

customary international law (law of aliens) or specific guarantees stemming from bilateral investment treaties with Russia or from. Russia currently has 62 bilateral investment treaties in force,[45] including 27 bilateral investment treaties with so-called *unfriendly* States.[46]

Moreover, EU sanctions under Article 215 TFEU cannot be definitive and repressive[47]. Finally, expropriation without compensation could also backfire, as assets of EU persons and companies in Russia might be exposed to similar treatment. Against that background, the EU has not adopted any sanction decision to seize assets of targeted persons.

However, the EU explored the option to broaden the scope for asset forfeiture as a result of a criminal conviction, including for cases of corporate criminal activities[48]. If a targeted person commits a punishable offence, a trial judge can order the seizer of his assets. Against that background, the Commission proposed to make the violation of EU sanctions a "Euro-crime" under Article 83 (1) TFEU[49]. Once the proposed Council decision is adopted, the EU legislator could then enact an EU Directive with more concrete elements, under which circumstances the violation of EU sanctions should be criminalized under national law. In the meantime, a couple of Member States may already use their criminal law to start cases against EU-sanctions offenders with the aim to turn frozen assets into forfeited assets. Moreover, the EU is likely to introduce into its sanctions regimes also an obligation of targeted persons to report about their assets. Like in German law, a failure to do so could then also become a criminal office, enlarging the possibilities to seize assets in after a trial.

---

45 See United Nations Conference on Trade and Development ("UNCTAD"), Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/countries/175/russian-federation.

46 Albania; Austria; Belgium; Bulgaria; Canada; the Czech Republic; Denmark; Finland; France; Germany; Greece; Hungary; Italy; Japan; Lithuania; Luxembourg; the Netherlands; North Macedonia; Norway; Romania; Singapore; Slovakia; South Korea; Spain; Switzerland; Ukraine; and the United Kingdom.

47 ECJ judgment in Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, '*Kadi I'*, [ECLI:EU:C:2008:461], para. 358 that reads: "That freezing measure constitutes a temporary precautionary measure which is not supposed to deprive those persons of their property.(…)".

48 See inter alia: Linde Byrk/Goeran Sluiter, *Russia: Academic analysis shows why companies should cease business activities to avoid corporate criminal liability risks*, 22 March 2022, available at: https://www.business-humanrights.org/en/latest-news/russia-academic-analysis-shows-why-companies-should-cease-business-activities-to-avoid-corporate-criminal-liability-risks/.

49 Commission Proposal for a Council Decision on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union, COM (2022) 247 of 25 May 2022.

VI. Mobility Restrictions - Denial of Entry, Airspace, and Port Access

1. Denial of Entry

Under Council Decision 2014/145/CFSP[50], the targeted persons are also denied entry into the European Union. Lacking a specific EU power in this regard, the decisions are directly implemented at national level. As the decision to admit foreigners to their territory (or not) generally falls under the sovereignty of each State, such EU decisions do not pose a particular challenge under international law.

The Council Decision also contains an exception for President Putin and Foreign Minister Lavrov. According to the two annotations for Points 669 and 670 of the Annex[51], Article 1(1) does not apply for those two persons. Owing to their specific position as Heads of State and Foreign Minister, they are not barred from entering the Union.

2. Denial of Airspace

a) The Belarus case

Already before the Russian invasion of Ukraine, the EU used the denial of airspace as a sanction. When Belarus forced a flight from Athens to Vilnius to redirect itself to Minsk on 23 May 2021 on the pretext of a demonstrably false bomb threat in order to arrest an opposition blogger[52], the Council urged the EU Member States on 24 May 2021 to close their airspace to Belarussian aircraft.[53] Two weeks later, on 4 June 2021, the Council took a binding decision to restrict the entire EU's airspace:

> "*Member States shall deny permission to land in, take off from or overfly their territories to any aircraft operated by Belarusian air carriers, including as a marketing carrier, in accordance with their national rules and laws and consistent with international law, in particular relevant international civil aviation agreements.*" [54]

---

50 Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ L 78/16 of 17.3.2014).

51 Consolidated Version of Council Decision 2014/145/CFSP, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02014D0145-20220604&qid=1656943250786&from=en.

52 See the full ICAO Investigation Report dated 19 January 2022 here: https://www.politico.eu/wp-content/uploads/2022/01/19/ICAO-Fact-Finding-Investigation-Report_FR497849.pdf.

53 European Council conclusions on Belarus, 24 May 2021, available at https://www.consilium.europa.eu/en/press/press-releases/2021/05/24/european-council-conclusions-on-belarus-24-may-2021/.

54 Council Decision (CFSP) 2021/908 of 4 June 2021 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus, Article 2a(1), (OJ L 197I , 4.6.2021, p. 3–4 and Council Regulation (EU) 2021/907 of 4 June 2021, amending Regulation (EC) No. 765 concerning restrictive measures in respect of Belarus, Article 8b(1).

