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MEETING DOCUMENT

From:	Presidency
To:	Working Party on Public International Law
N° prev. doc.:	WK 10275/2022 INIT
Subject:	Revised paper on third-party countermeasures under international law

Dear Delegates,

With reference to document WK 10275/2022 INIT of 13 July 2022, please find attached the revised version of the EEAS note on third-party countermeasures under international law, containing a few updates and reflecting comments by Member States. (The document is relevant for the discussion under agenda item 3.c of the forthcoming COJUR meeting.)

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 COJUR meeting of 30 September, delegations generally welcomed the first version. Following written comments from Estonia[2] and oral comments from Austria during the meeting, the Czech Presidency asked the EEAS to prepare a second version.

The EEAS thanks delegations for the precious input received. We start from the generally accepted assessment that Russia's use of force was an act of aggression[3]. 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.

Under international law, such reaction may fall broadly into three type of categories. First, an act may be qualified as a "retorsion", i.e. an "unfriendly" acts not interfering with the responsible State's rights.[4] Second, a reaction may infringe on certain treaty obligations owed to Russia, but be justified under the treaty regime itself. Third, an act may constitute "conduct taken in derogation from a subsisting treaty obligation, but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are

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

2 WK 12708/2022 INIT, COJUR, of 26 September 2022.

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

4 ILC, Commentary on Draft Articles on Responsibility of States for Internationally Wrongful Acts, Ch. 2 para. 3, p. 128, YBILC 1991 (2) Part Two.

taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved" (countermeasures) [5].

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

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[6]. This chapter will briefly examine to what extent they require justification under international law.

I. Military Assistance

Between February and October 2022, the Council adopted six successive decisions under the European Peace Facility on the delivery of lethal weapons [7] and other assistance [8] to the Ukrainian army. Under this scheme, the EU will reimburse up to 3.1 billion € of costs for the delivery of heavy weapons and other material by Member States. On 17 October 2022, the Council also deployed an EU Military Assistance Mission in support of Ukraine to enhance the military capability of Ukraine Armed Forces (EUMAM).[9]

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.

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5 ILC, Commentary on Draft Articles on Responsibility of States for Internationally Wrongful Acts, Ch. 2 para. 4, p. 129, YBILC 1991 (2) Part Two, mentioning in particular the justification under Art. 60 of the Vienna Convention on the Law of Treaties.

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

7 For the first decision see Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force (OJ 2022, L 60 , 28.2.2022, p. 1).

8 For the first decision see Council Decision (CFSP) 2022/339 of 28 February 2022 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces (OJ L 61, 28.2.2022, p. 1).

9 Council Decision (CFSP) 2022/1968 of 17 October 2022 on a European Military Assistance Mission in support of Ukraine (EUMAM), OJ 2022, L 270, 18.10.2022, p. 85).

A different matter arises under the law of neutrality. While the supply of war material is prohibited under the strict reading of Article 6 of Hague XIII (1907)[10], international law has evolved thereafter. With the introduction of a general prohibition on the use of force under the Briand-Kellogg Pact (1928) and the UN Charter (1945), there is no obligation anymore to treat the aggressor and the victim in a similar way. Henceforth, the status of "non-belligerency" has replaced the principle of strict neutrality, without fully derogating from the entire law of neutrality[11]. In particular, a non-belligerent State does not have to remain impartial with respect to the aggression by helping the victim state. As long as it does not actively participate in hostilities such non-belligerent State does not become a party to the armed conflict.

According to NATO Secretary-General Stoltenberg non-forcible responses should ensure that the helping states do not become co-belligerents themselves.[12] Despite some initial hesitation whether training Ukrainian soldiers on new weapons might cross the line[13], legal scholars mostly reject this view as unfounded[14]. 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[15]:

> (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;
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> (2) Any indirect military engagement that would consist of taking part in the planning and supervision of military operations of another State; or

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10 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).

11 C. Walter, Der Ukraine-Krieg und das wertebasierte Völkerrecht, Juristenzeitung 10/2022, p 473, at p. 478 with further references.

12 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.

13 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").*

14 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/.

15 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.

