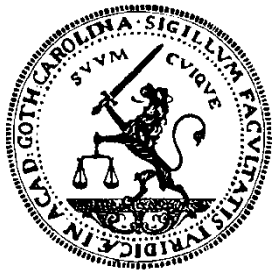

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Economic Warfare or Countermeasures? EU Autonomous Sanctions Against Russia under International Law

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Contents

Summary

This thesis has examined the international legal framework for the EU's autonomous sanctions against Russia. Following Russia's breaches of the obligations of non-use of force and non-intervention in Ukraine in 2014, the EU adopted a package of different measures against those deemed responsible and against key sectors of the Russian economy. The sanctions are autonomous since they are imposed independently of any UNSC resolution.

Autonomous sanctions are notoriously difficult to define and legally categorise. If the measures do not violate any of the EU Member States' international obligations, they can be freely exercised as legal acts of retorsion. If they are in breach of an obligation however, they can only be justified as third-party countermeasures under the law of State responsibility. The main question of the thesis has therefore been to what extent the EU's autonomous sanctions against Russia could be justified as third-party countermeasures. First, the question regarding whether they are in violation of the EU Member States' obligations under WTO law, in the treaties of GATT and GATS, had to be examined.

The travel bans, the asset freezes and the arms embargo imposed by the EU can be qualified as retorsion, but the financial and trade restrictions against the Russian financial and energy sectors are in violation of the EU Member States' obligations of non-discrimination under WTO law.

To qualify as lawful countermeasures, they would have to meet certain criteria codified by the ILC in Articles 49-53 ARSIWA. The dilemma is that the EU Member States cannot be considered directly injured States within the meaning of Articles 42 and 49 ARSIWA. As the obligations breached by Russia are obligations *erga omnes*, owed to the international community as a whole, the EU Member States can invoke the responsibility of Russia under Article 48. The right of non-injured States to take third-party countermeasures however, is one of the most divisive and unresolved issues of the law of State responsibility. The ILC infamously avoided the issue by adopting Article 54 ARSIWA.

By using a legal dogmatic method with an international perspective, the generally recognised sources of international law have been consulted to find answers to the research questions. Because there is little guidance from the primary sources of international law, the content of customary international law has mostly been interpreted and examined through legal doctrine and judicial decisions.

The conclusion of the thesis is that the measures that violate the EU Member States' obligations under WTO law are permissible third-party countermeasures. The stronger position in legal doctrine is that they are lawful, and the measures against Russia appear to fulfil the requirements, including proportionality and necessity. However, it is evident by these issues that the general legal position of autonomous sanctions remains weak.

Sammanfattning

Denna uppsats har undersökt det folkrättsliga ramverket bakom EU's autonoma sanktioner mot Ryssland. Efter Rysslands folkrättsstridiga handlingar mot våldsförbudet och non-interventionsprincipen i Ukraina 2014, antog EU ett paket av olika åtgärder mot de som ansetts ansvariga och mot viktiga sektorer av den ryska ekonomin. Sanktionerna är autonoma eftersom de har antagits oberoende av någon resolution från FN:s säkerhetsråd.

Autonoma sanktioner är beryktat svåra att definiera och att rättsligt kategorisera. Om åtgärderna inte strider mot någon av EU-medlemsstaternas internationella förpliktelser, kan de fritt utövas som rättsenliga retorsionshandlingar. Om de däremot är i strid med en förpliktelse, kan de bara rättfärdigas som tredjestatskontraåtgärder i statsansvarsrätten. Huvudfrågan för uppsatsen har därför varit i vilken mån EU's autonoma sanktioner mot Ryssland kan rättfärdigas som tredjestatskontraåtgärder. Först behövde dock frågan om de strider mot EU-medlemsstaternas förpliktelser enligt WTO-rätten i traktaten GATT och GATS undersökas.

Reseförbuden, frysningarna av tillgångar och vapenembargot som införts av EU kan kvalificeras som retorsionshandlingar, men de finansiella restriktionerna och handelsrestriktionerna strider mot EU-medlemsstaternas förpliktelser till icke-diskriminering under WTO-rätten.

För att kvalificeras som folkrättsenliga kontraåtgärder, måste de uppfylla vissa kriterier kodifierade av ILC i Artiklarna 49-53 ARSIWA. Dilemmat är att EU-medlemsstaterna inte kan anses som direkt skadade stater utifrån Artiklarna 42 och 49 ARSIWA. Eftersom förpliktelserna som brutits av Ryssland är förpliktelser *erga omnes*, gentemot hela det internationella samfundet, kan EU-medlemsstaterna göra Rysslands ansvar gällande enligt Artikel 48. Rätten för icke-skadade stater att vidta kontraåtgärder är dock en av de mest splittrande och kvarvarande frågorna i statsansvarsrätten. ILC undvek frågan genom att anta Artikel 54 ARSIWA.

Genom att använda en rättsdogmatisk metod med ett internationellt perspektiv, har de allmänt erkända folkrättsliga källorna tagits hänsyn till för

att finna svaren på forskningsfrågorna. Eftersom de primära folkrättsliga källorna ger liten vägledning, har innehållet i den internationella sedvanerätten mestadels tolkats och undersökts utifrån rättslig doktrin och judiciella avgöranden.

Uppsatsens slutsats är att åtgärderna som strider mot EU-medlemsstaternas förpliktelser enligt WTO-rätten är tillåtna tredjestatskontraåtgärder. Den tyngre ståndpunkten i doktrinen är att de är folkrättsenliga, och åtgärderna mot Ryssland verkar uppfylla kraven, inklusive proportionalitet och nödvändighet. Emellertid är det uppenbart vad gäller dessa frågor att den generella rättsliga grunden för autonoma sanktioner kvarstår som svag.