However, Article 5 of the Convention on International Civil Aviation ("Chicago" or "ICAO" Convention), to which EU Member States as well as Russia are party to, obliges all contracting States to keep their airspace open to all civilian aircraft of other contracting States.[55] Article 9 of the Convention offers the right to close the airspace of a contracting State in part or in whole only for reasons of military necessity or public safety and only if applied undiscriminatingly against all aircraft of other contracting States. Therefore, the 4 June 2021 decision to restrict the EU's airspace was per se unlawful under international law and may only be justified as a countermeasure under international law. When Belarus attacked the decision in ICAO, the Commission instructed its representative to state in the ICAO meeting of 31 January 2022 that not only the States concerned have been directly injured and had a right under international law to take retaliatory action[56]. Rather,

"*Considering also the gravity of the wrongful acts, which put in jeopardy, under false pretences, the safety and security of civil aviation, for the purposes of repression of the civil society in Belarus, the effects of the countermeasures are well justified and proportionate to the injury suffered by the EU MS, not only directly, but also as members of the international community as a whole*".

This quote makes it clear that the non-directly affected MS would have the right to take a third-party countermeasure, underpinning the EU's right to avail itself for the Union as a whole.

b) The Russian case

In response to the Russian invasion of Ukraine, the ICAO Council condemned the unilateral violation of Ukraine's airspace by Russia.[57] On 28 February 2022 the EU closed its entire airspace to Russia. Article 4e (1) of Council Decision 2014/512 (consolidated) reads:

Member States shall, in accordance with their national rules and laws and consistent with international law, in particular relevant international civil aviation agreements, deny to any aircraft operated by Russian air carriers, including as a marketing carrier in code-sharing or blocked-space arrangements, to any Russian-registered aircraft, and to any non-Russian registered aircraft which is owned or chartered, or otherwise controlled by any Russian

---

55 Article 5, Convention on International Civil Aviation, Ninth Edition, 2006: "*Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing.*"

56 European Commission, ICAO Council 31 January 2022, European LTT on ICAO Council Paper C-1528 on the request of the Republic of Belarus to the ICAO Council for its consideration under Article 54 (j) of the Chicago Convention.

57 ICAO Council condemns violation of territorial integrity and airspace of Ukraine, 25 February 2022, available at: https://www.icao.int/Newsroom/Pages/ICAO-Council-condemns-invasion-of-Ukraine.aspx.

natural or legal person, entity or body, permission to land in, take off from, or overfly the territory of the Union.[58]

Importantly, as the EU did not react to a breach vis-à-vis its own interests, but to a breach of Russia vis-à-vis Ukraine, this measure may only be justified as a third-party countermeasure under international law.

3. Denial of Access to Harbours

On 8 April 2022, the Council adopted the following wording in its amending sanction package:

> "*Moreover, it is appropriate to prohibit access to ports in the territory of the Union to vessels registered under the flag of Russia.*"[59]

In a press release, the Council argued that this restrictive measure "*will limit the options for Russian industry to obtain key goods. It will disrupt road and maritime trade both to and from Russia*."[60] Certain exemptions for agricultural and food products are included and Member State may grant derogations under specific circumstances.

While there is no universal convention guaranteeing the free access to the harbours of other contracting states, such access may be promised under bilateral treaties. As far as the EEAS is aware, Cyprus has concluded an agreement with Russia on the access of the navy[61], whereas bilateral treaties of Denmark and Malta with Russia concern equal access of civil ships to their ports. Against that background, the denial of access to harbours requires a specific justification under those bilateral treaties, for example for reasons of public policy if the treaty so allows.[62] Otherwise, the denial of port access may need to be justified under the Vienna Convention on the Law of Treaties or could be construed as a third country countermeasure.

---

58 Article 1(2) of Council Decision 2022/335 of 28 February 2022 (OJ 2022, L 57/4), inserting an Article 4e to Council Decision 2014/512; and Council Regulation (EU) 2022/334 of 28 February 2022 2022 (OJ L 57, 28.2.2022, p. 1–3) inserting an Article 3d to Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

59 COUNCIL DECISION (CFSP) 2022/578 of 8 April 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, Recital (6) and Article 4ha, (OJ L 111 of 8.4.2022, p.70).

60 *Question and answers on the fifth package of restrictive measures against Russia*, 8 April 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_2333.

61 *Cyprus Signs Deal to Let Russian Navy Ships Stop at its Ports*, The Wall Street Journal, 25 February 2015, available at: https://www.wsj.com/articles/putin-highlights-closer-russia-cyprus-ties-1424882012.

62 See inter alia the 1998 dispute between Norway and Iceland, both parties to the EEA Agreement at the time. Norway prima facie breached Article 36 of the EEA Agreement by barring Icelandic ships from its ports, yet successfully invoked Article 33, to prohibit access to its ports for reasons of public policy: see https://www.eftasurv.int/cms/sites/default/files/documents/gopro/3598-148885.pdf.

VII. Media Restrictions - Prohibition of War Propaganda

Finally, the EU started to restrict certain media outlets who are serving the Russian war propaganda. On 1 March 2022 the EU banned RT/Russia Today and Sputnik from broadcasting in the EU until 31 July 2022.[63] The sixth sanctions package added another three outlets.

These decisions raise questions of compatibility with the freedom of the press, a fundamental rights guaranteed by Article 11 of the EU-Charter and Article 10 ECHR. In the pending case of Russia Today France v. Council (the latter being supported by France, Belgium, Lithuania, Estonia, Poland and Latvia as well as the Commission and the High Representative[64]), the Court will have to determine whether companies, who are financed and controlled by the Russian State, can rely on such freedoms *rationae personae* and whether they can rely on them *rationae materiae* if their main purpose is to spread war propaganda which is prohibited by Article 20 of the UN Covenant on Civil and Political Rights. In case their activity falls within the scope of Article 11 EU-Charter the Court will have to determine whether the EU sanctions can be justified by legitimate grounds of public policy and whether the interference was proportionate. In that balancing test, the fact that the media outlets do not live up to their journalistic obligation to provide balanced reporting many be of particular importance. Most likely, these questions will reach the Court of Justice upon appeal.