(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 for either the reimbursement of the costs for weapons delivery to Ukraine nor for the training of Ukraine armed forces on European soil, such action is also in compliance with the law of neutrality and does not make the EU or any Member State party to the armed conflict between Russia and Ukraine.

II. Economic Sanctions – Embargos and transit restrictions

So far, the Council adopted eight 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"[16], 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 not pertinent, as Russia is not a developing country[17] and the threshold of "coercion"[18] is not automatically surpassed by an embargo[19]. 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[20].

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16 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.

17 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.

18 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".

19 See ICJ, *Nicaragua* (note 18), 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.

20 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

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 2022. 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."*[21] In the sixth package, the EU extended the embargo to cover oil products[22]. Accordingly, such products cannot enter into the Union market anymore. Second, sanctioned goods can also not cross the transit route from Kaliningrad (via 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[23].

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

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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."

21 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).

22 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).

23 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).

> […] *(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.*[24] [emphasis added]

On 5 April 2019, a WTO panel issued a landmark ruling in a dispute between Russia and Ukraine in which it confirmed its jurisdiction over Article XXI GATT[25]. In that case, Russia had invoked the exception to justify measures that blocked trade between Ukraine, Kazakhstan, and the Kyrgyz Republic in transit through Russia. Russia had claimed it had adopted these 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 whether a measure is necessary to protect U.S. national security would be an inappropriate breach of national sovereignty[26].

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)[27]. 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.

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24 Article XXI, GATT.

25 WTO Report of the Panel, 5 April 2019, '*Russia – Measures concerning Traffic in Transit'*, WT/DS512/R.

26 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.

27 Panel Report of 5 April 2019 (note 24), p. 50, paras 7.53-7.101.

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*."[28]

On the same day, Russia protested[29] 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.

2. EU-Russia Partnership Agreement

A similar line of reasoning can also be applied under the EU-Russia Partnership and Cooperation Agreement of 1994[30]. 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;'* [emphasis added]

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28 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.

29 *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.

30 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).

The European Court of Justice has already ruled 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*".[31]

Both the 2014 and the present EU sanctions are a reaction to a severe breach of international law by Russia, which has created a state of 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 dealing with assets of 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 until 31 January 2023:

> "*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, such as the Russian National Wealth Fund are prohibited.*"[32]

On 1 March 2002, commerce with Euro banknotes was restricted with Russian entities, including with the Central Bank:

> "*It shall be prohibited to sell, supply, transfer or export euro denominated banknotes to Russia or to any natural or legal person, entity or body in Russia, including the government and the Central Bank of Russia, or for use in Russia"*[33]

From a technical point of view, these prohibitions does not directly freeze the assets of the Central Bank. However, they restrict the possibility of the Central Bank for Russia to do business in Europe, as all partners around it are not allowed to engage into transactions. The effect of the prohibition is therefore very close to a direct freeze of assets. According to the

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

32 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).

33 Article 1(1) of Council Decision (CFSP) 2022/346 of 1 March 2002, amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine and Article 5i (1) of Regulation 833/2014, (OJ L 61 of 2.3.2022, p.1).

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 persons falling under EU jurisdiction not to engage in transactions relating to 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.[34]

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[35]. Accordingly, the property of the Russian Central Bank is covered by its rules.

Under Article 5, a State enjoys immunity for itself and for its property before foreign courts as a general principle ("jurisdictional immunity"). However, if a central bank engages in commercial transaction, such immunity cannot be invoked for such commercial action (Art. 10 para. 1).

Under Article 19 of the UN Immunity Convention, "enforcement immunity" (also referred to as immunity from execution) 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

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34 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.

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

concluded that the assets of a central bank enjoy an absolute enforcement immunity under the UN Immunity Convention from judicial and post-judicial measures.[36]

Importantly, the entire Convention only focuses only on judicial proceedings, as explained by the ILC at the time[37]. Accordingly, the wording of Article 19 of the Convention limits the concept to measures taken in connection with a proceeding before a court.[38] At the same time, the Convention does not regulate other forms of immunities. As the preamble observes, these continue to be governed by rules of customary international law.