Abbreviations

ARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
ARSIWAC	Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries
CFSP	Common Foreign and Security Policy
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade (1994)
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ILC	International Law Commission
MFN	Most-favoured nation
MPEPIL	Max Planck Encyclopaedia of Public International Law
UN	United Nations
UN Charter	Charter of the United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States of America
WTO	World Trade Organisation

1 Introduction

1.1 Background

The tensions between Russia on one hand and the EU and US on the other are perhaps at the highest level since the Cold War, in a time where there is fear of a potential escalation of the military conflict in Ukraine.[1] Following Russia's violation of Ukrainian sovereignty in Donbass and the illegal annexation of Crimea in 2014, the EU imposed economic sanctions against Russian subjects.[2]

The use of sanctions has rarely been more prevalent, or more contested.[3] Historically, coercive economic measures have been used by States as a means of economic warfare besides conventional military campaigns.[4] Since the end of the Cold War's strategic stalemate in the UNSC in the 1990's, both UN and autonomous sanctions have been used more extensively.[5] Under Articles 39 and 41 of the UN Charter, the UNSC has the authority to impose economic sanctions to restore international peace and security, after determining that something constitutes a threat to the peace. Although UNGA adopted a resolution on the situation in Ukraine, there has been no action by the UNSC, where Russia is a permanent member with veto power.[6] The EU sanctions against Russia are unilateral, or autonomous, since they are imposed independently of any UNSC resolution.[7]

The nature and basis of autonomous sanctions in international law is still largely unsettled.[8] They have raised many questions and have been criticised as being contrary to international law and in breach of the rights of targeted

[1] BBC News (2021), "Russian 'troop build-up' near Ukraine alarms Nato" https://www.bbc.com/news/world-europe-56616778.
[2] Dawidowicz (2017), 235.
[3] Happold (2016), 1.
[4] Lowe, Tzanakopoulos (2013), "Economic Warfare", MPEPIL.
[5] Cameron (2013), 3.
[6] UNGA Res. 68/262 (27 March 2014).
[7] Desierto (2014), EJIL: Talk!.
[8] Ibid.

States.[9] Prima facie unlawful sanctions have been imposed by States and international organisations, including the EU and its members, on a large number of occasions.[10]

As members of the WTO, the EU Member States and Russia are parties to GATT and GATS.[11] If the economic sanctions against Russia violate the EU States' obligations under GATT and GATS, they would have to be defended on an alternative basis of international law as countermeasures under the law of State responsibility.[12] The problem however, is that it is far from obvious that such third-party countermeasures are permissible, or under what conditions.

1.2 Purpose and Research Questions

The purpose of this thesis is to examine the international legal framework for the EU's autonomous sanctions against Russia, in particular whether they can be qualified as third-party countermeasures within the framework of the law of State responsibility. Russia has been used as the main example for three main reasons; to provide a more concrete understanding of the issues at hand, as a way of delimiting the scope of the thesis and because the EU's relations with Russia arguably have the biggest repercussions.

The main research question that will be examined is therefore:

- *To what extent can the EU's autonomous sanctions against Russia be justified as third-party countermeasures under the law of State responsibility?*

To answer the main research question, other important questions must also be examined:

- *How can autonomous sanctions be defined and legally categorised under international law?*
- *Are the EU's autonomous sanctions against Russia in violation of the EU Member States' obligations under WTO law?*

[9] Happold (2016), 1.
[10] Dawidowicz (2017), 112.
[11] WTO (2021), https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.
[12] Desierto (2014), EJIL: Talk!.

1.3 Delimitation

Due to the constraints of time and space, some interesting factors will not be examined in this thesis. Autonomous sanctions as countermeasures have been chosen as the main subject of this paper, because of the controversial nature of so-called "third-party countermeasures" and the unclear legal basis for autonomous sanctions in international law. The sanctions within the framework of the UN Charter have also raised questions, but the EU's own sanctions are in more of a legal grey zone.

The thesis examines the role of EU sanctions in public international law, and aspects of EU law will only be mentioned briefly. The thesis is further delimited to countermeasures by individual EU Member States, which is governed by the law of State responsibility and not the law of responsibility of international organisations.[13]

One of the most discussed issues regarding sanctions is their potential to violate individual human rights, as they have often been used against non-State actors and terrorists and could interfere with internationally protected rights of citizens of a targeted State.[14] This thesis only concerns the State perspective.

Economic sanctions, meaning trade and financial restrictions, will be discussed whereas other types of sanctions will not. Military sanctions are judged as use of force or self-defence respectively, and diplomatic sanctions, i.e. a suspension of diplomatic relations, are often categorised as legal acts of retorsion. There are a range of possible primary obligations that can be violated by autonomous sanctions. By focusing on Russia and on EU Member States in general, it is most relevant to delimit the scope of this thesis to the legality of the sanctions under GATT and GATS since all relevant actors are parties to those WTO agreements. In addition to other specific bilateral treaty obligations between each EU member and Russia, an asset freeze for example can be in violation of obligations regarding the immunity of States and their

[13] Dupont (2016), 52.
[14] Happold (2016), 8.

assets and of certain high-ranking State officials.[15] There are also arguments concerning the compatibility of autonomous sanctions, as "coercive measures" that can interfere in the internal affairs of States, with the principle of non-intervention.[16] These factors are beyond the scope of this thesis.