C. Third Party Countermeasures

Under general international law, the directly affected State can react to the breach of international law of another State in various manners, including by taking countermeasures. However, it is less clear under what circumstances third States may be entitled to do the same. During the COJUR discussions, delegations asked the EEAS to present a brief overview about relevant State practice in the field. In so doing, it seems useful to distinguish between State practice before 2001, when the ICL adopted its Articles on State Responsibility[65], and the subsequent practice.

---

63 Article 4g of Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 65, 2.3.2022, p. 5–7), and Article 2f of Council Regulation (EU) 2022/350 of 1 March 2022, amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 65, 2.3.2022, p. 1–4).

64 Case T-125/22, Russia Today France v. Council (pending before the General Court).

65 Responsibility of States for Internationally Wrongful Acts 2001, Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 2001, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

I. State practice until 2001

Literature and state practice on third party countermeasures until 2001 was scarce.[66]

An early example relates to South Africa. In 1960, Ghana and Malaysia imposed a trade embargo due to the on-going crime of Apartheid on the one hand and specifically in response to the Sharpeville massacre on the other hand. Over the next four years, seven other States (Indonesia, Kuwait, Nigeria, Pakistan, Sierra Leone, Tanzania and Uganda) followed, probably inspired by a GA resolution[67] or an OAU recommendation[68]. For their part, Ghana and Malaysia both acknowledged that the trade embargo violated their respective GATT obligations towards South Africa, but considered their actions to be lawful. States appear to have relied on the rationale of the concept of third-party countermeasures and done so in response to serious breaches of obligations *erga omnes*; namely, those concerning apartheid and fundamental human rights[69].

In 1978, the US Congress adopted legislation prohibiting the import of goods from Uganda and the export of goods and technology to the country. The legislator justified these violations of the US GATT-commitments in order to "dissociate (the US) from any foreign government which engages in the international crime of genocide"[70].

Following the imposition of martial law in Poland in December 1981, a couple of Western States (US, UK, France, Netherlands, Switzerland Austria) denied landing rights to AEROFLOT and LOT in breach of their bilateral air transport agreements[71].

The European Community and its Member States also took certain unilateral sanctions which can be qualified as third-country countermeasures. Among them figure the decision of April 1980 to suspend contracts with Iran after the hostage crisis of 1979 taken in the framework of European Political Cooperation, a number of Commission decisions during the 1980ies to withhold development aid to certain African States after military coups or a wave of political oppression which would normally have been due under the EU-ACP Lomé Conventions, and

---

66 See e.g. Michael Akehurst, *Reprisals by Third States*, 44 British Yearbook of Int. Law (1970), 1-18; Jonathan Charney, *Third State Remedies in International Law*, Michigan Journal of Int. Law, Volume 10, Issue 1, 1989, p. 57; Jochen Frowein, *Reactions by Not Directly Affected States to Breaches of International Law*, RdC 1994-IV, p. 345 (423).

67 UNGA Resolution 1761 (XVII) of 6 November 1962.

68 OAU-Resolution „A" of Addis Abbeba, 22-25 May 1963.

69 Dawidowicz (note 31), pp. 116-117.

70 Uganda Embargo Act, Public Law 95–435 of 10 October 1978, United States Statutes at Large 1978, Vol. 92, part 1 (Washington D C , United States Government Printing Office, 1980), pp. 1051–1053.

71 For details see RGDIP 1982, pp. 603-606 and Dawidowiz (note 31), pp. 133-139.

the flight ban against the former Yugoslavia in 1998 to counteract grave human rights violations in Kosovo enacted by the Council[72].

Finally, there were two instances where bilateral treaties were suspended by relying on Article 62 VCLT rather than the concept of third country countermeasure. This was the case in 1982, when the Netherlands suspended a development cooperation treaty with Suriname after a military coup[73] and in 1991, when the EC suspended its Cooperation agreement with Yugoslavia. While the Commission argued before the ECJ that the action was justified by both Article 62 VCLT and general international law on countermeasures[74], the ECJ preferred to apply the *clausula rebus sic stantibus* only[75].

II. ILC Articles on State Responsibility 2001

Summarizing the above practice, the ILC took a cautious approach on the matter. Article 48 of the Articles on State responsibility reads:

> Article 48 - Invocation of responsibility by a State other than an injured State
>
> *1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:*
>
> *(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or*
>
> *(b) the obligation breached is owed to the international community as a whole.* [emphasis added].

---

72 For details of this early EU practice see Frank Hoffmeister, *The Contribution of EU Practice to International Law* in Developments in EU External Relations Law, Oxford Univ. Press 2008, pp. 93-95.

73 For details see H -H Lindemann, *The repercussions resulting from the violation of human rights in Surinam on the contractual relations between the Netherlands and Surinam*, ZaöRV 1984, p. 64 et seq.