In this respect, doctrine seems to be divided. 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.[39] Therefore, also the administrative freezing of central bank assets would infringe *per se* State immunity and can only be justified as a countermeasure[40]. Others point to the narrow judicial context of the term enforcement immunity. For them, immunity does not apply to administrative or legislative measures.[41] Behind these competing views, one may also detect two different purposes of granting immunity. For the first school of thought, the main rationale of immunity is to protect the liberty of a State to manage its property located in other States ("freedom")[42]. From that perspective, it does not matter whether the constraints on its property are imposed by judicial,

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36 Ingrid Wuerth (note 35), p. 269.

37 ILC Commentary to the Draft Articles on the UN Convention, Yearbook of the ILC 1991 II (Part Two), Article 1, para 2: "The concept therefore covers the entire judicial process, from the initiation or institution of proceedings, service of writs, investigation, examination, trial, orders which can constitute provisional or interim measures, to decisions rendering various instances of judgments and execution of the judgements thus rendered or their suspension and further exemption".

38 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".

39 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.

40 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, qualifying EU sanctions against the Iranian central bank as countermeasures): 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).

41 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.

42 S. Schmahl, Völker- und europarechtliche Implikationen des Ukrainekriegs, Neue Juristische Wochenschrift 2022, 969, p. 973, stressing as the purpose of enforcement immunity the protection foreign property which is dedicated to serve public purposes.

administrative or legislative means of another State. The other school of thought may derive its conclusion from the principle that one State should not sit as a judge over another State ("equality"). From that viewpoint, only the judicial arrogation of power by one State over another State is illegal, whereas States have to live with the fact that other States take legislative and administrative decisions on their territory affecting their property.

In that respect, it may be useful to recall the finding of the ICJ in *Jurisdictional Immunities of the State*:

The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.[43]

This dictum seems to suggest that any "departure" from the principle of territorial sovereignty needs to be construed narrowly. However, the ICJ has not been able to clarify this position in more detail so far. In an April 2016 letter, Iran complained against US legislative and judicial practice to confiscate assets from the Iranian Central Bank to the UN Secretary-General[44]. In June 2016, a legal action before the ICJ followed. In that case, Iran claims that several US action, leading US courts to award damages for alleged State-sponsored terrorist acts to private litigants, are violating the principle of immunity[45]. However, in its judgment of February 2019 on American preliminary objections, the ICJ established that no provision of the 1955 FCN Treaty between the parties allowed it to exercise jurisdiction over the question whether denying sovereign immunity of the Iranian Central Bank in the United States amounted to a treaty breach[46]. Accordingly, the ICJ had no authority on interpreting the scope of immunity of central banks.

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43 *Jurisdictional Immunity of the State (Germany v. Italy, Greece intervening)*, Judgment of 3 February 2012, pp. 123-124, para. 57.

44 Letter dated 28 April 2016 from the representative of Iran to the UN Secretary-General, https://digitallibrary.un.org/record/828768?ln=en.: "It is a matter of grave concern that the United States Congress, along with other branches of the United States Government, seem to believe that they can easily defy and breach the fundamental principle of State immunity by unilaterally waiving the immunity of States and even central banks in total contravention of the international obligations of the United States and under a groundless legal doctrine that the international community does not recognize."

45 *Certain Iranian Assets* (Islamic Republic of Iran v. USA), Application of Iran of 14 June 2016, para. 7.

46 *Certain Iranian Assets* (Islamic Republic of Iran v. USA), Judgment on Preliminary Objections of 13 February 2019, paras. 48-80. The ICJ concluded at para. 80: Consequently, the Court finds that Iran's claims based on the alleged violation of the sovereign immunities guaranteed by customary

In this situation, it seems useful to have recourse to recent State practice. When the US Office for Foreign Asset Control (OFAC) enacted restrictions on dealing with assets of the Russian bank in the United States in 2022, it held that the Foreign Sovereign Immunities Act does not apply. The reasoning behind is that OFAC action does not involve a court nor any form of enforcement or execution of a judgment[47]. Consequently, the US government seems to argue currently that there is no rule under customary international law to prohibit the administrative freeze of Russian Central bank assets. Similarly, the United Kingdom amended its Russia Sanctions Act[48] to prohibit transactions with the Russian Central Bank without being concerned with sovereign immunities. A similar reading is possible for the EU measures in question. There is no evidence that the adoption of Articles 5a(4) or Article 5i(1) of Regulation 833/2014 was considered by the High Representative, the Commission (when proposing the act) or the Council (when adopting it) as infringing on State immunity of Russian central bank assets. Accordingly, the EU did not consider that there was a rule of customary law on central bank immunity against legislative or administrative measures from which it had to depart by taking a collective 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. So far, such EU restrictive measures adopted under Articles 29 and 215 TFEU have been of a temporary and non-punitive nature[49].

