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Restrictive Measures

A Study of the Legality of Countermeasures and EU's Sanctions Imposed on Russia and Iran

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Summary

This thesis has studied the concept of countermeasures in public international law. I have analysed two cases where the EU has imposed sanctions on States that do not follow their international obligations. A countermeasure is a measure that is inherently illegal but may become legal if it is adopted as a response to another State's unlaw act. The purpose of a countermeasure is to induce cessation and compliance of the wrongdoing State. The term sanction is a wide concept which includes countermeasures and acts of retorsion. An act of retorsions is inherently legal and is used as a tool to express political ambitions. For countermeasure to be legal they must follow procedural and substantial conditions which are set in the Articles 49-53 in ARSIWA. Apart from following these conditions a State must also be regarded as "an injured State" or "other than an injured State" according to Articles 42 and 48 ARSIWA.

Third-party countermeasure is a concept that enables a State which is not directly injured to still adopt countermeasures. These third-party countermeasures are imagined to protect certain important legal values which are enshrined in the *erga omnes (partes)* concept. Whether this right exist at all in public international law has been debated under a long period of time. When the ILC created the ARSIWA there was no consensus as to whether a right to third-party countermeasures should be implemented. It resulted in Article 54 ARSIWA which is a savings clause that neither forbids nor allows the concept. Those who promote the concept argue that it is an important tool to make sure that important international obligations are being followed. Further they argue that the practice of third-party countermeasures exists in the customary law. Lastly, they argue that the fear of the opposition, that the third-party countermeasures would be abused by the strong States, is exaggerated. The counterpart on the other hand, argue that this concept will be abused by strong States to promote their own political ambitions under a flag of good will. They also argue that customary international law has not yet shown enough evidence of an existence of the right. Safe to say the EU and other States has on several occasions adopted third-party countermeasures.

In my analysis of the EU's countermeasures against Iran and Russia I investigated the concept of an injured State and the safeguards against abuse which are found in the procedural and substantial conditions in Articles 49-53 of ARSIWA. I also investigated whether third-party countermeasures are legal under public international law. In relation to EU's countermeasures against Iran I concluded that EU is regarded as an injured State because of the interdependent character of the NPT. I also found that it is unclear whether the EU had a right of adopting countermeasures against Iran due to not fulfilling the substantial conditions as stated in ARSIWA. Whether the third-party countermeasures adopted against Russia are permissible may depend on the dignity of the breach. Serious and systematic breaches of obligations *erga omnes* may give rise to the use of third-party countermeasures, although ARSIWA gives no answer, and it remains uncertain in public international law.

Sammanfattning

Denna uppsats har undersökt konceptet kontraåtgärder inom folkrätten i förhållande till EU:s användning av sanktioner som ett medel för att tvinga efterlevnad av internationella förpliktelser. En kontraåtgärd är en åtgärd som i sig själv är olaglig men blir laglig när den tas som svar på en annans stats olagliga handling. Syftet med kontraåtgärden är att förmå den felande staten att upphöra med sina felaktigheter och återgå till att följa sina internationella förpliktelser. Förutom kontraåtgärder finns det andra åtgärder som ryms inom paraplybegreppet sanktioner. En av dessa åtgärder är vedergällningar som i sig inte är olagliga och används snarare som politiska markeringar. För att kontraåtgärder ska vara lagliga måste de uppfylla ett antal kriterier som är stadgade i artiklarna 49–53 i ARSIWA. Förutom att uppfylla dessa kriterier måste staten som vidtar en kontraåtgärd anses vara antingen en skadad stat, som stadgas i Artikel 42 ARSIWA, eller vara en annan än en skadade stat, som stadgas i Artikel 48 ARSIWA.

Tredjestatskontraåtgärder är ett koncept som innebär att en stat som inte är direkt skadad ändå har möjlighet att vidta kontraåtgärder i syfte att tvinga efterlevnad av internationella förpliktelser, ofta av *erga omnes (partes)*-karaktär. Om möjligheten till tredjestatskontraåtgärder överhuvudtaget existerar inom folkrätten har debatterats under en lång tid. När ILC tog fram ARSIWA kunde man inte enas huruvida en sådan rätt existerade och kunde därför inte uttryckligen införas i artiklarna. Resultatet blev Artikel 54 ARSIWA som är en kompromiss där dessa åtgärder varken förbjuds eller tillåts. De som förespråkar en rätt för tredjestatskontraåtgärder menar att den är ett viktigt verktyg för att tillse att internationella förpliktelser efterlevs. De menar att den är i linje med den internationella sedvanerätten och att farhågorna som motståndarna har om att den kommer missbrukas är överdrivna. Motståndarna menar att detta verktyg kommer missbrukas av starkare stater som förklär sina politiska ambitioner i den goda allmänhetens namn. De menar även det inte finns något uttryckligt stöd i den internationella sedvanerätten. Säkert är att EU vid flera tillfällen agerat som om en rätt för tredjestatskontraåtgärder existerar.