1.4 Method, Material and Previous Research

This thesis has been written using a legal dogmatic method with an international perspective. The purpose of the legal dogmatic method is to reconstruct a legal norm or the solution to a legal problem by application of the legal norms found in the generally accepted legal sources.[17] It often implies that you have a concrete research question as a starting point and then legal sources are consulted to identify the current content of the existing law and to find answers to the questions.[18] The choice of the legal dogmatic method is motivated for this thesis because of the unclear legal position of autonomous sanctions in general, and third-party countermeasures in particular.

This means that the generally recognised sources of international law have been used to examine and answer the research questions. Article 38 of the ICJ Statute is the classic list of the sources considered to be generally accepted as international legal sources and its proposed hierarchical order of the sources has been followed in this thesis.[19] The primary (law-creating) sources are treaties, customary international law and general principles, and the secondary (law-identifying) sources include judicial decisions and scholarly contributions.[20] It is important to be aware of the difference, because the secondary sources give their own interpretations of the content of the primary sources.

[15] Dawidowicz (2017), 113.
[16] Orakhelashvili (2016), 36.
[17] Kleineman (2018), 21.
[18] Ibid, 23.
[19] Henriksen (2019), 22.
[20] Ibid, 23.

The international perspective also means that one must bear in mind the differences between the international legal system and national legal systems. Public international law is a highly decentralised system where the law often is created, interpreted and enforced by the same legal subjects that are bound by it, primarily States and international organisations.[21] In that way the legal dogmatic method may not allow for examinations of extra-legal motives of States, but at the same time it helps to distinguish the law from politics.

In general, I have first consulted the primary sources when possible, in particular the customary norms of the law of State responsibility and the treaties of GATT and GATS. The secondary sources, especially legal doctrine, have then been analysed to give more weight to my findings, or to find potential solutions and arguments where the primary sources do not give definitive answers. As there is little guidance in the primary sources on third-party countermeasures, legal doctrine has been used to clarify and interpret the content of customary international law. Judicial decisions by the ICJ have also been used, but to a lesser extent since States rarely have challenged autonomous sanctions through international adjudication.[22]

The material has mostly consisted of the rules of customary international law interpreted through legal doctrine and judicial decisions. The more recent contributions have been preferred over older texts. The previous research of Dawidowicz on State practice concerning third-party countermeasures has been particularly useful since such an extensive examination of practice is beyond the scope of this thesis. The ILC texts, which has a special position in international law, have also guided the thesis.

1.5 Outline

First, I will present the role of autonomous sanctions in the international legal system by examining the fundamental legal characteristics, definitions and categories relevant for such measures. Then, I will examine the existing primary international legal norms under the WTO agreements and in what

[21] Henriksen (2019), 2.
[22] Happold (2016), 11.

way they limit the use of autonomous sanctions. Thereafter, I assess the requirements for categorising sanctions as countermeasures under the law of State responsibility, as embodied in ARSIWA, and the arguments concerning the permissibility of third-party countermeasures. Lastly, the findings will be analysed to discuss and answer the research questions.

2 Legal Categorisation of Autonomous Sanctions

2.1 EU Autonomous Sanctions against Russia

What is commonly called "sanctions" are referred to as "restrictive measures" in the constituent treaties of the EU and by the EU institutions.[23] Currently, there are over forty EU sanctions regimes in effect against third States.[24] The measures typically consist of a mix of arms embargoes, asset freezes, travel bans and different trade and financial restrictions.[25] The EU implements two types of sanctions; UN sanctions as well as its own "unilateral" or "autonomous" sanctions within the framework of the CFSP.[26] By adopting its own sanctions regimes against non-EU members, the EU is able to strive for its own goals as an international actor and go further than the UNSC in case it is blocked for political reasons.[27]

Russia invaded Ukraine and occupied Crimea on 28 February 2014 and a few weeks later, after a dubious referendum, Crimea was formally annexed by Russia. A civil war erupted in Eastern Ukraine between Ukraine and pro-Russian separatists. These acts of aggression, in violation of Ukrainian sovereignty and territorial integrity, were condemned by the EU as clear breaches of the prohibition of the use of force, as embodied in Article 2(4) UN Charter, and of the principle of non-intervention. The EU has continuously urged Russia to comply with its obligations.[28]

[23] Cameron (2013), 1.
[24] European Commission (2021), "Restrictive measures (sanctions)", https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en.
[25] Ibid.
[26] Cameron (2013), 1.
[27] Ibid, 31.
[28] Dawidowicz (2017), 231-235.

The EU decided on 17 March 2014 to impose travel bans and asset freezes on a range of Russian individuals deemed responsible for the situation in Ukraine. On 31 July 2014, the EU adopted a package of different measures against key sectors of the Russian economy. An arms embargo, including dual-use goods, was introduced against the defence sector. Russian financial institutions were denied access to European capital markets through a ban on selling certain financial instruments, while the energy sector was targeted by an export embargo on certain goods and technology used for oil and gas production and exploration. Extending loans and credits to the listed entities was also prohibited. These measures have since been reviewed and extended multiple times, at the latest occasion in December 2020 until July 2021.[29]

2.2 Sanctions

There is no authoritative definition of "sanction" in international law.[30] It has been defined as a "deliberate, government-inspired withdrawal or threat of withdrawal of customary trade or financial relations".[31] It has also, more simply, been described as a reaction to illegality.[32]