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

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international law do not relate to the interpretation or application of the Treaty of Amity and, as a result, do not fall within the scope of the compromissory clause in Article XXI, paragraph 2. Thus, in so far as Iran's claims concern the alleged violation of rules of international law on sovereign immunities, the Court does not have jurisdiction to consider them.

47 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.

48 https://www.legislation.gov.uk/uksi/2022/194/contents/made.

49 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.(…)".

> *'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*.'[50]

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 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.[51]

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.[52]

Since then, the Court has repeated such reasoning also with respect to EU autonomous sanctions.[53] 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[54] 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

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

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

52 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.

53 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.

54 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.

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[55].

The same is true under international investment rules[56]. While Russia stopped its provisional application of the Energy Treaty Charter in August 2009 and cannot avail itself of Article 13 thereof anymore[57], the legal basis for Russian compensation claims can still be found in customary international law (law of aliens) or specific guarantees stemming from bilateral investment treaties with Russia. Russia currently has 62 bilateral investment treaties in force,[58] including 27 bilateral investment treaties with so-called *unfriendly* States.[59]

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[60]. If a targeted person commits a punishable offence, a trial judge can order the seizure of his assets. The Commission proposed to make the violation of EU sanctions a "EU-crime" under Article 83 (1) TFEU.[61] 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

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55 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.

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

57 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/.

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

59 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.

60 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/.

61 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.

States may already use their criminal law to initiate proceedings against EU-sanctions violators with the aim to turn frozen assets into forfeited assets. The EU is also likely to introduce in its sanctions regimes an obligation for 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 after legal proceedings.

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

1. Denial of Entry

Under Council Decision 2014/145/CFSP[62], 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 (or not) foreigners into their territory 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[63], Article 1(1) does not apply for those two persons. Owing to their specific position as Head 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 to Minsk on 23 May 2021 on the pretext of a demonstrably false bomb threat in order to arrest an opposition blogger[64], the Council urged the EU Member States on 24 May 2021 to close their airspace to Belarusian aircraft.[65] 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*

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62 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).

63 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.

64 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.

65 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/.

accordance with their national rules and laws and consistent with international law, in particular relevant international civil aviation agreements." [66]

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.[67] 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 in the case of indiscriminate application 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.[68] 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 have the right to take a third-party countermeasure and underpins 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 as a breach of Article 1 of the ICAO Convention.[69] On 28 February 2022 the EU closed its entire airspace to Russia. Article 4e (1) of Council Decision 2014/512 (consolidated) reads:

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66 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).

67 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.*"

68 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.

69 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.

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 natural or legal person, entity or body, permission to land in, take off from, or overfly the territory of the Union.[70]

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. As the ICAO Convention does not contain a clear-cut provision for such scenario, 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.*"[71]

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*."[72] 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[73], whereas bilateral treaties of Denmark and Malta with Russia concern equal access of civil vessels to their ports. Against that background, the denial of access to harbours requires a specific justification under these bilateral treaties, for example for reasons of public policy, if the treaty

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70 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.

71 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).

72 *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.

73 *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.

so allows.[74] 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 party countermeasure.

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.[75] The sixth sanctions package added another three outlets as of 4 June 2022.

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 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), the General Court ruled on 27 July 2022 in favour of the Council and upheld the restrictive measures imposing a broadcasting ban on Russia Today France.[76]

The Court was satisfied that Article 29 TEU and 215 TFEU was the only available means to take action with effect in the entire EU. Therefore, the Council had considerable latitude to adopt restrictive measures. [77] The limitation of the applicant's right to be heard can be justified with regard to the exceptional circumstances of the Russian aggression and the significance of media outlets in forming a public opinion.[78] In its judgment, the Court concluded that the applicant has engaged in activities of propaganda and disinformation supporting Russian aggression against Ukraine.[79] The Court held that that the limitations of the right to freedom

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74 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.