I min analys av EU:s kontraåtgärder mot Iran och Ryssland utredde jag dels konceptet skadad stat och efterlevnaden av de skyddande förutsättningarna för att vidta kontraåtgärder, dels om tredjestatskontraåtgärder är förenliga med folkrätten. Angående EU:s kontraåtgärder mot Iran kom jag fram till att EU var att anse som en skadad stat eftersom NPT utgör en ”interdependet obligation”. Däremot är det oklart om EU uppfyller alla de andra förutsättningarna som krävs för att vidta en laglig kontraåtgärd. För att tredjestatskontraåtgärder eventuellt ska vara lagliga krävs ett allvarligt och systematiskt brott mot förpliktelser *erga omnes (partes)*. Varken ARSIWA eller den internationella sedvanerätten svarar på om tredjestatskontraåtgärder är lagliga vilket innebär att rättsläget är fortsatt oklart.

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	European Union Common Foreign and Security Policy
DARIO	Draft Articles on Responsibility of International Organizations
EU	European Union
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ILC	International Law Commission
JCPOA	Joint Comprehensive Plan of Action
NPT	Non-Proliferation Treaty
UN	United Nations
UN Charter	Charter of the United Nations
UNGA	United Nations General Assembly
UNSCR	United Nations Security Council Resolution
VCLT	Vienna Convention of the Law of Treaties

1 Introduction

1.1 Background

States in the international community owe each other obligations due to their membership of the United Nations (UN) and due to treaties of various sorts. These obligations should, as with any other contractual law, be fulfilled. For different reasons, however, some States do not always fulfil their obligations. One of the most effective and most used regimes to tackle this problem is the regime of countermeasures. Countermeasures are an old instrument in public international law and offers a peaceful method of solving conflicts.

The regime of third-party countermeasures is constantly being debated by scholars. With Russia's war in Ukraine, the question has been brought to the table again. Preferably, the Security Council should resolve issues of this dignity but with a veto-right for the permanent members, deadlocks often occur. Instead, States must resort to third-party countermeasures to induce compliance of the obligations that Russia is breaching. The European Union (EU) is a group of States that frequently resorts to the regime of third-party countermeasures. The recent sanctions imposed on Russia makes it the most sanctioned State in the world. Iran, which is the world's second most sanctioned country has also been a subject of countermeasures adopted by the EU. Iran's alleged breaches of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) has raised concerns in States all over the world causing the international community to act.

In 2001 the International Law Committee (ILC), completed the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). These articles are a result of the ILC's work to codify existing international custom. Therefore, ARSIWA is not legally binding for States, and it is not identical to the international custom. In ARSIWA, however, there exist several articles regarding countermeasures which will be the starting point for this thesis and its analysis.

1.2 Purpose

The purpose of this thesis is to study the legality of the use of countermeasures in general. More specifically it will study the asset freezes adopted as countermeasures by the EU against Russia and Iran in recent years. This is important because the regime of adopting sanctions in various forms is a growing phenomenon in the world. At the present moment the EU has targeted sanctions in force directed at 34 different States in the world.[1] In this paper I will study the countermeasures as they are stated in ARSIWA. The term sanction, or restrictive measure, as the EU uses, entails more than countermeasures. This makes it important to first understand and identify what a sanction is and then, to evaluate its legality.

The EU adopts countermeasures both as an injured State but also as an indirectly injured State. Whether States can adopt these third-party countermeasures is uncertain. With a rising usage of this sanction regime an understanding and clarification to whether these instruments are legal is of utmost importance. With a clear framework and set of rules, States know what to expect when committing breaches of the public international law and will hopefully refrain from such actions with regards of their imminent consequences.

My main research question is as follows:

- Does the EU's freezing of Russian and Iranian assets in response to the war in Ukraine and the alleged breaches of the NPT count as a countermeasure under public international law, and if so, does it meet the conditions of the law on countermeasures?

To answer this main question, I will also answer:

- What are the procedural and substantial conditions when resorting to countermeasures and are they always adhered to?

[1] EU Sanctions Map (2023), https://www.sanctionsmap.eu/#/main.

- Does the ARSIWA or public international law give a legal right for third-party countermeasures?

- Can obligations *erga omnes (partes)* be legally enforced within the regime of third-party countermeasures?

1.3 Delimitation

There are many areas of public international law which are related to the question of countermeasures and third-party countermeasures. Some of these include, the reparations side of countermeasures, treaties and norms concerning the diplomatic protection of assets, and the fact that sanctions can have an unwanted impact on other parties, such as the civilian population or other States. Also, mechanisms for treaty withdrawals, either incorporated in specific treaties or the general clause in the Vienna Convention on the Law of Treaties (VCLT), are related to countermeasures due to the lawful mean of withdrawing from treaties. All these subjects have intentionally been left out due to time and space. These are all great topics for further study either on their own or in relation to countermeasures and third-party countermeasures.