As there are a wide variety of measures of unilateral self-help, the term "sanction" and the distinction between it and other cognate concepts is quite imprecise.[33] The distinction between sanctions in a strict meaning, acts of retorsion, countermeasures, armed or forcible reprisals, self-defence and the suspension or termination of treaty relations under treaty-law doctrines can sometimes be confusing, but is nevertheless important.[34] To determine the applicable legal framework that governs the legality of sanctions, one must first assess the legal nature of the measures.[35] Dupont identifies three different categories that are relevant for the EU measures in question; sanctions, retorsion and countermeasures.[36]

[29] Council Decision 2014/512/CFSP, Council Regulation (EU) No. 833/2014.
[30] Cameron (2013), 2.
[31] Ibid.
[32] Tzanakopoulos (2016), 67.
[33] Dawidowicz (2017), 22.
[34] Ibid, 18.
[35] Dupont (2016), 39.
[36] Ibid, 41.

First, the EU's autonomous measures must be distinguished from UN sanctions. In a strict sense, the term "sanction" can be said to be reserved in modern international law for centralised measures taken collectively by States within the institutional framework of international organisations, in particular under Chapter VII of the UN Charter.[37] Article 25 of the UN Charter states that all UN members are required to accept and carry out UNSC resolutions and, according to Article 103, they have priority over other obligations in international law in case of conflict.[38] The EU's autonomous sanctions are, although coordinated collectively as a group through the EU, decentralised reactions implemented individually against non-EU members.[39] UN sanctions, including those implemented by the EU, derive their justification from the supremacy clause in Article 103, whereas autonomous sanctions find no justification under the UN Charter as they are either lacking or exceeding the authority of the UNSC.[40]

2.3 Retorsion

When a State, a group of States or an international organisation imposes autonomous sanctions against a third State, the measures are judged as countermeasures or seen as acts of retorsion.[41] If the measures cannot be categorised as either, they are simply unlawful breaches of a State's international obligations.[42]

Retorsion refers to "unfriendly" conduct "which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act".[43]

An act of retorsion is thus a completely legal act within the discretion of the acting State, although it can be unpleasant for the target State.[44] The motives behind it are irrelevant; it is not necessarily a reaction to illegality.

[37] Dawidowicz (2017), 22; and UN Charter (1945).
[38] Cameron (2013), 3.
[39] Dawidowicz (2017), 22.
[40] Ibid, 22.
[41] Cameron (2013), 2.
[42] Lowe, Tzanakopoulos (2013), "Economic Warfare", MPEPIL.
[43] ARSIWAC (2001), 128, para. 3.
[44] Dupont (2016), 41-42.

To withdraw a unilateral and voluntary undertaking, such as aid, is normally an act of retorsion while a suspension of reciprocal obligations most likely will be judged as a countermeasure, so long as the suspension of the specific obligation is not founded in a treaty between the States.[45]

2.4 Countermeasures

To be considered lawful countermeasures, the EU's autonomous sanctions would have to meet certain legal criteria as set out in the law of State responsibility.[46] The rules on State responsibility are secondary rules. The primary rules of international law define the specific obligations States must comply with, whereas secondary rules define the consequences of violating the primary rules.[47]

A countermeasure is a tool of decentralised, peaceful law enforcement.[48] The legal effect of the countermeasure is, unlike the termination or suspension of treaty relations under treaty-law doctrines, not the temporary or permanent extinction of the obligation, but the temporary suspension of its performance.[49] While retorsion is intrinsically lawful, a countermeasure is by definition an infringement on the target State's rights under international law.[50] Retorsion is a largely unregulated and freely exercised category of self-help measures that, unlike countermeasures, fall outside the law of State responsibility and its legal requirements.[51]

The ILC intended to codify the law of State responsibility and its requirements for countermeasures through its work with ARSIWA.[52] The articles were presented to and subsequently recommended by UNGA in December 2001.[53] ARSIWA is not a treaty and it is not itself binding upon

[45] Cameron (2013), 2.
[46] Desierto (2014), EJIL:Talk!.
[47] Henriksen (2019), 120-121.
[48] Dawidowicz (2017), 20.
[49] Ibid, 21.
[50] Ibid, 27.
[51] Ibid, 28.
[52] ARSIWA (2001).
[53] UNGA Res. 56/83 (12 December 2001).

States, but the articles are generally considered to reflect customary international law.[54]

Countermeasures have been defined by the ILC as "measures that would otherwise be contrary to international obligations of an injured State vis-à-vis the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation".[55] A traditional "bilateral countermeasure", as embodied in Articles 42 and 49 ARSIWA, with reference to the "injured State", concerns the legal relationship between the directly injured State and the responsible State.[56] It is a non-forcible measure of an injured State not in conformity with an international obligation owed towards the responsible State.[57] Under Article 22, the wrongfulness of the measure is precluded if and to the extent that the act constitutes a countermeasure in accordance with Chapter II of part three ARSIWA.

In sum, the crucial distinguishing element between retorsion and countermeasures is whether the measure is taken in violation of any international obligation. Because of the lack of precision of international legal norms and the relative absence of binding third party settlement of disputes, the legal characterisation as either retorsion or countermeasures can be unclear.[58] It depends on the given circumstances, the current state of general international law and the specific international obligations in force between the specific States.[59] The concurrent use of countermeasures and retorsion can further complicate the distinction between them and the analysis of their permissibility.[60]

[54] Henriksen (2019), 121.
[55] ARSIWAC (2001), 128, para. 1.
[56] Happold (2016), 8.
[57] Dawidowicz (2017), 19.
[58] Cameron (2013), 2.
[59] Dawidowicz (2017), 29.
[60] Ibid.

