

Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework

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1. Introduction: ‘sanctions’ – what’s in a name?

‘Sanctions’ are a common feature of international relations, and frequently make for headlines in the news. Yet, for all the common parlance of sanctions by the United Nations, by regional organizations and by individual States, the concept is used to refer to measures that are fundamentally different from a legal perspective. A single authoritative definition is lacking. Overall, it seems possible to discern three approaches to defining the concept of ‘sanction’. A first approach is purpose-oriented and focuses on a measure’s *objective* to respond to a breach of a legal norm. A second approach instead focuses on the *identity* of the author of the measures concerned, and limits the concept to measures adopted by an international organization (and in accordance with its constituent instrument). A third approach, prominent in international relations theory, defines sanctions by reference to the *type of measures* undertaken, and construes it as referring to *economic* sanctions, such as import and export restrictions against certain countries, or asset freezes targeting specific individuals or entities.

First, a ‘sanction’ is sometimes understood as referring to any measure ‘taken against a State to compel it to obey international law or to punish it for a breach of international law’.² This purpose-oriented understanding is borrowed from an analogy with the national sphere, where sanctions generally represent ‘a range of action that can be taken against a person who has transgressed a legal norm’.³ Transposed to the international sphere, the idea of ‘sanctions’ as a tool to enforce international legal norms is intrinsically linked to the long-standing debate over whether international law ultimately constitutes ‘law’ properly so termed.⁴ As is well-known, some scholars – most prominent among them the 19th-century legal philosopher John Austin – have answered in the negative, on the basis that the qualification of ‘law’ is reserved to a ‘command backed by sanction’,⁵ and – absent a hierarchically superior judge and enforcer of laws – no such sanction allegedly exists in respect of international rights and obligations. This view has, however, been rebutted by a substantial body of legal doctrine which has drawn attention to the fact that the ‘Austinian’ view of international law as no more than ‘positive morality’ rests on a false parallel between national and international law (consider e.g. the fact that in domestic proceedings between a private citizen and the state, there is no tool to ‘force’ the authorities to implement an adverse ruling),⁶ as well as to the fact that the availability of tools for enforcement relates to the effectiveness of the law, rather than to its qualification as ‘law’.⁷ Furthermore, international law is not purely a ‘paper tiger’. Apart from the possibility of UN sanctions, international law leaves room for self-help by States by taking non-forcible measures

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² J. Law and E.A. Martin (eds.), *A Dictionary of Law* (Oxford: OUP)(2014), ‘sanction’.

³ J.M. Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge: CUP)(2007), at 6.

⁴ See also: A. Pellet and A. Miron, ‘Sanctions’, (2013) *MPEPIL*, at §§ 1 et seq.

⁵ J. Austin, ‘The Province of Jurisprudence Determined’, reproduced in C. Morris (ed.), *The Great Legal Philosophers* (Philadelphia: University of Pennsylvania Press) (1971), at 352. Consider also: H. Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press)(1945), at 28.

⁶ For an interesting critique of this parallel, see e.g.: A. D’Amato, ‘Is International Law Really “Law”?’ (1984-1985) 79 *Northwestern U.L. Rev.*, pp. 1293-1314.

⁷ In the words of Fitzmaurice: ‘Law’ is not ‘law’ because it is enforced: it is enforced because it is ‘law’; and enforcement would otherwise be illegal. G. Fitzmaurice, ‘The general principles of international law considered from the standpoint of the rule of law’, (1957) 92-II *R.d.C.*, pp. 1-227, at 45. Thus, while international law is underdeveloped and imperfect in comparison to national law because the prospects for enforcement are more limited, this does not alter the fact that States regard it as legally binding.

against offenders. The extent to which such self-help is permitted, has been defined in some detail by the International Law Commission (ILC) in its 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)⁸ and the 2011 Draft Articles on the Responsibility of International Organizations (DARIO),⁹ and their respective Commentaries, in particular in the sections codifying the rules on ‘countermeasures’. At the same time, two observations are due. First, while the two instruments offer authoritative guidance on the law of international responsibility, several delicate questions – e.g., concerning the permissibility of measures against offenders that harm community interests – remain unanswered. Second, the ILC’s work does not contemplate punitive action against offenders. The ARSIWA Commentary observes, for instance, that, in contrast with domestic law, there has been ‘*no development of penal consequences for States of breaches of (...) fundamental norms*’ of international law.¹⁰ Just as the ILC rejects the idea of ‘punitive damages’,¹¹ it stresses that countermeasures must be proportionate to the original wrongful act(s), and reversible, and should be aimed (only) at obtaining compliance with the law.