1.4 Method and Theory

The method used in this paper is the legal dogmatic method. That is a method often associated with exploring and trying to answer a concrete legal question.[2] The purpose of this method is to try to answer a legal question by applying certain legal rules.[3] I chose this method to answer my research questions because the legal status of my research questions, and specially the legal status of third-party countermeasures, is unclear. The legal dogmatic method has no unified definition, although it is certainly related to legal positivism.[4] The norm hierarchy of public international law is found in Article 38 in the ICJ Statute. It states the order of which the court itself shall apply a certain

[2] Kleineman (2018), 23.
[3] Kleineman (2019), 21.
[4] Spaak (2018), 47.

norm when answering a legal dispute. As the purpose of this paper is to answer a concrete legal question, applying the norm hierarchy the International Court of Justice (ICJ) would use is logical. The primary sources of public international law are international conventions, international custom, and general law. The secondary sources are judicial decisions and the contribution of the most highly qualified publicists. I have based my thesis on the articles in ARSIWA, which is not a primary source of international law but still a widely respected and accepted document. In addition to ARSIWA I have used different scholar's work to understand ARSIWA and interpret other non-codified public international law.

1.5 Disposition

This thesis will consist of three chapters, excluding the introduction. The first two chapters, Chapters 2 and 3, are mainly of a descriptive character. Respective chapter will also be linked with, for that chapter, a relevant case study. In the case study the former descriptive part of that chapter will be analyzed and applied to a certain case. In the last chapter, Chapter 4, I will conclude the paper and draw the conclusions of the points I make in the case studies.

Chapter 2 will consist of answering my question about restrictive measures. It will be a descriptive chapter that explains various legal terms, including sanction, countermeasure and retorsion. The focus will then be on countermeasures and the way it is portrayed in the ARSIWA with all the prerequisites and safeguards that entails. The chapter will end with a case study of the sanctions imposed on Iran by the EU and analyze whether the EU has followed the legal framework.

In Chapter 3 the focus will move from the bilateral countermeasures to the highly topical third-party countermeasures. This will also be a descriptive chapter which will include third-party countermeasures in ARSIWA, obligations *erga omnes(partes)* and how they relate to that, and, if there exist a right to adopt third-party countermeasures in the international law at all. This chapter will also be concluded with a case study of EU's sanctions towards Russia where I analyze whether third-party countermeasures are permissible.

Chapter 4 will conclude this paper with a study of the points I have made in the paper and the conclusions of the case studies.

2 Restrictive Measures

2.1 Sanctions in International Law

The term sanction (or restrictive measures as the EU also calls it) is an unprecise term which involves a broad variety of actions. According to the ILC the term sanction usually refers to groups of States who together adopt an action against a State either on their own or mandated by an international organization.[5] Both the EU and UN can adopt sanctions. In the UN Charter Chapter VII, the term sanction is not used but instead it uses the term “measures”. These “measures” include both peaceful acts and the use of force.[6] The “measures” mandated by the Security Council and its Chapter VII power under the UN Charter in combination with Articles 25 and 103 of the UN Charter are not without critique. Critics argue that they are based on undisclosed evidence and lack the institution of judicial control.[7] Notwithstanding, it still is emanating from primary international law.

The restrictive measures adopted by the EU on the other hand is mandated by their own legal system which of course must be legally justified under international law. In the following I will focus on the restrictive measures adopted by the EU against Russia and Iran. These restrictive measures are autonomously or unilaterally adopted. Legal justification of these unilateral sanctions is dependent on whether they can be classified as a countermeasure or retorsions.[8] Furthermore a sanction can be mandated by a specific treaty. In the following I will focus mainly on countermeasures and retorsions.

The act of adopting countermeasures is a fundamental aspect of the Law of State Responsibility. It functions as tool which States can adopt when the Security Council is unable to act according to their Chapter VII rights. Since Russia is a permanent member of the Security Council the only way to respond is with a decentralized measure. In this chapter I will regard the act of

[5] ARSIWAC (2001), Chapter II, para. 3.
[6] ARSIWAC (2001), Chapter II, para. 3. See also Chapter VII UN Charter.
[7] Happold (2016), 1.
[8] Happold (2016), 2.

a countermeasure as it is codified in the ARSIWA which was developed by the ILC and later adopted as a resolution by the United Nations General Assembly (UNGA) in 2001. The term countermeasure as we know it today was popularized in the *Air Service Agreement Tribunal*.[9] When it was adopted in ARSIWA in 2001 it unquestionably replaced the older term reprisals.[10] The concept of reprisals can be dated back to the thirteenth century and was originally used to describe both peaceful and non-peaceful actions taken as a self-help measure in response to a prior breach of international law.[11] In modern times and especially in the context of the ARSIWA, the term countermeasures is only referring to the peaceful actions.[12] The aim of countermeasures is to induce compliance with obligations owed to the injured State. The definition of a countermeasure can be described in the following quote:

> Countermeasures are pacific unilateral reactions which are intrinsically unlawful, which are adopted by one or more State against another State, when the former consider that the latter has committed an internationally wrongful act which could justify such a reaction. [13]