3 EU Autonomous Sanctions under WTO Law

On one side of the dispute concerning the lawfulness of autonomous sanctions, it is argued that States are completely free to revise, restrict or totally suspend its relations with other States, including trade, as long as there are no specific legal obligations breached.[61] In the *Nicaragua* case, the ICJ confirmed that "a State is not bound to continue particular trade relations longer than it sees fit to do so in the absence of a treaty commitment or other specific legal obligation".[62] However, the freedom of action that States enjoy is normally constrained by treaty obligations.[63]

The travel bans and asset freezes are best seen as acts of retorsion as they are not in violation of any of the EU Member States' international obligations, and the same can be said for the arms embargo.[64] However, the financial and trade restrictions are covered by GATT and GATS, which the EU and its Member States are parties to since they are members of the WTO.[65] Russia has been a WTO member since 2012.[66]

Quantitative and discriminatory trade restrictions are prohibited under the GATT regime, in particular under Articles XI and XIII.[67] The export embargo on Russian energy goods is unlawful under Article XI GATT, as a quantitative trade restriction.[68] GATT contains a security exception in Article XXI that permits the interruption of trade relations.[69] Article XXI(b)(iii) states that nothing in the agreement shall be construed to prevent a contracting party from taking any action it considers necessary for the protection of its essential security interests, taken in time of war or other emergency in

[61] Happold (2016), 3.
[62] *Nicaragua*, para. 276.
[63] Happold (2016), 7.
[64] Dawidowicz (2017), 233-234.
[65] WTO (2021), https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.
[66] Dawidowicz (2017), 235.
[67] Ibid, 116.
[68] Ibid, 235.
[69] Happold (2016), 6.

international relations. However, the EU Member States have not invoked any national security exception under Article XXI GATT.[70]

The financial measures against Russian entities are covered by Article I(2)(b) GATS. They appear to violate the general obligation, under Article II GATS, to provide MFN treatment, which means a member cannot discriminate against other members, and no exemption seems applicable. The national security exceptions under Article XIV bis GATS, which are similar to the ones under GATT, have not been invoked either.[71]

If there is no invocation of the WTO exceptions at all, it appears that the measures are prima facie violations of the EU Member States' treaty obligations. Such measures would then have to find their justification under general international law, namely the law of State responsibility.[72]

[70] Dawidowicz (2017), 235.
[71] Ibid.
[72] Ibid, 116-117.

4 EU Autonomous Sanctions as Third-Party Countermeasures

4.1 Internationally Wrongful Act

The first fundamental prerequisite for a lawful countermeasure is the existence of an internationally wrongful act.[73] Under Article 49(1) ARSIWA, an injured State may only take countermeasures against a State which is responsible for an internationally wrongful act, as defined in Articles 1-2. This requirement constitutes a fundamental principle that presupposes an "objective standard".[74] However, since there is no compulsory jurisdiction of courts and tribunals that can make binding decisions in international law, the power to determine whether the conditions for countermeasures are met or not rests with the State taking the measures.[75] The assessment is thereby also at that State's own risk; if the assessment is incorrect the State could itself incur responsibility and be responded to with countermeasures.[76]

This decentralised system "entitles the State to act as a judge and a sheriff in its own cause".[77] The broad discretion of States to auto-interpret the internationally wrongful act has a high potential for abuse which is only exacerbated further by the inequalities between States.[78] Countermeasures are therefore subject to both substantial and procedural conditions.[79]

[73] Orakhelashvili (2016), 34.
[74] ARSIWAC (2001), 130, para. 3.
[75] Tzanakopoulos (2016), 70.
[76] Ibid.
[77] Dawidowicz (2017), 4.
[78] ARSIWAC (2001), 128, para. 2.
[79] Dupont (2016), 53.

4.2 Injured State

The references in Articles 42 and 49 ARSIWA to the "injured State" raise the question whether the EU Member States really can be considered as such. As evident by the ILC's work with Articles 40, 41, 48 and 54, the law is not completely limited to bilateral situations of responsibility.[80] Article 42 provides that invocation and implementation of responsibility is first and foremost the entitlement of the injured State, which is defined "in a relatively narrow way, drawing a distinction between injury to an individual State or possibly a small number of States and the legal interests of several or all States in certain obligations established in the collective interest".[81] To be considered the former under Article 42, a State "must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed".[82] The latter category can invoke responsibility under Article 48 instead.[83]

In the instance of Russia, Ukraine is clearly the directly injured State. However, the prohibition of aggression and use of force are obligations *erga omnes*, where "all States can be held to have a legal interest in their protection", as was recognised by the ICJ in the *Barcelona Traction* case.[84] A State other than an injured State, or a "non-injured State", is thus entitled under Article 48 to invoke the responsibility of another State 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". Articles 48(1)(a) and (b) refer to communitarian norms; obligations *erga omnes partes* and *erga omnes* respectively.[85] After invoking responsibility under the same bilateral requirements under Articles 43-45, the non-injured State can, according to Article 48(2), claim cessation of the breach,

[80] Dawidowicz (2017), 33.
[81] ARSIWAC (2001), 117, para. 1.
[82] Ibid, 119, para. 12.
[83] Ibid, 117, para. 1.
[84] Henriksen (2019), 137; and *Barcelona Traction*, paras. 33-34.
[85] Tzanakoupolos (2016), 72.

guarantees of non-repetition and reparation in the interest of the injured State under the same requirements as for injured States. The EU Member States are accordingly entitled under Article 48 to invoke Russia's responsibility on behalf of Ukraine.