Second, the concept of ‘sanctions’ is sometimes limited to measures adopted by an international organization, and in accordance with the organization’s rules. This (author-oriented) approach is reflected, for instance, in the work of the ILC on international responsibility, where the language of ‘sanctions’ is largely absent, and the focus is instead on ‘retorsions’ and, in particular, ‘countermeasures’. On those sparse occasions where the ILC refers to the concept of ‘sanctions’, it construes the concept in a rather narrow fashion. The ARSIWA Commentary, for instance, notes that the latter term has been used “*for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the [UN Charter]*”.¹² The Commentary adds that the term is ‘imprecise’, in that Chapter VII refers only to various ‘measures’ which the Council can take.¹³ The DARIO uses the concept in an even more restrictive manner, and speaks of measures ‘which an organization may be entitled to adopt *against its members* according to its rules’ (emphasis added)¹⁴ – one could also speak of ‘institutional sanctions’ in this context. In legal doctrine, one can discern a similar tendency to confining the concept of ‘sanctions’ to acts undertaken by international organizations, whereas the acts of individual States are mostly framed in terms of ‘countermeasures’.¹⁵ As will be explained below, however, such attempt to distinguish between the two terms on the basis of the identity of the author of the measures concerned is legally inaccurate, and moreover ignores the fact that the ‘sanction’ label is also commonly used to refer to measures adopted by States.

A third approach to defining ‘sanctions’ – prominent in international relations theory and discourse – focuses on the *type* of measures adopted, and construes the notion as referring specifically to a variety of economic measures, notably embargoes (whether of a general nature or limited to the trade of certain goods (e.g., arms certain mineral resources,...), import and export restrictions,¹⁶ as well as

⁸ ILC, ‘Draft articles on responsibility of States for internationally wrongful acts, with commentaries’, (2001) *Yb ILC* vol. II, Part Two.

⁹ ILC, Draft articles on the responsibility of international organizations, with commentaries, (2011) *Yb ILC* Vol. II, Part Two.

¹⁰ ILC, loc. cit., supra n. 8, at 111. According to the ILC stresses, it remains the case, as the Nuremberg Tribunal asserted in 1946, that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” Nuremberg International Military Tribunal (Nuremberg Trial), Judgment (1946), 1 *IMT* 171, reprinted in (1947) 41 *A.J.I.L.*, pp. 172-333, at 221.

¹¹ ILC, loc. cit., supra n. 8, at 111.

¹² *Ibid.*, at 75.

¹³ *Ibid.*, at 128.

¹⁴ ILC, loc. cit., supra n. 9, at 47.

¹⁵ A. Pellet and A. Miron, loc. cit., supra n. 4, at § 10. See in a similar vein : N.D. White and A. Abass, ‘Countermeasures and sanctions’, in M.D. Evans (ed.), *International Law* (Oxford: OUP)(2014; 4th ed.), pp. 537-562, at 554.

¹⁶ Note: one commonly used definition of ‘sanction’ in international relations is the ‘deliberate, government-inspired withdrawal or threat of withdrawal of customary trade or financial relations’. G.C. Hufbauer, J.J. Schott, K.A. Elliott, B.