74 See description of the Commission position in the Conclusions of the Advocate General-Jacobs, Case C-162/96 *Racke* (1998) ECR I-3688, Rec. 65 of the opinion.

75 ECJ, Case C-162/96 *Racke* (1998), ECR I-3688, paras. 48-61.

This Article reflects the jurisprudence of the ICJ since the *Barcelona Traction* case of 1970[76], according which certain obligations have an *erga-omnes* character. For example, in the 2012 judgment Belgium v. Senegal, the ICJ held that:

> '*68.* […] *All the States parties "have a legal interest" in the protection of the rights involved* […] *These obligations may be defined as "obligations erga omnes partes"* […]
>
> '*69.* […] *It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.*'[77]

However, the ability of a non-directly affected State to invoke the *erga-omnes* responsibility of another State does not qualify which type of reactions are allowed under international law. In the Nicaragua case, the ICJ stated:

'*249.* […] *The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate countermeasures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify countermeasures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.*'[78]

In this respect, Article 54 of the ILC Articles says:

> Article 54 -Measures taken by States other than an injured State
>
> *This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.* [emphasis added]

In its commentary the ILC explained:

> *'[T]he current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. (emphasis added). Consequently, it is not appropriate to include in the present articles a*

---

76 ICJ, *Barcelona Traction (Belgium v. Spain)*, Judgment of 5 February 1970, ICJ Reports 1970, p. 3 at para. 33.

77 ICJ, *Questions relating to the obligation to prosecute or extradite (Belgium v Senegal),* ICJ Reports 2012, 422, paras. 68-69.

78 ICJ, *Nicaragua* (note 13), para 249.

> *provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead, chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.*[79]

For some authors, the ILC has prejudiced the right of Article 48 states to take "lawful measures" because countermeasures are inherently wrongful[80], while others consider that Article 48 states are neither sanctioned nor prohibited by the articles to take countermeasures[81]. In any case, as the ILC expressly left the question open, it is most appropriate to examine these further developments in the last twenty years.

III. State Practice and Developments since 2001

Since 2001, a number of scholars have mapped additional evidence in State practice of countermeasures by third States or organisations. Writing in 2005, Tams opined that the ILC '*could have said more'* than it did in Article 54 ARSIWA.[82] However, when codifying the responsibility of international organisations in 2011, the ILC did not elaborate on the issue any further. It simply stated that one may apply by analogy the conditions that are set out for countermeasures taken by a State against another State in articles 49 to 54 also to countermeasures taken by international organisations against States[83].

Against that background it is important to review newer practice that has materialized in more recent years.[84] The assessment of State practice and *opinio juris* concerning third-party countermeasures raises some challenges. In order to properly assess this practice it is necessary to distinguish third-party countermeasures retorsions, the suspension and termination of treaties under Article 60 VCLT (and other treaty-law doctrines), self-defence, collective non-recognition and non-assistance and the right to adopt unilateral trade restrictions based on the

---

79 Report of the International Law Commission (2001) A56/10, p. 139(6), https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf.

80 D. Alland, *Countermeasures of General Interest*, EJIL 13 (2002), p. 1221, at pp. 1232-33.

81 L-A. Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, EJIL 13 (2002) p. 1127, pp. 1134-1135.

82 Christian Tams, *Enforcing obligations erga omnes in international law*, CUP 2005, p. 249, quoted by Ruys (note 84).

83 ILC Commentary on the Draft Articles on the Responsibility of International Organisations, ILC Yearbook 2011 II (2), p. 72, Article 22, Observation (2).

84 Tom Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework,* https://www.ohchr.org/sites/default/files/Documents/Issues/UCM/ReportHRC48/Academia/submission-tom-ruys-2.pdf., pp. 23-25 of the manuscript; later published in Larissa van den Herik (ed.), Research Handbook on UN Sanctions and International Law, Edward Elgar Publishing, 2016.

national security exception in Article XXI GATT[85]. The difficulty in identifying third-party countermeasures is further compounded by the obscurity of practice: States rarely explain in clear terms which of the aforementioned categories they actually rely on in a given case. Nevertheless, it seems possible to identify a number of important cases.

1. Iran 2005

Since the first revelations of Iran's nuclear development program in 2002, the International Atomic Energy Agency (IAEA) reported numerous breaches of Iran's commitments under Article III of the Non-Proliferation Treaty and its agreement on safeguards. Since 2006, after the election of President Ahmadinejad, the Security Council imposed severe sanctions on the country under Chapter VII to "constrain Iran's development of sensitive technologies in support of its nuclear and missile programs"[86]. It also employed targeted sanctions against persons and entities.

Importantly, the EU and US decided to go beyond UN Security Council Resolutions and imposed additional measures to achieve a maximum pressure campaign against Iran to give up its nuclear programme. In 2007, the EU targeted additional persons (which were not on the UN list)[87], in 2008, it froze the assets of Iran's largest bank (Bank Melli[88]), and in 2012, it imposed an oil embargo and froze assets of the Iranian national bank[89]. Further down the road, the E-3 and High Representative of the EU helped in the conclusion of the Joint Comprehensive Plan of Action of 2015[90].