The permissibility of *countermeasures* taken by non-injured States, however, has been discussed intensively.[86] Such measures have been called many different things, including third-party countermeasures.[87] They have become increasingly common in international relations, yet their legal position has remained unclear and controversial.[88] Dawidowicz has defined a third-party countermeasure as "an otherwise unlawful act of a peaceful character taken by a State other than an injured State in response to a breach of a communitarian norm owed to it (as defined in Article 48 ARSIWA) in order to obtain cessation and reparation".[89]

The issue was very controversial in the ILC; States and scholars were clearly divided.[90] The ILC concluded that the evidence was insufficient, with regards to practice and opinio juris, to include a right to take third-party countermeasures.[91] ARSIWA does not expressly state the legality or illegality of third-party countermeasures.[92] Article 54 of Chapter II ("*Countermeasures*") concerns "*Measures taken by States other than an injured State*". It says that the chapter does not prejudice the right of a non-injured State to take lawful measures against the responsible State to ensure cessation of the breach and reparation in the interest of the injured State. By adopting this "saving clause", referring to "lawful measures" instead of countermeasures, the ILC avoided the issue and reserved its position.[93] The controversies of the topic forced the ILC to find a "compromise solution" and leave the question open for future development.[94]

[86] Happold (2016), 7.
[87] Tzanakoupolos (2016), 72.
[88] Dawidowicz (2017), ix.
[89] Ibid, 34.
[90] Ibid, 109.
[91] Ibid, 240.
[92] Tzanakoupolos (2016), 72.
[93] Dawidowicz (2017), 34.
[94] Ibid, 13.

The ICJ and other judicial organs have not offered much guidance either when it comes to enforcement of communitarian norms, and the issue of third-party countermeasures has never been litigated before the court.[95]

Differing interpretations have been presented for the provision in Article 54.[96] It could be seen as an out-right prohibition of third-party countermeasures, as countermeasures by definition are intrinsically unlawful measures whose wrongfulness is subsequently precluded.[97] A provision that just enables States to take "lawful measures" could also be seen as redundant.[98] Although doctrine is divided on third-party countermeasures, the stronger position seems to be the one arguing that the permissibility of such measures is supported by practice.[99] In other words, the subsequent practice since the adoption of ARSIWA has increasingly been seen as support for third-party countermeasures.[100] Dawidowicz concludes, after a thorough examination of practice, that it is more widespread, consistent and representative today than what the ILC had found.[101] Practice shows that third-party countermeasures have been taken many times explicitly in response to widely acknowledged, serious breaches of communitarian norms.[102] A serious breach, meaning gross or systematic failure to fulfil an obligation, thus limits the use of third-party countermeasures.[103] In sum, Dawidowicz suggests that there is enough support in practice for the conclusion that third-party countermeasures to enforce serious breaches of communitarian norms are permissible as a general rule of customary international law.[104] Still, they would have to live up to the general conditions for bilateral countermeasures in Articles 49-53, applied by analogy.[105]

[95] Dawidowicz (2017), 71.
[96] Tzanakopoulos (2016), 72.
[97] Ibid.
[98] Ibid.
[99] Ibid, 73.
[100] Happold (2016), 7.
[101] Dawidowicz (2016), 242.
[102] Ibid, 252.
[103] Ibid, 268.
[104] Ibid, 282.
[105] Ibid, 287.

4.3 Substantive Conditions

4.3.1 Object and Limits

According to Article 49, an injured State may only take countermeasures against a responsible State in order to induce that State to comply with its obligations of cessation and reparation. In addition, the measures are limited to the non-performance for the time being of international obligations of the State taking the measures, and they shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question. According to Article 53, countermeasures shall also be terminated as soon as the responsible State has complied with its obligations of cessation and reparation. As a basic principle, the measures must be directed only against the responsible State.[106] The purpose of the measures must be "to induce the wrongdoing State to comply with its international obligations, and that the measure must therefore be reversible".[107] If it is purely motivated by political or punitive elements, it is incapable of justification.[108] However, practice appears to show that there often is a clear legal instrumental justification, and then additional ulterior motives do not matter.[109] Practice seems to justify third-party countermeasures only in relation to cessation, as reparation rarely has been enforced that way.[110] It is unclear what role consent from the directly injured State has, but it seems that it is not necessarily required.[111] If and when the responsible State returns to legality, the measures must be possible to revert back to legality even if some effects may be irreversible.[112]

[106] *Gabcikovo-Nagymaros Project*, para. 83.
[107] Ibid, para. 87.
[108] Dawidowicz (2017), 297.
[109] Ibid, 296.
[110] Ibid, 299.
[111] Ibid, 302.
[112] Ibid, 304.