In contrast to countermeasures, we have acts of retorsion. They can also be categorized as a self-help measure which States can adopt against other States. An act of retorsion, as opposed to a countermeasure, is inherently legal and does not disrupt any obligations the State taking them may have against the targeted State. They can be seen as "unfriendly" conduct which is still legal.[14] Their purpose being sending a signal of disapproval of a certain conduct. An act of retorsion may be taken both as a response against a previous internationally wrongful act or not. Scholars are not in agreement as to whether acts of retorsion are required to fulfil any conditions and thus may

[9] See *Air Service Agreement of 27 March 1946 between the United States of America and France Tribunal,* (1978)
[10] Paddeu, F. (2015), para 2.
[11] Dawidowicz (2017), 16-17.
[12] ARSIWAC (2001), Chapter II, para. 3.
[13] Alland (2010), 1135.
[14] ARSIWAC (2001), Chapter II, para. 3.

be "subject to limitations."[15] Some argue that they must comply with the principle of proportionality while others argue that an act of retorsion will be illegal if it is being adopted with a malicious intent.[16] A significant difference from countermeasures is that acts of retorsion may have "punitive or retributive function" where countermeasures may not.[17]

2.2 Countermeasures in the Law of State Responsibility

The regime of countermeasure is susceptible to abuse. Therefore, there are both substantive and procedural conditions which must be met. These conditions are codified in Articles 49-53 in ARSIWA.[18] A fundamental prerequisite for a lawful countermeasure is that it is taken in response to a previous unlawful act by a State. The countermeasure must also target that State.[19] The object and limits of countermeasures are found in Article 49 ARSIWA. A countermeasure is intended to make the "target" State comply with its obligation and cease any international wrongful act. It is not intended to punish the "wrongdoing" State and thus it may never be punitive.[20] An injured State is not required to adopt a countermeasure which mirrors to the obligation being broken. In many cases this is not even possible or desirable. For instances where obligations regarding human rights are being broken a reciprocal countermeasure would be unthinkable. Countermeasures that would go against the peremptory norms would also fall outside of the scope of lawful countermeasures.[21] The injured State therefore has a freedom of choice in which countermeasure to adopt.[22] Although a State may have wide discretion in choosing what countermeasure to adopt, the countermeasure must comply with the principle of proportionality as found in Article 51 ARSIWA.

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[15] Schmidt (2022), 21. Also see Chapter 2.4.1 below for a comparison with substantial and procedural conditions which applies for countermeasures.
[16] Schmidt (2022), 21.
[17] Dawidowicz (2017), 28.
[18] ARSIWAC (2001), Chapter II, para. 2.
[19] See *Gabcikovo-Nagymoros Project (1997),* para. 83.
[20] ARSIWAC (2001), Article 49, para. 1.
[21] See Article 50 ARSIWA.
[22] Dawidowicz (2017), 20.

The procedural condition is stated in Article 52 ARSIWA and requires the injured State to call for reparation and notify the target State before adopting any countermeasure. The aim of this regime is to "give the responsible State an opportunity to review the action alleged to be unlawful."[23] Further on, a State must follow the principle of necessity and may not adopt a countermeasure if the internationally wrongful act has ended, or the dispute is pending before a court authorized to bind the parties with its decisions. Iwasawa and Iwatsuki conclude that there are two underlying principles that safeguard the procedural conditions: the principle of necessity and non-aggravation of the dispute.[24] Lastly the countermeasure shall be terminated as soon as the target State complies with its obligations, thus making the countermeasure no longer necessary.

In this paper I will focus on countermeasures adopted by the EU. Because EU is an international organization the Draft Articles on Responsibility of International Organizations (DARIO) would be the relevant codification to apply instead of ARSIWA. The countermeasures in DARIO, however, refer to those being applicable between organizations and not between organizations and States. However, when an organization, such as the EU, adopts a countermeasure against another State, the conditions set in Articles 49-54 in ARSIWA is analogously applicable.[25]

2.2.1 Invocation of Responsibility

To invoke responsibility a State must be entitled as an "injured State" in the meaning of Article 42 ARSIWA. It is stated in a "relatively narrow way" and entitles a directly injured State or sometimes a small group of States. This is to be distinguished from the legal interests which emanates from "certain obligations established in the collective interest".[26] These legal interests are attended to in Article 48 ARSIWA. The relevance of being entitled as an "injured State" is being able to resort to some specific means enshrined in the ARSIWA. For this paper the countermeasures in Article 49 ARSIWA are of

[23] Iwasawa and Iwatsuki (2010), 1151.
[24] Iwasawa and Iwatsuki (2010), 1154.
[25] Dupont (2016), 52.
[26] ARSIWAC (2002), Article 42, para. 1.

central interest. Article 42 ARSIWA statutes three grounds of injury. The first ground is the breach of a bilateral obligation where a state party of a treaty has an obligation vis-à-vis another state party to the same treaty. The second ground is being specifically affected by a breach of a treaty which the State is party to even though the obligation breached is not directly owed to that State. Thirdly we have the interdependent obligations. The "performance of the obligation by the responsible State is a necessary condition of its performance by all the other State."[27] This type of injury is associated with disarmament treaties, nuclear free zone treaties and non-proliferation treaties.[28] I will return to this ground of injury in my case study of Iran below.[29]