75 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).

76 Judgment of the General Court of 27 July 2022, T-125/22, *RT France v. Council*, ECLI:EU:T:2022:483.

77 Judgment of the General Court of 27 July 2022, T-125/22, *RT France v. Council*, ECLI:EU:T:2022:483, para. 52.

78 Judgment of the General Court of 27 July 2022, T-125/22, *RT France v. Council*, ECLI:EU:T:2022:483, paras. 75-98, 99.

79 Judgment of the General Court of 27 July 2022, T-125/22, *RT France v. Council*, ECLI:EU:T:2022:483, paras. 172-188.

of expression (Article 11 EU Charter of Fundamental Rights) are proportionate, since they are temporary and reversible.[80]

This judgment is all the more important as it may influence future legislative action for the fight against State-orchestrated disinformation campaigns. It emphasises that the protection of the right of freedom of expression does not extend to cover disinformation that is aimed at encroaching on the interest and values of the Union. Disseminating knowingly false information that, on top of it, is also war-propaganda, does not contribute to the democratic debate, but on the contrary, undermines it and represents even further reaching menace and thus should not benefit from protection under the freedom of expression. As RT France has appealed the judgment, the case is currently pending before the ECJ.

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[81], and the subsequent practice.

I. State practice until 2001

Literature and state practice on third party countermeasures were sparse until 2001.[82]

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,

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80 Judgment of the General Court of 27 July 2022, T-125/22, *RT France v. Council*, ECLI:EU:T:2022:483, paras. 192-212, 213.

81 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.

82 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).

probably inspired by a GA resolution[83] or an OAU recommendation[84]. 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[85].

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".[86]

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.[87]

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 the flight ban against the former Yugoslavia in 1998 to counteract grave human rights violations in Kosovo enacted by the Council[88].

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

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

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

85 Dawidowicz (note 41), pp. 116-117.

86 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.

87 For details see RGDIP 1982, pp. 603-606 and Dawidowiz (note 41), pp. 133-139.

88 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.

military coup[89] 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[90], the ECJ preferred to apply the *clausula rebus sic stantibus* only[91].

II. ILC Articles on State Responsibility 2001

Summarizing the above practice, the ILC took a cautious approach on the matter. Some States and ILC members feared the risk of abuse and were questioning the relationship of collective countermeasures to UN Security Council resolutions.[92] 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].

This Article reflects the jurisprudence of the ICJ since the *Barcelona Traction* case of 1970[93], 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"* […]

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89 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.

90 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.

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

92 Amanda Bills, *The Relationship between Third-party Countermeasures and the Security Council's Chapter VII Powers: Enforcing Obligations erga omnes in Internaional Law*, NJIL Vol. 89 (2020), 117-141, p. 118.

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

> '*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.*'[94]

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.*'[95]

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. Consequently, it is not appropriate to include in the present articles a 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."*[96] [emphasis added]

These provisions neither endorse nor exclude the right of third parties to take countermeasures. According to some authors, the ILC has prejudiced the right of states under Article 48 to take

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

95 ICJ, *Nicaragua* (note 18), para 249.

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

"lawful measures" because countermeasures are inherently wrongful[97], while others consider that Article 48 neither permits nor prohibits states from taking countermeasures[98]. In any case, as the ILC expressly left this question open, it is appropriate to examine further developments over the last twenty years. The saving clause in Article 54 of the ILC Articles can be considered as a compromise open to the further development of international law.[99]

III. State Practice and Developments since 2001

Since 2001, a number of scholars have found additional evidence of countermeasures by third States or organisations in practice. In 2005, *Tams* opined that the ILC "*could have said more*" than it did in Article 54 ARSIWA.[100] However, when codifying the responsibility of international organisations in 2011, the ILC did not elaborate on the issue any further. It merely stated that the conditions laid down in Articles 49 to 54 for countermeasures by one State against another could be applied by analogy to countermeasures by international organisations against States.[101]

Against that background, it is important to review newer practice that has materialized in more recent years.[102] The assessment of State practice and *opinio juris* concerning third-party countermeasures raises some legal and political challenges. In order to properly assess this practice it is necessary to distinguish third-party countermeasures, 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 national security exception in Article XXI GATT[103]. 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.