4.3.2 Excluded Obligations

There are some obligations the performance of which cannot be suspended by way of countermeasures. Article 26 ARSIWA makes it clear that countermeasures may never violate obligations under peremptory norms and Article 50 also excludes them, as well as some other obligations whose status as peremptory is more unclear.[113] Article 50 is an attempt to list some obligations not affected by countermeasures, including the obligation to refrain from the threat or use of force, obligations for the protection of fundamental human rights and obligations of a humanitarian character prohibiting reprisals. As prescribed in Article 50(2)(a), obligations relating to available binding dispute settlement procedures cannot themselves be suspended. Under Article 50(2)(b), States must also respect diplomatic and consular inviolability. Although not expressly included in the list in ARSIWA, principles such as the principle of non-intervention and the respect for territorial integrity cannot be suspended.[114] Practice confirms, with only a few possible exceptions, that these obligations have not been suspended through third-party countermeasures.[115] The EU appears to be regularly careful by for example exempting diplomatic staff and property from sanctions.[116]

4.3.3 Proportionality

According to Article 51, countermeasures "must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question". EU autonomous sanctions are thus subject to the respect of the principle of proportionality in customary international law.[117] The purpose is moderation, and the principle relates both to the type of measure adopted and its degree of intensity, but the exact criteria for a

[113] Dawidowicz (2017), 308.
[114] Ibid, 313.
[115] Ibid, 314.
[116] Ibid, 346.
[117] Dupont (2016), 60.

measurement of proportionality are rather vague and flexible.[118] A State taking countermeasures is not limited to only suspend the same obligation that was breached by the responsible State.[119] However, countermeasures "are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation".[120] Proportionality is especially difficult to measure regarding third-party countermeasures, as the level of reciprocity is limited.[121] The principle could prevent or limit measures that for example adversely affect individual human rights and the rights of foreign investors, measures that are clearly punitive or has serious, irreversible effects and measures bordering on breaching principles of territorial integrity and non-intervention.[122]

4.4 Procedural Conditions

The procedural conditions seem to be guided in general by principles of necessity and non-aggravation of disputes.[123] According to Article 52(1)(a), the injured State shall, before taking countermeasures, call on the responsible State to fulfil its obligations in accordance with Article 43. This requirement of an unfulfilled demand for redress is reflected in customary international law.[124]

The State shall also, under Article 52(1)(b), notify the responsible State in advance of the decision and offer to negotiate. The State is at least required to give advance explanation or warning before resorting to countermeasures.[125] So-called "urgent countermeasures" not preceded by notification, referred to in Article 52(2), however, does not seem to have a clear basis in customary international law.[126]

[118] Dawidowicz (2017), 346.
[119] Orakhelashvili (2016), 35-36.
[120] ARSIWAC (2001), 129, para. 5.
[121] Dawidowicz (2017), 347.
[122] Ibid, 358.
[123] Ibid, 365.
[124] *Gabcikovo-Nagymaros Project*, para. 84.
[125] Dawidowicz, 364.
[126] Ibid, 379.

According to Article 52(3), countermeasures may not be taken if the wrongful act has ceased and the dispute is pending before a court or tribunal with the authority to make a binding decision. That does not apply in cases where the responsible State fails to implement dispute settlement procedures in good faith, according to Article 52(4). However, the situation in Articles 52(3) and (4) is not relevant in practice for third-party countermeasures, because they simply have not been adopted simultaneously to dispute settlement in an international court or tribunal.[127]

In sum, while there is no procedural requirements of evidence or judicial proceedings, practice appears to show that the principle in Article 52 is conformed with as an "adequate safeguard".[128] Practice also provides that the requirement to notify and offer to negotiate is most often fulfilled through parallel diplomatic contacts.[129]

[127] Dawidowicz (2017), 379.
[128] Ibid, 378.
[129] Ibid, 379.

5 Analysis

5.1 Legal Categorisation of Autonomous Sanctions

The term "sanction" is notoriously imprecise and difficult to define. The term is mostly used to encompass a wide range of different measures that are imposed by a State or a group of States to respond to illegal or at least unwanted behaviour by another State. The use of trade and financial restrictions are at the centre of this thesis, but sanctions can also include freezes of assets, travel bans, the suspension of aid and an almost unlimited number of other measures. They all differ in legal characterisation however and are subject to different legal constraints. Because of the indeterminacy of the term itself, it is difficult to distinguish it from other concepts that are similar by varying degrees. "Sanctions" is also too broad of a category in itself, since there are different types of sanctions. These definitions and distinctions are important, because there are different legal regimes applicable to the different categories.

First, the distinction between UN sanctions and autonomous sanctions, such as those imposed by the EU against Russia, is crucial. UN sanctions are imposed whenever the UNSC can agree upon them in accordance with the UN Charter. They do not necessarily have to be preceded by a breach of international law, even if that is the case most of the time, and they are not adopted in response to every single breach of international law. They find their justification in the power and competence that UN members have delegated to the UNSC to uphold international peace and security. Autonomous sanctions cannot be justified under the UN Charter because they are by definition qualitatively different from what the UNSC has authorised in accordance with the UN Charter. Autonomous sanctions are decentralised and taken by a State or group of States unilaterally and against a third State,

i.e. a State that is not a part of the same institutional framework through which the sanctions are adopted.

Autonomous sanctions can only be categorised as either retorsion or countermeasures. If the measures fit neither category, they are unlawful under international law. Retorsion refers to behaviour that is unfriendly, but never illegal. It is unregulated and freely exercised within the discretion of the State. Any measure that is not in breach of any obligation of a State under international law would be categorised as retorsion. A countermeasure on the other hand, is by definition an otherwise unlawful measure whose wrongfulness is subsequently precluded because it fulfils certain legal requirements. The decisive difference between retorsion and countermeasures is accordingly the lawfulness of the measure. This categorisation is often easier said than done. The absence of binding case law, the occasionally imprecise legal norms and the complexities of State practice in international relations all complicate the matter.