Article 48 ARSIWA covers the invocation of responsibilities by a State other than an injured State. This article is intended to complement Article 42 ARSIWA. When breaches of "specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole" or *erga omnes (partes)* occur, any "other than an injured State" will be able to invoke responsibility.[30] These States will not be able to adopt countermeasures under Article 49 ARSIWA but must instead resort to the "lawful measures" under Article 54 ARSIWA. This is where the legality of third-party countermeasures may be justified.[31]

2.3 Case Study – Iran

2.3.1 Background

Iran is a party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) which is a treaty that gives all parties an "inalienable right" to research, develop and use all peaceful applications of nuclear technology. The treaty prohibits any use of nuclear technology for non-peaceful purposes.[32] The

[27] ARSIWAC (2002), Article 42, para. 5.
[28] ARSIWAC (2002), Article 42, para. 13.
[29] See Chapter 2.3.
[30] ARSIWAC (2002), Article 48, paras. 1-2.
[31] See Chapter 3.2.
[32] NPT (1970), Treaty on the Non-Proliferation of Nuclear Weapons, 5 March 1970, Article II and IV.

treaty also contains a safeguard agreement with the International Atomic Energy Agency (IAEA) which is an international agency that monitors nuclear activity and makes sure that the parties to the NPT follow their obligations. The safeguard agreement gives the IAEA a right to control and inspect the parties.[33] In 2002 the first reports of Iran not complying with the safeguard agreement with IAEA emerged. In 2003 the IAEA Director General concluded that "it is clear that Iran has failed in a number of instances over an extended period of time to meet its obligations under its Safeguards Agreement".[34] In 2006 sanctions was imposed in by the UN. The EU also imposed unilateral sanctions on their own. In 2015 the Joint Comprehensive Plan of Action (JCPOA) was implemented with the aim of eventually lifting all the sanctions against Iran in return for Iran to reduce its nuclear capacity and again have the IAEA monitoring its facilities.[35] In this case study I will focus on the sanctions the EU unilaterally imposed in 2012, which entailed e.g. prohibition of import of crude oil and petroleum products, and freezing of assets of the Central Bank of Iran.[36]

In the following case study and the one in Chapter 3.5.1, I will assess whether the restrictive measures adopted by the EU are countermeasures and if they are legal. Due to the complex nature of the relationship between retorsions, countermeasures and other treaty-mandated sanctions I will distinguish some of the most common responses ahead of the analysis. Firstly, I will consider the diplomatic boycotts and other actions that compromise diplomatic relations as lawful and to be classified as retorsions. Secondly, the instances of such economic sanctions as embargos and related measures will also be classified as retorsions if they do not violate any specific treaties. Lastly, the measure of freezing assets will be classified as a countermeasure due to its forcible involvement with another State's possessions and property.[37]

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[33] NPT (1970), Treaty on the Non-Proliferation of Nuclear Weapons, 5 March 1970, Article III.

[34] Calamita (2009), 1400-1401.

[35] UNSCR 2231 (2015).

[36] Council Decision 2012/35 CFSP of 23 January 2012, amending Decision 2010/413/CFSP.

[37] Tams (2005), 209. These distinguished assumptions are the same Tams uses in his chapter 6.2.1 and is according to him "in line with the generally held view".

2.3.2 Analysis

According to Pierre Dupont, the oil embargo and freezing of assets of the Central Bank of Iran may be unlawful. This unlawfulness is derived from the EU's measures breaking both procedural and substantial conditions.[38] The substantial conditions are a prerequisite for a lawful countermeasure. The first one being the fact that a wrongful act exists. In this analysis I will mainly focus on this substantial requirement since it is the source of most controversy. The countermeasures adopted by the EU in 2012 rely on Iran breaching their obligations according to the NPT and their Safeguards Agreement with the IAEA. The fact that the Security Council already imposed sanctions based on the reports from the IAEA is an indication that the IAEA has substance to that claim that Iran breached its obligations. Critics have been raised regarding that the Security Council did not acquire enough proof to ensure an actual breach of the NPT and that they based their decision on speculative allegations and not of proven facts.[39] Orakhelashvili argues that "[…] it is unclear on what basis the EU could have any standing here, for it is difficult to identify the initial wrongful act committed by Iran against the EU."[40] Without an initial wrongful act from Iran EU will never legally be able to adopt unilateral countermeasures. This question, however, is about evidence and is not within the scope of this paper. Therefore, I will continue to assess the invocation of responsibility.