(increasingly popular) targeted sanctions, such as asset freezes, travel bans etc. This approach excludes other institutional sanctions by international organizations against their Member States, involving, for instance, expulsion or the suspension of voting rights. The archetypical example are the sanctions adopted by the UN Security Council pursuant to Article 41 of the UN Charter,¹⁷ and which are generally monitored by one of the Council's Sanctions Committees.¹⁸ It is these sanctions that form the object of study of the present edited volume. Before having a closer look at the various dimensions of, and challenges related to, UN sanctions, however, it must be emphasized that the UN is not the only organization to adopt measures of this type. Indeed, the past several decades have witnessed a proliferation of such sanctions applied by regional and sub-regional organizations, especially in Europe and Africa. A background paper prepared for the recent High-Level Review of UN Sanctions, for instance, identified 48 situations where the EU had chosen to adopt sanctions (or 'restrictive measures' as the EU prefers to label them), and 11 situations where the AU had adopted such sanctions.¹⁹ Contrary to the DARIO Commentary understanding of 'sanctions' mentioned above, these sanctions are not necessarily taken by the international organization concerned 'against its members'. There is, for instance, a clear distinction between the different sanctions regimes adopted by the European Union and the African Union respectively: if the AU sanctions are targeted against AU Member States, the opposite is true for those adopted by the EU.²⁰ Finally, whereas the ILC seems to regard 'sanctions' as measures adopted under the auspices of an international organization (see *supra*), in international relations the concept is also understood as referring to measures taken by individual States. Indeed, long before the advent of the so-called 'sanctions decade',²¹ individual countries already used economic sanctions as an important instrument of foreign policy, "*less dangerous than military force, but more serious – and sometimes more effective – than diplomacy alone.*"²² The increased recourse by the UN Security Council to the sanctions tool since the end of the Cold War has not reversed this trend – quite the contrary. Today, numerous countries adopt economic sanctions of a more general nature, and keep lists of designated persons and entities that are subject to 'targeted' sanctions.²³ Often, such sanctions merely tend to implement binding measures adopted by the UN Security Council pursuant to Article 41 UN Charter. Yet, individual countries (and regional organizations) also have recourse to 'autonomous' sanctions, which do not rest on a pre-existing Security Council resolution. The Russian intervention in Ukraine in March 2014, for instance, triggered autonomous sanctions from the EU, as well as from countries as diverse as e.g., the United States, Canada, Australia, New Zealand and Japan.

Oegg, *Economic Sanctions Reconsidered* (Washington DC: Peterson Institute for International Economics)(2007; 3rd ed.), at 3.

¹⁷ Note that not every measure adopted by the UN Security Council pursuant to Article 41 UN Charter qualifies as a 'sanction' as that notion is commonly understood in international relations. Thus, measures establishing *ad hoc* international criminal tribunals or providing for a referral of a 'situation' to the International Criminal Court do not qualify as 'sanctions' in this context, even if they find their legal basis in Article 41 UN Charter.

¹⁸ See: <http://www.un.org/sc/committees/>.

¹⁹ E. Carisch, S. Eckert, L. Rickard-Martin, 'High Level Review of UN Sanctions Background Paper', 2014, available at http://www.hlr-unsanctions.org/20140706_HLR_Background.pdf, at 17.

²⁰ See further: A. Charron and C. Portela, 'The UN, regional sanctions and Africa', (2015) 91 *International Affairs*, pp. 1369-1385. The authors note that, contrary to the EU, the AU only imposes sanctions on AU Members. The same is true *mutatis mutandis* for ECOWAS, which has imposed sanctions on nearly half of its members (*ibid.*, at 1376).

²¹ See: D. Cortright, G.A. Lopez, R.W. Conroy, *The sanctions decade: assessing UN strategies in the 1990s* (Boulder: Rienner)(2000), 274 p.

²² A.F. Lowenfeld, *International Economic Law* (Oxford: OUP)(2008; 2nd ed.), at 925.

²³ See e.g.: US Department of the Treasury, 'Sanctions Programs and Country Information', at <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>; Foreign Affairs, Trade and Development Canada, 'Canadian Economic Sanctions', at <http://www.international.gc.ca/sanctions/index.aspx?lang=eng>; Swiss State Secretariat for Economic Affairs, 'Sanctions/Embargoes', at <http://www.seco.admin.ch/themen/00513/00620/index.html?lang=en>.