The 2007 action (additional targets) was considered as suspending the performance of certain international obligations owed to Iran[91], most likely under bilateral investment treaties of certain member States with Iran (such as Austria, Germany and France). However, as Iran's breaches were either directly injuring all Parties to the NPT under Article 42 (b)(ii) or owed

---

85 Dawidowicz (note 31), pp. 111-112.

86 See UNSC Res 1737 (2006), recital 8; UNSC Res 1747 (2007), recital 7; UNSC Res 1803 (2008), recital 11; UNSC Res. 1929 (2010).

87 Article 3 of Council Common Position No. 2007/140/CFSP of 27 February 2007, OJ 2007, L 61, p. 49; Article 7(2) of Council Regulation 423/2007, OJ 2007, L 103, 1.

88 See also ECJ judgment in the case C-124/20 *Melli Bank*, about the interpretation of the EU's "blocking statute" with respect to secondary sanctions imposed the United States.

89 Council Decision 2012/35/CFSP of 23 January 2012, OJ 2012, L 19, 10; Council Regulation 267/20120 of 23 March 2012, OJ 2012, L 88, 1.

90 For details see F. Hoffmeister, *Of Presidents, High Representatives and European Commissioners – the external representation of the European Union seven years after Lisbon, Europe and the World* (2017), p. 37, at pp. 54-59.

91 N. J. Calamita, Sanctions, Countermeasures and the Iran Nuclear Issue, 42 Vanderbilt Journal of Transnational Law 139 (2009), p. 1939, at p. 1397; available at https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1401&context=vjtl.

to the international community as a whole (Article 48), these sanctions could be seen as (third country) countermeasures[92].

With respect to the 2012 oil embargo and the freezing of the central bank assets, a similar infringement of investment guarantees owed to Iran (and even Article VIII(2)(a) IMF Articles of Agreement) was identified[93]. While admitting the abstract possibility of a third party countermeasures, one eminent author, though, came to the conclusion that the conditions were not met. This author questioned, in particular the proportionality of the reaction and the possibility of the EU to adopt countermeasures when the UN Security Council was seized with the situation[94].

2. Libya 2011

On 17 February 2011, Libyan security forces killed scores of protesters demonstrating against Colonel Gaddafi's regime in Benghazi. This marked the beginning of a series of similar incidents across Libya. A bloody uprising followed which soon sparked a full-scale civil war in the country.

On 21 February 2011, Switzerland decided with immediate effect to freeze the assets of the Libyan Central Bank, as well as those of several senior Libyan officials involved in the violent repression of the civilian population, including assets belonging to Colonel Gaddafi, Libya's Head of State.[95] A day later, the Council of the League of Arab States agreed by unanimous vote to suspend Libya from its membership in the Arab League – a decision 'welcomed' by the UN Security Council and the General Assembly. Whereas the suspension of Libya may have been covered by Article 60 VCLT, the actions of the Member States of the Arab League may be construed as in adherence to the principle of third party countermeasures.[96] On 25 February 2011, the United States decided to freeze with immediate effect the assets of the Central Bank of Libya as well as those of Colonel Gaddafi and his closest associates in response to the 'extreme measures taken against the people of Libya, including by using weapons of war, mercenaries, and wanton violence against unarmed civilians, all of which have caused a deterioration in the security of Libya and pose a serious risk to its stability'.[97]

---

92 Calamita (note 91), pp. 1422-1428 (in favour of Article 42); and pp. 1429-1433 (accepted a construction under Article 48 *arguendo*).

93 P.-E. Dupont, Countermeasures and Collective Security, The Case of EU Sanctions Against Iran, Journal of Conflict and Security Law, 17 (2012), at 313-316 (manuscript at pp. 13-14).

94 P.-E. Dupont (note 93), manuscript at p. 30-33.

95 See Swiss Federal Council, '*Ordonnance instituant des mesures à l'encontre de certaines personnes originaires de la Libye'*, 21 February 2011.

96 Dawidowicz (note 31), p. 217.

97 See President Obama's Executive Order 13566 (25 Feb. 2011), '*Blocking Property and Prohibiting Certain Transactions Related to Libya'*, www.treasury.gov/resource-center/sanctions/Programs/Documents/2011_libya_eo.pdf.

For Dawidowicz, Switzerland and the United States adopted third-party countermeasures against Libya by freezing the assets of Col. Gaddafi and the Central Bank of Libya prior to the enforcement measures taken by the Security Council under Chapter VII UN Charter.[98] However, as explained above, that assessment is doubtful as there is no immunity from prescriptive jurisdiction. More convincing seems the position that Arab League Member States supported the adoption of third-party countermeasures by suspending Libya's membership in the Arab League without a proper legal basis. Importantly, Security Council Resolution 1970[99] welcoming the unilateral condemnation by the Arab League was voted for unanimously 15-0-0[100]. As it included votes from both the Russian Federation and the Peoples Republic of China it can be argued that they tacitly supported the principle of third party countermeasures in that case.

3. Syria 2011 – Various States

On 9 May 2011, EU Member States responded to the unfolding humanitarian catastrophe by adopting a sanctions regime against Syria involving an arms embargo, travel bans and the freezing of assets of several leading regime officials.[101] President Al-Assad, Vice-President Al-Sharaa and Interior Minister Al-Sha'ar followed on 23 May 2011[102], and their assets were subsequently frozen also by Australia, Switzerland, Canada, Japan and Turkey. Similar action was later coordinated by the International Working Group on Sanctions ('IWGS) in 2012-2013, supported by 60 States. However, contrary to the opinion of Dawidowicz[103], these asset freezes cannot be characterized as third-party countermeasures.