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

98 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.

99 Amanda Bills, *The Relationship between Third-party Countermeasures and the Security Council's Chapter VII Powers: Enforcing Obligations erga omnes in Internaional Law*, NJIL Vol. 89 (2020), 117-141, p. 119.

100 Christian Tams, *Enforcing obligations erga omnes in international law*, CUP 2005, p. 249.

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

102 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.

103 Dawidowicz (note 41), pp. 111-112.

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"[104]. It also employed targeted sanctions against persons and entities.

Importantly, the EU and the US have decided to go beyond the UN Security Council Resolutions and imposed additional measures to put maximum pressure on Iran to end its nuclear programme. In 2007, the EU targeted additional persons (which were not on the UN list).[105] In 2008, the EU froze assets of Iran's largest bank (Bank Melli[106]), and in 2012, imposed an oil embargo and froze assets of the Iranian national bank[107]. Further on, the E-3 and High Representative of the EU contributed to the finalisation of the Joint Comprehensive Action Plan of 2015.[108]

The 2007 action (additional targets) was considered as suspending the fulfilment of certain international obligations owed to Iran[109], most likely arising 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 to the international community as a whole (Article 48), these sanctions could be seen as (third party) countermeasures[110].

With respect to the 2012 oil embargo and the freezing of the Central Bank's assets, a similar infringement of investment guarantees owed to Iran (and even Article VIII(2)(a) IMF Articles

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

105 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.

106 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.

107 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.

108 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.

109 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.

110 Calamita (note 110), pp. 1422-1428 (in favour of Article 42); and pp. 1429-1433 (accepted a construction under Article 48 *arguendo*).

of Agreement) was identified[111]. While admitting the abstract possibility of a third party countermeasures, one eminent author concluded that the conditions were not met. In particular, this author questioned the proportionality of the reaction and the possibility of the EU to adopt countermeasures when the matter is brought before the UN Security Council.[112]

2. Libya 2011

On 17 February 2011, Libyan security forces killed numerous of protesters in Benghazi who were demonstrating against Colonel Gaddafi's regime. This marked the beginning of a series of similar incidents across Libya. A bloody uprising followed, which soon led to a 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 of Colonel Gaddafi, Libya's Head of State.[113] 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 could fall under Article 60 VCLT, the actions of the Member States of the Arab League can be construed as compliance to the principle of third party countermeasures.[114] 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".[115]

For *Dawidowicz*, Switzerland and the United States adopted third-party countermeasures against Libya by freezing the assets of Colonel Gaddafi and the Central Bank of Libya prior to the enforcement measures taken by the Security Council under Chapter VII of the UN Charter.[116] However, as explained above, that assessment is doubtful as there is no immunity from prescriptive jurisdiction. More convincing appears to be 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

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111 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).

112 P.-E. Dupont (note 112), manuscript at p. 30-33.

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

114 Dawidowicz (note 41), p. 217.

115 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.

116 Dawidowicz (note 41), p. 220.

Resolution 1970[117], welcoming the unilateral condemnation by the Arab League, passed unanimously by a vote of 15-0-0[118]. 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 implementing sanctions on Syria, including an arms embargo, travel bans and the freezing of assets of several leading regime officials.[119] President Al-Assad, Vice-President Al-Sharaa and Interior Minister Al-Sha'ar followed on 23 May 2011[120], 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*[121], 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 (with the exception of the State concerned). In this case, Syria, Lebanon and Yemen, voted against the membership suspension, with Iraq abstaining. The decision to suspend Syria was thus unlawful both in substantive and procedural terms under Article 18 of the pact of the League of Arab States. Accordingly, it can be argued in this case that Arab League Member States expressed their support for the adoption of third-party countermeasures.[122]

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*".[123]

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117 SC Resolution 1970 (2011).

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

119 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).