There is moreover a fundamental difference between the latter understanding of ‘sanctions’, and the purpose-oriented understanding discussed above. Indeed, in international relations the concept of ‘sanction’ refers to a certain *type* of measures, but which can serve a variety of purposes, namely: (i) to coerce or change behaviour; (ii) to constrain access to resources needed to engage in certain activities, or (iii) to signal and stigmatize.²⁴ Allegations have also often been made of sanctions serving *punitive* purposes, albeit that the UN Security Council and the Court of Justice of the EU have both stressed their inherently preventive character.²⁵ As illustrated in the next section of this volume, sanctions can serve a wide variety of functions. Prominent examples are the prevention of WMD proliferation, counter-terrorism, human rights promotion and post-conflict peacebuilding, yet the foregoing list is clearly not exhaustive. What is key for present purposes is that such economic sanctions and targeted sanctions are not necessarily a reaction to a prior breach of international law (and aimed at halting such breach (or punishing the offender)). Thus, even if the Council is undergoing a process of substantive formalization whereby sanctions are increasingly framed as reactions to prior breaches of international law (e.g., aggression, apartheid, use of child soldiers, war crimes,...), this is not always the case. Ultimately, in order to adopt binding sanctions, the Council need not (and very often does not) find a breach of international law, but must (only) find the existence of a ‘threat to the peace, a breach of the peace or an act of aggression’ in the sense of Article 39 UN Charter. By analogy, it is clear that sanctions adopted by individual States – such as the notorious US sanctions imposed on Cuba pursuant to the Helms-Burton Act²⁶ – often serve foreign policy purposes of the State(s) concerned, without necessarily constituting a reaction to a prior breach of international law. At times, whether or not sanctions can qualify as a reaction to a prior breach of international law may be unclear. Thus, whereas the sanctions imposed by the EU and by various individual States against Russia in 2014 can arguably be framed as a response to Russia’s unlawful recourse to force against, and intervention in, Ukraine, other situations may be less clear-cut. In his analysis of the EU’s sanctions against Iran adopted in 2012, for instance, Dupont suggests that the existence of a wrongful act on the part of Iran is ‘dubious in this case’.²⁷ Nonetheless, from an international law perspective, this aspect makes all the difference.

Again, while the present volume focuses on UN sanctions,²⁸ this chapter takes a different approach in that it aims at giving a broader overview of the concepts of sanctions and countermeasures and the overarching international legal framework. At the outset, a note of caution is due. In spite of the laudable efforts of the ILC, the issue of enforcement by means of non-forcible measures is and remains ‘one of the least developed areas of international law’.²⁹ Notwithstanding its importance, it remains plagued by a variety of delicate controversies and grey areas. The present chapter’s aim is essentially to map the main knowns and, perhaps even more so, the main unknowns. An in-depth treatment of all of these controversies is beyond the scope of the present chapter.

Section 2 looks at the extent to which sanctions may constitute mere ‘unfriendly’ retorsions that largely operate below the radar of international law. In the alternative, Section 3 examines the main

²⁴ L.J. van den Herik, ‘Peripheral Hegemony in the Quest to ensure Security Council Accountability for its individualized UN sanctions regimes’, (2014) 19 *J.C.S.L.*, pp. 427-449, at 433.

²⁵ See *Ibid.*, at 433-434; SC Res. 2083(2012), 17 December 2012, 14th preambular paragraph, and Court of Justice, *European Commission and others v. Yassin Abdullah Kadi*, Joined cases C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013, ECLI:EU:C:2013:518, at § 130.

²⁶ Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, 22 U.S.C. §§ 6021-6091 (1996).

²⁷ P.-E. Dupont, ‘Countermeasures and collective security: the case of the EU sanctions against Iran’, (2012) 17 *J.C.S.L.*, pp. 301-336, at 325.

²⁸ Understood here as the sub-category of measures adopted by the UN Security Council pursuant to Article 41 UN Charter, and which take the form of embargoes and other trade restrictions, as well as targeted sanctions against specified natural and legal persons.

²⁹ N.D. White and A. Abass, loc. cit., supra n. 15, at 537.

accepted legal bases which may justify the recourse to sanctions by States and organizations. Section 4 turns to the controversy over the legality of third-party countermeasures. Section 5 concludes.

2. *Embargoes and targeted sanctions as ‘retorsions’ unregulated by international law?*

As mentioned above, the ILC’s work on State responsibility pays scant attention to the concept of ‘sanctions’, instead focussing on the notions of ‘retorsions’ and ‘countermeasures’. The latter are a form of ‘self-help’, whereby a State breaches an international obligation incumbent upon it, pursuant to, and in response to, a prior breach of international law by another State. Subject to certain conditions, further dealt with below, countermeasures are not regarded as wrongful acts on the part of the State taking them. ‘Retorsions’ are, however, fundamentally different in that they involve measures of discourtesy or unfriendliness vis-à-vis another State but which are *a priori not inconsistent* with any international obligation of the State engaging in them.³⁰ Retorsions may constitute a response to a prior internationally wrongful act, but (contrary to what is true for countermeasures) this must not necessarily be the case. While there is no universal agreement, ‘retorsion is widely regarded as a freedom (as opposed to a right to which certain limitations may apply) and is accordingly largely unregulated by international law’.³¹ Thus, retorsions need not necessarily be temporary or reversible, and may possibly contain a punitive element.³²