5.2 EU Autonomous Sanctions under WTO Law

When we discuss autonomous sanctions, it is clear that they can be constrained by primary rules of international law in the form of treaty obligations. The ICJ clarified in the *Nicaragua* case that, in the absence of treaty constraints, trade restrictions and embargoes are just acts of retorsion that are totally permissible and freely exercised under international law. Still, the otherwise free and lawful use of autonomous sanctions by States is in reality limited in many different ways by a complex web of treaty obligations and other primary obligations under general international law.

The EU's travel bans, asset freezes and arms embargo against Russia are examples of sanctions that qualify as acts of retorsion as they do not violate any of the EU Member States' international obligations. When we discuss the economic sanctions against Russia, however, they are covered by the WTO agreements of GATT and GATS. Both the EU Member States and Russia were parties to the treaties under the relevant time period. The export embargo

on Russian energy goods is unlawful as a quantitative trade restriction under Article XI GATT. It could perhaps be justified under the national security exception under Article XXI(b)(iii), where States seemingly have broad discretion, but no exception was ever invoked by the EU Member States. The financial restrictions on access to European markets imposed upon Russian financial institutions are covered by GATS, which obligates the contracting parties to provide MFN treatment under Article II. The measures are therefore unlawful, and the national security exceptions under Article XIV bis GATS have not been invoked for these measures either.

When no exceptions have been invoked, the suspension of performance of a treaty obligation cannot be justified on the basis of the treaty. As such, the EU's autonomous sanctions consisting of trade and financial restrictions against Russia are unlawful breaches of EU Member States' treaty obligations under WTO law and would have to find justification elsewhere.

5.3 EU Autonomous Sanctions as Third-Party Countermeasures

The law of State responsibility, as codified in ARSIWA, provides the right to take countermeasures and under what conditions. An injured State is entitled, under Article 49 ARSIWA, to respond to an internationally wrongful act by taking otherwise unlawful, non-forcible measures against the responsible State, the wrongfulness of which is subsequently precluded under Article 22 because they fulfil certain conditions for qualifying as countermeasures. The "injured State" is narrowly defined to include only the State or small number of States that are directly affected by the internationally wrongful act. Ukraine is, unlike EU Member States, entitled under Articles 42 and 49 as an injured State to invoke the responsibility of Russia and take bilateral countermeasures. The EU Member States are entitled under Article 48 to invoke the responsibility of Russia on behalf of Ukraine because there has been a breach of an obligation erga omnes. But since the EU Member States cannot be considered directly injured States, it raises the question if they are

entitled to take third-party countermeasures against Russia and if so, under what conditions?

A third-party countermeasure is a countermeasure taken by a non-injured State to enforce serious breaches of communitarian norms. The ILC concluded that practice was insufficient to include a right to take them in ARSIWA and thus adopted the redundant "saving clause" in Article 54. Another problem is that there is little guidance in case law regarding the enforcement of communitarian norms and the ICJ has never examined the issue of third-party countermeasures. Since there are no clear answers from the ILC or in judicial decisions, one must take a look at doctrine and what has been observed about State practice. The problem with looking at practice on third-party countermeasures, is that there is strong support for such action by some States and simultaneously strong resistance from others. They have been criticised as having no basis in international law, while others see them as a legitimate development. The stronger position nowadays, however, seems to be the one arguing that third-party countermeasures are permissible.

In conclusion, the economic sanctions of trade and financial restrictions against Russia, although unlawful under the primary rules, should in all likelihood be justified as third-party countermeasures under the secondary rules. I find the permissibility of third-party countermeasures to be reasonable and legitimate, but only within certain limits. Safeguards against abuse are needed not only to strengthen legal certainty and the rule of law, but also to give the EU measures a higher degree of legitimacy in specific cases. Therefore, the substantive and procedural conditions for bilateral countermeasures, codified in Articles 49-53, should to a large extent apply by analogy to third-party countermeasures. If the assessment behind the measures is incorrect in some instance, the EU and its Member States could themselves incur international responsibility. In the instance with Russia, there is nothing that suggests that the EU's sanctions do not fulfil these conditions. Russia is allegedly responsible for an internationally wrongful act consisting of serious breaches of obligations erga omnes, for which the EU Member States have a legal interest and entitlement to enforce through countermeasures. There is a clear instrumental function behind the EU

measures to induce Russia to cease its actions. I think it would be a stretch to say that the measures are only punitive or political, as they explicitly call on Russia to return to legality. They are not in breach of any excluded obligation and although proportionality is more difficult to conclude, nothing indicates the measures are disproportional taking into account the wrongful act and the rights in question. Regarding the procedural requirements, the issue of adjudication has not been actualised and the EU has consistently warned and urged Russia to comply with its obligations.

6 Conclusion

As the EU's economic sanctions against Russia cannot be categorised as legal acts of retorsion, because they violate the EU Member States' obligations under the WTO agreements of GATT and GATS, they can only be understood and justified as third-party countermeasures to enforce serious breaches of the obligations of non-use of force and non-intervention on behalf of Ukraine.

It appears that the position in support of the permissibility of third-party countermeasures is only becoming stronger and until something dramatic happens, States will continue to enforce their interests with the self-help means they have at their disposal in the decentralised international legal system, while the simultaneously developing State practice will only accelerate to cement that position.

The occasionally uncertain legal position of autonomous sanctions in international law, however, is a problem from a legality perspective. The underlying issue is that they are difficult to define, controversial, somewhat unregulated and thus have a questionable legal basis. Its political justifications as a tool for enforcing higher values may be of great importance, but the legal justifications remain rather weak. There is therefore a need for further clarification from the actors of international law and studies into how autonomous sanctions could be regulated in the future.

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