If there existed an initial wrongful act committed by Iran, EU must still be qualified as "an injured State" according to Article 42 ARSIWA or as "a State other than an injured" according to Article 48 ARSIWA. Calamita concludes that EU and its member States would fall under the category of injured State as stated in Article 42(b)(ii) ARSIWA.[41] Due to the nature of the NPT an alleged breach of it "is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation." In cases concerning breaches of treaties

[38] Dupont (2006), 64.
[39] Dupont (2006), 57.
[40] Orakhelashvili (2006), 34.
[41] Calamita (2009), 1422–23.

which in some way relates to disarmament or nuclear weapons will most definitely qualify as an interdependent obligation. "In terms of the law of State responsibility, then, the NPT is the quintessence of an agreement that, if breached by one party, gives rise to an injury in each other party thereto."[42] The EU is then an injured State and will be able to resort to the countermeasure as stated in Article 49 ARSIWA.

For the sake of arguing Calamita further investigates the possibility of adopting countermeasures in the general interest if EU would not qualify as an injured State. The NPT has built in procedures that are implemented to detect breaches and determine whether there has been a violation.[43] The IAEA, being a multilateral agency, fills a vital role in response to the fears of oppressive and illegitimate use of unilateral countermeasures. Together with the development of third-party countermeasures and the fact that the IAEA is competent on determining whether there has been a breach of an obligation these unilateral sanctions by the EU may have been legal even if the EU would not have been a directly injured State.[44]

Now after concluding that Iran has committed an initial wrongful act, and that the EU is considered an injured State, would the countermeasures be in line with the rest of the safeguard system enshrined in ARSIWA? Dupont argues that "[...] the adoption of countermeasures by the EU is likely to have a negative impact on the coherence of the collective security system."[45] This is because the question already has been referred to the Security Council by the member States. The Security Council has already acted within its Chapter VII rights and thus one might argue that EU should not adopt sanctions on their own or that are stricter of those allowed by the Security Council. Dawidowicz has shown that there have been many cases where countermeasures have been imposed while the Security Council has already been involved in the matter.[46] Imposing countermeasures when the Security Council is already seized in the

[42] Calamita (2009), 1428.
[43] Calamita (2009), 1430–1432, 1433.
[44] Calamita (2009), 1433.
[45] Dupont, (2006), 65.
[46] Dawidowicz (2006), 417.

matter does not necessarily mean that the countermeasures would violate the principles of proportionality and necessity.

3 Third-Party Countermeasures

3.1 International Obligations

Peremptory norms, *jus cogens*, and communitarian norms, *erga omnes (partes),* are central terms when talking about State responsibility. The concepts have varying legal implications although similar in that sense that they both carry fundamental values of international law which have a status to give States a legal interest.[47] In the *Barcelona Traction Case* the ICJ recognized the obligations *erga omnes:*

> In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[48]

In the same case the ICJ then went on with naming a few examples of these obligations including "outlawing acts of aggression", "genocide", "protection from slavery" and "racial discrimination".[49] The relationship between norms *jus cogens* and obligations *erga omnes (partes)* is not identical although in many regards they overlap.[50] In the draft Articles the ambiguity of wording causes some confusion regarding the two concepts. Sicilianos addresses the ambiguity arising from the choice of wording in the ARSIWA. The concept of a "serious" breach as stated in Articles 40 and 41 ARSIWA refers only to peremptory norms whereas the articles regarding invoking of responsibility and the act of countermeasures in Articles 42, 48, 49, and 54 ARSIWA refers to the concept of breach of obligation *erga omnes.*[51] According to the wording of ARSIWA then any breach of an obligation *erga omnes* would mandate

[47] Frowein, J. (2008), para 3.
[48] *Barcelona Traction* para, 33.
[49] *Barcelona Traction* para, 34.
[50] Linderfalk (2020), 140.
[51] Sicilianos (2002), 1135.

invocation of responsibility and would legitimate the use of all actions including the adoption of “lawful measures” as stated in Article 54. This, however, is not how the ILC intended it and neither the way State practice appears. Breaches of obligations *erga omnes* has only been invoked in cases where the breach is “gross” or “systematic”. In State practice there is no evidence of a countermeasure being adopted as a response to a minor breach.[52]

Linderfalk, in agreement with other legal scholars, categorize the international obligations into four divisions: bilateral obligations, obligations *erga omnes,* interdependent obligations, and obligations *erga omnes partes.*[53] These are reflected in the Articles 42 and 48 of ARSIWA.[54]

3.2 Third-Party Countermeasures in the Law of State Responsibility

The ILC was divided on whether to implement a possibility for third-party countermeasures in ARSIWA. Some of the members of the ILC including Crawford and Simma were for. Those who argued for the idea meant that it would serve “[…] as a legitimate progressive development of international law and as a necessary tool of law enforcement, especially for dealing with serious breaches of obligations *erga omnes*”[55]. They meant that the notion of third-party countermeasures was in line with the UN Charter and would be a key when the Security Council failed to act due to States putting in their veto. They also argued that the third-party countermeasures would serve as a practical option to resorting to military alternatives and thus diminishing the risk of use of force.[56] Lastly, they argued that the concerns about third-party countermeasures being abused by stronger States in the name of the greater good was absent in the practice.[57]

[52] Sicilianos (2002), 1135.
[53] Linderfalk (2020), 138-139.
[54] See Chapter 2.4.
[55] Dawidowicz (2017), 109.
[56] Dawidowicz (2017), 109.
[57] Dawidowicz (2017), 109.