On 12 November 2011, the Council of the League of Arab States suspended Syria's membership in the organization. A decision on such a suspension requires a unanimous vote (except the affected State). In this case, Syria, Lebanon and Yemen, with Iraq abstaining, voted against the membership suspension. It thus appears that the decision to suspend Syria was unlawful both in substantive and procedural terms under Article 18 of the pact of the League of Arab States. Accordingly, in this instance one can argue that Arab League Member States expressed support for the adoption of third-party countermeasures.[104]

---

98 Dawidowicz (note 31), p. 220.

99 SC Resolution 1970 (2011).

100 Data provided by the Stockholm International Peace Research Institute: https://www.sipri.org/sites/default/files/2016-03/Libya-vote-2011.pdf.

101 See Council Decision 2011/273/CFSP (9 May 2011), OJ 2011 L 121/11 (10 May 2011); Council Decision 2011/782/CFSP (1 Dec. 2011), OJ 2011 L 319/56 (2 Dec. 2011).

102 See Council Implementing Decision 2011/302/CFSP (23 May 2011), OJ 2011 L 136/91 (24 May 2011). Also: Declaration by the High Representative for Foreign Affairs and Security Policy, Catherine Ashton, on behalf of the European Union, on the unfolding situation in Syria (18 May 2011), www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/cfsp/121684.pdf.

103 Dawidowicz (note 31), p. 222-223 and p. 230.

104 Dawidowicz (note 31), p. 225.

4. Russia 2014 – Western States

On 2 March 2014, leaders of the G7 adopted a statement by which they '*condemn[ed] the Russian Federation's clear violation of the sovereignty and territorial integrity of Ukraine, in contravention of Russia's obligations under the UN Charter and its 1997 basing agreement with Ukraine*'.[105]

In the aftermath, on 31 July 2004, the EU adopted a broad sanctions package with an arms embargo, and export restrictions on dual-use and goods for the oil exploration industry, as well as financial sanctions[106]. Switzerland, the US, Canada, Australia, and Japan also imposed measures against Russia in response to its illegal annexation of Crimea. Whereas most of the initial sanctions levied against the Russian Federation by the EU and its Member States may best be analysed as acts of retorsion, the financial and economic measures to impede access to the EU market of certain goods and services needed a justification. While Dawidowicz regards them as third party countermeasures as Articles XXI GATT and XIVa GATS had not been formally invoked[107], the better view is to regard them as covered by the security exceptions (as later confirmed by the ECJ in the Rosneft case with respect to Article 99 PCA).

D. Analysis

Against the more recent practice, an analysis is warranted whether third party countermeasures can now be seen as forming part of customary international law (I.). If so, the procedural (II.) and substantive (III.) requirements need to be briefly sketched out.

I. Existence of the rule

Under Article 38 (1)(b) of the ICJ Statute international custom is defined as "evidence of a general practice accepted as law". It is hence necessary to establish a widespread practice of States, supported by an *opinio iuris*, in order to establish whether the concept of a third party countermeasure has by now become a norm of customary international law. Moreover, the teachings of the most highly qualified professors of international law may be a subsidiary means for the determination of rules of law (Article 38(1)(d) ICJ-Statute).

1. General practice

One of the arguments of the ILC in 2001 against the concept was that State practice so far had only involved "a limited number" of States. Indeed, most of the cases quoted by the ILC at the time involved the Western States (US, Canada, EU, Norway, Switzerland, Australia). However, as the reactions of African States towards apartheid in South Africa show the

---

105 G-7 Leaders Statement on Ukraine, 2 March 2014, https://www.bundesregierung.de/breg-en/news/g7-statement-440208.

106 Council Decision 2014/512/CFSP, OJ 2014 L 229, p. 13 of 31 July 2014; Council Regulation (EU) No. 833/2014, OJ 2014 L 229, p. 1 of 31 July 2014).

107 Dawidowicz (note 31), p. 235.

acceptance of the concept was already wider at the time and continued to grow after 2001[108]. In the Libya crisis, Arab States became also active, and the countermeasures against the Syrian regime since 2011 enjoyed cross-regional support. Hence, by now, third party countermeasures have emanated from States on all continents (with the exception of Latin America) and from international organisations such as the EU, the AU, the AL and ECOWAS.[109]

At the same time, it has to be admitted that the sanctions against Russia in 2014 and 2022 are mostly applied by a core group of Western States. It follows that still mostly Western States are applying the concept of third party countermeasures in practice, with occasional followers from other regions.

2. *Opinio iuris*

Even more difficult is the establishment of an *opinio iuris*. In almost no instance, the official justification of the act talks about the right to take countermeasures as non-directly affected State. However, in many cases, the "need" to react to a grave breach of international law is underlined. In so far as the adopted measures would otherwise be illegal under international law, it can be assumed that the respective government relied on the concept as a justification[110].

At the same time, some States have voiced open criticism against the concept. In the UNGA 6th Committee discussions on the ILC Articles after 2001, China, Russia and several African and Asian States contended that third-party measures are prone to abuse and should generally not be accepted[111]. At the same time, there is little diplomatic protest when a third-party countermeasure is applied in a specific case, and none of it has been was challenged by the responsible State in dispute settlement.