That States (or international organizations) may adopt ‘unfriendly’ measures against other States (or international organizations) as long as these do not involve a potential internationally wrongful act seems self-evident. The difficulty, however, resides in determining whether or not certain measures do or do not amount to a breach of an international obligation of the State (or organization) engaging in them in the first place. In the case of a withdrawal of purely voluntary aid programmes or a severance of diplomatic relations,³³ it will normally be clear that no such breach is involved. In other situations, however, careful scrutiny of the measure may be needed under relevant customary law, bilateral treaty law and multilateral treaty law. Thus, a certain measure may well qualify as a retorsion when taken by State A against State B, but not in the relationship between State A and State C, because their treaty relations are different (e.g., when the measure infringes a bilateral treaty of friendship and commerce concluded between A and C). In this context, one may also have to examine the extent to which certain treaty rights are subjected to some form of conditionality, as is the case for numerous trade agreements between the EU and third countries, which contain so-called ‘essential elements’ clauses.³⁴

From the perspective of the retorsion/countermeasure-dichotomy, the adoption of embargoes and other economic and targeted sanctions in particular gives rise to a number of questions.

First, economic sanctions at first sight appear difficult to reconcile with the customary prohibition of ‘intervention’ in the internal or external affairs of sovereign States, which finds recognition in a wide

³⁰ ILC, *loc. cit.*, supra n. 8, at 128.

³¹ J. Crawford, *State Responsibility – The General Part* (Cambridge: CUP)(2013), at 677.

³² *Ibid.*; T. Giegerich, ‘Retorsion’, (2011) *MPEPIL*, at § 8.

³³ For other examples, see e.g.: T. Giegerich, *loc. cit.*, supra n. 32, at § 10 (Giegerich also notes that “*the proportionality principle does not set legal (but perhaps ethical and/or political) limits to the use of measures of retorsion*” (*ibid.*, at § 14)).

³⁴ See on this: N. Hachez, ‘‘Essential Elements’ clauses in EU trade agreements – making trade work in a way that helps human rights?’, Leuven GGS Working Paper No. 158, April 158, at <https://ghum.kuleuven.be/ggs/publications/wp158hachez.pdf>, 23 p. The author observes that the essential elements clauses have so far only been activated against ACP countries, and that, moreover: “*Essential elements have ... sparsely been invoked, they have not always led to sanctions proper but rather to consultations, and the sanctions when applied did not involve the lifting of trade preferences but rather ‘suspension of meetings and technical co-operation programmes’*”. (*ibid.*, at 18-19).

variety of multilateral and bilateral treaties, as well as in a number of UN General Assembly resolutions.³⁵ The linchpin of the duty of non-intervention is that it only covers acts that qualify as ‘coercive’.³⁶ Otherwise, the term ‘intervention’ is conceived as referring only to acts intended to force a policy change in the target State.

Various instruments indicate that the non-intervention principle equally extends to ‘economic coercion’. Thus, the OAS Charter proclaims that no State “*may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind*”.³⁷ A comparable provision can be found *inter alia* in the 1970 UN General Assembly Friendly Relations Declaration.³⁸ Reference can also be made to the UN General Assembly’s annual resolutions condemning the US embargo against Cuba, which *inter alia* refer to the non-intervention principle.³⁹ Additionally, when US President Obama issued a new Executive Order imposing financial sanctions on at least seven Venezuelan officials in March 2015,⁴⁰ numerous Latin American States criticized this move,⁴¹ with the Union of South American Nations (UNASUR) issuing a statement denouncing the ‘*interventionist threat to sovereignty and the principle of non-interference in the internal affairs of other countries*’.⁴²

More generally, reference must be made to the bi-annual resolutions adopted by the General Assembly on ‘unilateral economic measures as a means of political and economic coercion against developing countries’, and the yearly resolutions on ‘human rights and unilateral coercive measures’.⁴³ Thus, in resolution 70/185 (adopted by 131 votes in favour to 2 against and 49 abstentions), the General Assembly urged the international community “*to adopt urgent and effective measures to eliminate the use of unilateral coercive economic measures against developing countries that are not authorized by relevant organs of the United Nations or are inconsistent with the principles of international law as set forth in the Charter of the United Nations and that contravene the basic principles of the multilateral trading system*.”⁴⁴

³⁵ For an overview of the various sources of the duty of non-intervention, see: M. Jamnejad and M. Wood, ‘The principle of non-intervention’, (2009) 22 *Leiden J.I.L.*, pp. 345-381, at 349-357.