Other members such as Brownlie argued against it. Those who opposed the idea argued that firstly, there was not enough evidence that third-party countermeasures were allowed in international law and secondly that it would be discordant with the current order system regulated by the UN Charter.[58] Other argued that the relation between third-party countermeasures and the UN Charter was unclear, which would cause a range of questions and problems. They argued further that the UN Charter already has the tools which to international community would resort in cases of serious breaches of international law. Lastly the opposing members argued that the risk of abuse is inherent in the regime of third-party countermeasures. Due to the nature of countermeasures and the fact that States on their own interpret what a wrongful conduct is stronger States may bully smaller States while claiming that it is in the interests of the community.[59]

The result of the ILC's codification process led to the Article 54 ARSIWA which was a compromise between the two sides. The article states "lawful measures" instead of "countermeasures". This savings clause neither explicitly allows nor forbids adopting countermeasures and intends to let further development of international law determine the legality.[60] The main reason for not adopting a distinct right for third-party countermeasures, according to the ILC, was because "practice on this subject is limited and rather embryonic".[61] The ILC also concluded that "at present there appears to be no clearly recognized entitlement of States referred to in Article 48 ARSIWA to take countermeasures in the collective interest."[62] The ARSIWA gives no answer to whether third-party countermeasures are legal and the legal position remains unclear. What is clear is that the ILC leaves any future development of third-party countermeasures up to the progression of international law. The ILC "postponed" any final decision on the issue and mean to let States decide on their own whether such a right should be part of public international law.

[58] Dawidowicz (2017), 110.
[59] Dawidowicz (2017), 110.
[60] ARSIWAC (2002), Article 54, paras. 6-7.
[61] ARSIWAC (2002), Article 54, para. 3.
[62] ARSIWAC (2002), Article 54, para. 6.

The fact that the ILC was not willing to make a final decision might lead more to “controversy and legal uncertainty”.[63]

The ARSIWA was adopted more than 20 years ago which leaves plenty of time for the question of whether third-party countermeasures are permissible to be answered. The ILC concluded that there was no established right for third-party countermeasures in the general international law. The main legal arguments from the ILC that lead to that conclusion were “the absence of widespread and representative practice; the absence of a consistent practice; and the absence of a practice accepted as law.”[64] In his book Dawidowicz analyses twenty-one cases and argues that the practice today cannot be seen as limited as the ILC put it. Further on he argues that there is a uniform conduct which is required for creating international law. While the ILC argues that only Western States resort to third-party countermeasures, Dawidowicz shows in his study that the practice is “more widespread and diverse than the ILC had assumed.”[65] Many Non-Western States have adopted third-party countermeasures and some of those who have not, still express support for the concept. Also, the limited number of diplomatic protests against the concept is noteworthy according to Dawidowicz.[66] Tams is also of the opinion that the practice is not exclusively Western and that there is an *opinio juris* and that is not too selective.[67]

Some of the parties in the debate in the Sixth Committee raised concerns about the vagueness in the *erga omnes* concept. This vagueness could in turn lead to “serious abuses” when adopting third-party countermeasures.[68] Worth noting in this context is that a right to countermeasure in the general interest, i.e. in response to a breach of an obligation *erga omnes* is “by no means an automatic consequence of the *erga omnes* concept.”[69] In practice third-party countermeasures are usually adopted in relation to grave or serious breaches

[63] Katselli Proukaki (2010), 89.
[64] Dawidowicz (2017), 240.
[65] Dawidowicz (2017), 283.
[66] Dawidowicz (2017), 283.
[67] Tams (2005), 250.
[68] Dawidowicz (2017), 272.
[69] Tams (2005), 204.

of obligations *erga omnes (partes)*. These serious breaches are often being widely recognized by the international community. This recognition by the international community is limiting the possibility of States to determine on their own what constitutes a "wrongful conduct" and thus prevents some of the risk of abuse.[70] Tams claims that there is a right for all States "to take countermeasures in response to large-scale or systematic breaches of obligations *erga omnes*."[71] Resorting to third-party countermeasures in response to alleged breaches of communitarian norms or in the name of "protection of the collective and community interest"[72]must always be under scrutiny within its legal framework. Should any State abuse the regime of resorting to third-party countermeasures that same State would be responsible for an international breach and thus subject of legal consequences.[73]

The permissibility of third-party countermeasures under international law in response to breaches *erga omnes (partes)* seems to be legal if the breach is systematic and large-scale. Whether the same goes for breaches of communitarian norms that are not systematic and large-scale is not as investigated and remains unclear.