Against that background, Tom Ruys wrote in 2017 "that time may ultimately ripe to shift the debate from the binary question whether third-party countermeasures are permissible or not, to defining the possible boundaries of their use"[112]. In the aftermath of the 2022 invasion of Ukraine by the Russian Federation, contemporary authors simply affirm that countermeasures against Russia are allowed as reaction to its violation of *ius cogens*[113].

---

108 Christian Tams, *Obligations Erga Omnes in International Law*, UN Lecture series International Law, 15 August 2016, UN Video lecture (https://legal.un.org/avl/ls/Tams_IL.html) at minutes 28-29; Dawidowicz (note 31), pp. 240-243.

109 Ruys (note 84), p. 23 of the manuscript.

110 Dawidowicz (note 31), p.252.

111 Dawidowicz (note 31), pp. 8-11.

112 Ruys (note 84), p. 25 of the manuscript.

113 See e.g. Matthias Valta, *Wirtschaftssanktionen gegen Russland und ihre rechtlichen Grenzen,* VerfBlog, 2022/2/28, https://verfassungsblog.de/wirtschaftssanktionen-gegen-russland-und-ihre-rechtlichen-grenzen/, DOI: 10.17176/20220301-001127-0; Matthias Goldmann, *Hot War and Cold Freezes:*

II. Procedural requirements

According to Article 52 of the ILC Articles on State Responsibility, bilateral countermeasures need to comply with the following procedural requirements.

Article 52
Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:
(a) call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;
(b) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.
2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.
3. Countermeasures may not be taken, and if already taken must be suspended without undue
delay if:
(a) the internationally wrongful act has ceased; and
(b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.
4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

In the above-mentioned proposal for an EU anti-coercion instrument, the Commission emphasized the relevance of this norm for the EU. It quoted in particular the need call upon the responsible State to stop its breach, and the requirement to give prior notice before taking a countermeasure aimed at obtaining the cessation of the breach or reparation for it[114].

As argued by some delegations in COJUR, the same requirements should also be observed in the case of a third party countermeasure. The reason for this analogy is twofold. Both the bilateral and the third party countermeasure follow the same enforcement logic: their aim is to induce the responsible State to cease its wrongful act, which makes it important to notify the responsible State accordingly of the relevant reasoning (Article 52 (1)). Second, once this aim is achieved (the wrongful act has ceased and been repaired) or the case is brought to binding dispute settlement (unilateral enforcement is replaced by another peaceful means), the countermeasure should stop (Article 52 (3) and Article 53). Importantly, Article 52(2) contains an exception to the duty of prior notification in situations of urgency.

Targeting Russian Central Bank Assets, VerfBlog, 2022/2/28, https://verfassungsblog.de/hot-war-and-cold-freezes/, DOI: 10.17176/20220301-001108-0.

114 COM (2021) 775 final of 8.12.2021, p. 11: Recital 10 of the proposed regulation.

1. The duty to call upon the responsible state to fulfil its obligations

The first requirement is that before resorting to countermeasures, in injured State or organisation must call on the responsible State to fulfil its obligations. This requirement is well established in customary international law, as found by the arbitral tribunal in the Naulilaa case[115] and the ICJ in the Gabcikovo case[116]. If the aim of a measure is not directed at achieving the cessation of the wrongful act, it cannot be qualified as countermeasure[117].

In appears from the reviewed State practice that the invoking States generally comply with the duty to call upon the responsible State to cease the wrongful act. Such wording is usually contained political statements preceding the relevant national, European or international acts, which may also incorporate the same message.

2. The duty of prior notification

At the same time, most often there is no prior notification, in particular when the countermeasure takes the form of legislation (including EU sanctions by Council Decisions or Regulations). Whenever the responsible State contests the act subsequently, the invoking State must then engage in diplomatic exchanges to justify it by *note verbale* or other appropriate means. Hence, most recent third country countermeasures seem to have been taken as urgent countermeasures under Article 52(2) without prior notice.

A related question arises how to deal with the situation when an EU legislative act may contain an obligation for Member States to act in a way which would contravene their own treaty commitments vis-à-vis the responsible State. That scenario is in particular relevant for EU mobility restrictions, given that some Member States may have bilateral treaty obligations relating to air or harbour access. In that situation, it seems useful to reinforce the reasoning of the relevant EU legislation by introducing a recital according to which the EU action constitutes a proportionate reaction to the breach of the responsible States of a norm which is owed to the international community as a whole. That reasoning would make it sufficiently clear that the EU avails itself of the right to take a countermeasure to sanction an *erga-omnes* breach with effect for all its Member States.

3. The duty to respect ongoing binding dispute settlement procedures

Finally, it should be noted that a countermeasure is ruled out if the case is pending before an available dispute settlement body. In such a scenario, the trust to enforce international law is

---

115 Arbitral Award, *Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa (Portugal v. Germany) (Naulilaa)*, 31 July 1928, 2 RIAA 1011, 1026.

116 ICJ, *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports 1997, 7, 56, para. 84.

117 ICJ, *Interim Accord (Former Yugoslav Republic of Macedonia v. Greece*), Judgment of 5 December 2011, ICJ Reports 2011, p. 644, at § 165, finding that the Greece's objection to NATO membership did not qualify as countermeasure as it did not aim at the cessation of a wrongful act.

vested into the judiciary. However, if negotiations are only ongoing[118] or if no dispute settlement body is available, a countermeasure may be taken.