120 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.

121 Dawidowicz (note 41), p. 222-223 and p. 230.

122 Dawidowicz (note 41), p. 225.

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

Subsequently, on 31 July 2004, the EU adopted a comprehensive sanctions package including an arms embargo, and export restrictions on dual-use and goods for the oil exploration industry, as well as financial sanctions[124]. Switzerland, the US, Canada, Australia, and Japan also imposed measures against Russia in response to its illegal annexation of Crimea. While most of the initial sanctions imposed by the EU and its Member States against the Russian Federation may readily be seen as acts of retorsion, the financial and economic measures that impede the access of certain goods and services to the EU market needed justification. While *Dawidowicz* regards them as third party countermeasures as Articles XXI GATT and XIVa GATS had not been formally invoked[125], the preferable 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, it has to be examined whether third party countermeasures can now be considered part of customary international law (I.). If so, the procedural (II.) and substantive (III.) requirements need to be briefly outlined.

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 made by the ILC in 2001 against the concept was that previous State practice 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 acceptance of the concept was already wider at the time and continued to grow after 2001[126]. 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

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124 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).

125 Dawidowicz (note 41), p. 235.

126 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.

America) and from international organisations such as the EU, the AU, the AL and ECOWAS.[127]

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 case does the official justification of the legal act mention the right to take countermeasures as a non-directly affected State. In many cases, the necessity to react to a grave breach of international law is underlined. In so far as the adopted measures would otherwise be contrary to international law, it can be assumed that the respective government has invoked the concept as justification[128].

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[129]. 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, *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"[130]. After the Russian Federation's invasion of Ukraine in 2022, contemporary authors affirm that customary law has evolved, so that third-party countermeasures against Russia are permitted in response to its violation of the prohibition on the use of force.[131]

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

127 Ruys (note 103), p. 23 of the manuscript.

128 Dawidowicz (note 41), p.252.

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

130 Ruys (note 103), p. 25 of the manuscript.

131 C. Walter (note 11), p. 479.

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.[132]

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.

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

The first requirement is that before resorting to countermeasures, an 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

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

Naulilaa case[133] and the ICJ in the *Gabcikovo* case[134]. If the aim of a measure is not directed at achieving the cessation of the wrongful act, it cannot be qualified as countermeasure.[135]

From the State practice reviewed, it appears 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 in political statements that precede the relevant national, European or international legal instruments, which may also contain the same message.

2. The duty of prior notification

At the same time, in most cases 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. Most of the recent third party countermeasures therefore appear to have been taken as urgent countermeasures under Article 52(2) without prior notice.

In this context, the question arises of how to deal with the situation where an EU legislative act contains 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 that the EU measure constitutes a proportionate reaction to the breach by the responsible States of a norm 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 vested into the judiciary. However, if negotiations are only ongoing[136] or if no dispute settlement body is available, a countermeasure may be taken.

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133 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.

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

135 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.

136 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.

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 ceases 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[137]. Instead, one may consider to formally notify third-party countermeasures to the United Nations to strengthen their acceptance.[138]

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[139].

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[140] or the UNGA resolution ES-11/1 of 1 March 2022 condemning Russia's aggression improves the legitimacy of the respective countermeasures[141]. Similarly, if there are particularly serious or systematic breaches, a third-party countermeasure may be seen as less controversial.[142]

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

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137 Dawidowicz (note 41), pp. 255-262.

138 Ruys, (note 103), p. 26 of the manuscript.

139 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."

140 Calamita (note 110), at p. 1430.

141 C. Walter, (note 11), p. 479.

142 Ruys (note 103), p. 26 of the manuscript.

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[143] and presented in literature[144]. 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[145]. In such a situation, the continuation of the countermeasure must, though, be re-evaluated.

3. Reversibility

Another important constraint for countermeasures derives 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 obligation 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.[146] One example for a non-reversible countermeasure is the suspension of environmental obligations.[147] Similarly, it would have to be examined whether countermeasures would exceptionally 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 human rights are protected from countermeasures for which no derogations are allowed. Drawing from Article 15 (2) of the European Convention on Human Rights, these are the right

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

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

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

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

147 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.

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 the 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.