3.3 Case Study – Russia

3.3.1 Background

Following Russia's unlawful annexation of Crimea and Sevastopol and their intentional destabilization of Ukraine the EU has since March 2014 adopted several sanctions against Russia.[74] On the 24 of February 2022 Russia launched a full-scale invasion of Ukraine. The unilateral sanctions against Russia adopted by the EU in response to the invasion of Ukraine are unprecedented. They are "designed to reduce the Kremlin's ability to finance the war, impose clear economic and political costs on Russia's political elite and

[70] Dawidowicz (2017), 284.
[71] Tams (2005), 250.
[72] Katselli Proukaki (2010), 208.
[73] Katselli Proukaki (2010), 208.
[74] Council Decision 2014/512/CFSP, Council Regulation (EU) No. 833/2014.

diminish Russia's economic base".[75] These sanctions have targeted close to 1 800 individuals and entities and target several sectors including financial, energy, transport, "dual-use goods", trade, visa, and media.[76]

Russia, being a permanent member of the Security Council, will not pass any resolution regarding the situation, thus putting the Security Council in a deadlock. EU's adoptions of unilateral sanctions are therefore initiated by its own mandate with conviction that it follows international law.

3.3.2 Analysis

Russia has with its war in Ukraine breached one of the most fundamental international obligations, the prohibition of the use of force as stated in Article 2.4 in the UN Charter. This is a breach of a peremptory norm which constitutes an international wrongful act in the context of State Responsibility. A breach of the scale Russia is committing is undoubtedly a "serious breach" of an obligation *erga omnes*. Following an initial wrongful act, a State or a group of States must classify as "an injured State" or "a State other than an injured State". Since the EU is indirectly injured due to the breach of the obligation *erga omnes* the EU and its member States are seen as "a State other than an injured State" as stated in Article 48 ARSIWA.

Some of the restrictive measures, including the asset freeze of Russian individuals and entities, imposed on Russia are *prima facie* illegal which mean that the EU must justify them as third-party countermeasures. These must fall under the Article 54 ARSIWA. There has been debate to whether third-party countermeasures are allowed in international law. Although many legal scholars seem to think so and many States including the EU have acted as if they are legal, there still has not been any evidence of the existence in international

[75] European Commission (2023), 'EU sanctions against Russia following the invasion of Ukraine', https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_en.

[76] European Commission (2023), 'EU sanctions against Russia following the invasion of Ukraine', https://ec.europa.eu/commission/presscorner/detail/en/fs_22_1402.

court proceedings. It has neither been the subject of any legislation nor implemented in any treaties. For the continued analysis I will proceed with the assumption that third-party countermeasures are legal.

In accordance with the substantial and procedural conditions the third-party countermeasures imposed on Russia by the EU must aim to cease the Russian breaches of its international obligations owed to the international community. It is hard to assess the principles of proportionality and necessity as stated in the safeguards regarding the countermeasure regime in ARSIWA. Without escalating the conflict even further and adventuring the peace in the rest of Europe I regard the third-party countermeasures both proportionate and necessary to induce Russian compliance with international obligations.

4 Conclusion

In both case studies I have, in coherence with other scholars, concluded that EU's freezing of assets belonging to another State is an intrinsically unlawful behavior as it either breaches international treaties or the principle of non-intervention. Therefore, the EU must justify its sanctions as countermeasures. As shown in my analysis of Iran, EU is considered an injured State in the name of Article 42(b)(ii) ARSIWA. With that they are entitled to resort to countermeasures as stated in Article 49 ARSIWA. This, however, must be precluded by an initial wrongful act by Iran. Iran's alleged breach of their obligations owed due to the NPT and their safeguard agreement with the IAEA is what the EU claims to establish its right to countermeasures. This entails a fundamental problem with the regime of countermeasure, namely the fact that States themselves assess whether there is an initial breach of an international obligation or not. This is safeguarded by substantial conditions, but without an initial breach, no countermeasure would ever be necessary or proportionate. This can, however, be amended by the fact that a wrongfully adopted countermeasure would in turn give rise to State Responsibility which would legitimate counter-countermeasures.

In the case of Russia, the much-debated topic of third-party countermeasures is addressed. In contrast to the Iran case, there is no doubt that there has been a grave breach of an obligation *erga omnes*. The compliance with the prohibition of violence is fundamental in the public international law. Without a united Security Council, States have found that resorting to unilateral sanctions is the next best thing to induce compliance with such obligations. The necessity of the countermeasures is justifiable. The proportionality of the countermeasures is harder to assess but due to the grave violation of an obligation *erga omnes* the unprecedented sanctions against Russia is most likely proportionate.

Whether the third-party countermeasures are permitted remains unclear. The ILC was reluctant to openly codify that right in ARSIWA and decided to remain neutral with their savings clause which neither expressively permitted it

nor forbade it. Scholars argue that ILC might have been wrong in their analysis of the actual extent of the use of third-party countermeasures. In the public international law, there might exist a right of adopting third-party countermeasures if they are in response to systematic and widespread breaches of obligations *erga omnes (partes)*. Some States indeed act this way but whether it is legal remains unclear. Ultimately third-party countermeasures are supposed to be an effective tool to induce a peaceful and cooperating international community. A clearer view of the legality might both deter States from committing international wrongful acts and increase the willingness of States to adopt third-party countermeasures as a response to breaches of communitarian norms.

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