Also the fact that the Security Council is seized by a matter, does not prevent States from taking (further) action. In contrast to Article 51 of the UN-Charter, according to which self-defence needs to stop when the Security Council has taken necessary measures to maintain international peace and security, there is no corresponding limitation on the rights of Member States to use peaceful countermeasures in the interest of the community as a whole. That conclusion is further supported by the above-mentioned practice, in which many of the countermeasures exceeded the scope of certain Security Council decisions[119]. Instead, one may consider to formally notify third-party countermeasures to the United Nations to strengthen their acceptance[120].

III. Substantive requirements

1. The existence of a wrongful act by the responsible State

The first substantive requirement is the existence of a wrongful act by the responsible State owed to the international community as a whole under Article 48. There is no doubt that *ius cogens* norm fall within this category. But the range is wider, as already noted by the ICJ in 1970[121].

In order to avoid the abuse of the system, a prior political determination about the breach of the responsible state by a third body is not imperative, but would strengthen the case. Accordingly, the prior finding of the IAEA about Iran's NPT breaches[122] or the GA finding about Russia's aggression in 2022 improves the legitimacy of the respective countermeasures. Similarly, if there are particularly serious or systematic breaches, a third-party countermeasure may be seen as less controversial[123].

---

118 Arbitral Award, *Case Concerning the Air Service Agreement of 27 march 1946 between the United States of America and France,* 9 December 1978, 54 ILR 304, pp. 339-340.

119 Dawidowicz (note 31), pp. 255-262.

120 Ruys, (note 84), p. 26 of the manuscript.

121 ICJ, *Barcelona Traction*, Judgement of 1970, p. 32, at para. 34: "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character."

122 Calamita (note 91), at p. 1430.

123 Ruys (note 84), p. 26 of the manuscript.

2. Proportionality

According to Article 51, any countermeasure must be proportionate and Article 50 lists a number of obligations that must not be affected by them. These substantive requirements for bilateral countermeasures are equally relevant for third country countermeasures since they make sure that the unilateral enforcement powers serve to protect the integrity of the international order and not undermine it by potential abuse.

The proportionality test has been applied by the Court in the *Gabcikovo* case[124] and presented in literature[125]. Importantly, a countermeasure may still be proportionate even after the initial wrongful act has ceased because the responsible state has not fulfilled its secondary obligation of providing reparation[126]. In such a situation, the continuation of the countermeasure must, though, be re-evaluated.

3. Reversability

Another important constraint for countermeasures flows from Article 53.

Article 53
Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act

The duty to terminate a countermeasure upon compliance implies that a countermeasure must be reversible. Indeed, as the ICJ found in the Gabcikovo case, the reversibility of a countermeasure constitutes an essential feature thereof[127]. One example for a non-reversible countermeasure is the suspension of environmental obligations[128]. Similarly, countermeasures would generally not allow the confiscation of property (expropriation) as these cannot be reversed.

4. Non-Derogable Rights

Finally, any countermeasure must not interfere with the rights enumerated in Article 50 as non-derogable. In the list of "untouchable" obligations figures the "protection of fundamental human rights" (Article 50 (1)(b)). The qualification "fundamental" indicates that only those

---

124 ICJ, *Gabcikovo-Nagymaros Project (Hungary v. Slovakia*), ICJ Reports 1997, 7, 56-57.

125 T. Franck, *On proportionality of Countermeasures in International Law*, AJIL 102 (2008), 715.

126 ILC, Article 49, Commentary (8), YBILC 2001, at p. 128.

127 ICJ, *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports 1997, 7, 57, para. 87.

128 Separate Opinion of Judge Bedjaoui, *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports 1997, 7, 134, para. 52; L. Boisson de Chazournes, "Other Non-Derogable Obligations", in: Crawford/Pelltet/Olleson (ed). The Law of International Responsibility, OUP 20120, 1205, at p. 1212.

human rights are shielded from countermeasures on which no derogations are allowed. Drawing from Article 15 (2) of the European Convention on Human Rights, these refer to the right to life, the prohibition of torture and slavery and the prohibition of retroactive criminal sanctions.

E. Conclusion

Since 2001, State practice and the *opinio juris* on the legality of third party countermeasures evolved significantly. A clear cross-regional example occurred when the Security Council unanimously supported unilateral sanctions by the Arab League against Libya in 2011. Certain sanctions against Iran and Syria also fall within the realm of third party countermeasures.

Against that background, those recent sanctions of the EU against the Russian Federation which require specific justification under international law (such as denial of access to airspace and ports; freezing of assets of Heads of State and government ministers) are on safe ground. They are taken as a reaction to the breach of an *erga-omnes* rule by the Russian Federation. Sanctions in such a case are not only legitimate, but even needed to protect the integrity of the international public order.

An open question remains how to fulfil best the necessary procedural requirements. While EU sanctions are often taken in a situation of urgency and therefore do not require prior notification, they must be properly reasoned to give them a firm and consistent basis in international law. It is therefore proposed to insert a recital in relevant Council Decisions and Regulations, according to which the EU action at stake constitutes a proportionate reaction to the Russian breach of a norm which is owed to the international community as a whole.