³⁶ Thus, the ICJ in *Nicaragua* stated that a prohibited intervention must be “*one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely*.” It further declared that the “*element of coercion (...) defines, and indeed forms the very essence of, prohibited intervention*.” ICJ, *Case concerning military and paramilitary activities in and against Nicaragua* (*Nicaragua v. United States of America*), Judgment of 27 June 1986, (1986) *ICJ Rep.*, pp. 14-150, at § 205.

³⁷ Charter of the Organization of American States, Bogotá, 2 *U.S.T.* 2394 (Article 20 of the revised treaty).

³⁸ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970.

³⁹ See e.g.: GA Res. 62/3, 30 October 2007, ‘Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba’, (adopted by 184 votes to 4).

⁴⁰ United States White House, ‘Fact Sheet: Venezuela Executive Order’, 9 March 2015, <https://www.whitehouse.gov/the-press-office/2015/03/09/fact-sheet-venezuela-executive-order>.

⁴¹ See, e.g., Remarks by the President of Argentina, Cristina Fernandez de Kirchner, in her Address to the Seventh Summit of the Americas, April 2015, OEA/Ser.E CA-VII/INF.7/15, 3-4; Speech by President Rafael Correa of Ecuador During the Plenary of the Seventh Summit of the Americas, April 2015, OEA/Ser.E CA-VII/INF.13/15, 2.

⁴² UNASUR, ‘Comunicado de la Unión de Naciones Suramericanas sobre el Decreto Ejecutivo del Gobierno de los Estados Unidos sobre Venezuela’, Quito, 14 March 2015, available at <http://www.unasursg.org/images/especial/Comunicado%20por%20Decreto%20EEUU.pdf>. The US sanctions against Venezuela were also condemned by the 33 CELAC Member countries in a ‘Communiqué of the Community of Latin-American and Caribbean States in solidarity with the Bolivarian Republic of Venezuela’ dated 26 March 2015 (text reproduced at <http://www.telesurtv.net/english/news/CELAC-Unanimously-Passes-Resolution-in-Support-of-Venezuela-20150326-0021.html>). The resolution similarly refers to the principle of ‘non-interference in the internal affairs of the states’.

⁴³ See e.g., GA Res. 70/151, 17 December 2015; GA Res. 70/185, 22 December 2015; GA Res. 69/180, 18 December 2014, GA Res. 68/162, 18 December 2013; GA Res. 68/200, 20 December 2013; GA Res. 67/170, 20 December 2012.

⁴⁴ GA Res. 70/185, 22 December 2015. See in a similar vein: UNCTAD, the Doha Mandate (26 April 2012), Doc TD/L.427, para. 25 (‘strongly urging’ States “*to refrain from promulgating and applying any unilateral economic financial, or trade*

Against this, it has been argued that the traditional position in international law is that States are in principle free to determine with whom they want to conduct trade or not. In the words of Lauterpacht: “*in the absence of explicit conventional obligations, particularly those laid down in commercial treaties, a state is entitled to prevent altogether goods from a foreign state from coming into its territory*”.⁴⁵ It has also been argued that the principle of non-intervention has been significantly eroded as a result of State practice, and that the frequent use of sanctions by the US and other countries constitutes persuasive evidence that no clear norm exists in customary law against the use of economic sanctions.⁴⁶ Interestingly, in the *Nicaragua* case, Nicaragua drew the Court’s attention to a series of measures of economic constraint, i.e. the cessation of economic aid, a 90 percent reduction in the sugar quota for US imports from Nicaragua, and, ultimately, a trade embargo, which, it argued, ‘*added up to a systematic violation of the principle of non-intervention*’.⁴⁷ Eventually, however, the Court concluded it was “*unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention*”.⁴⁸ This dictum confirms that embargoes are not necessarily contrary to customary international law and indicates that any prohibition of economic intervention must be narrowly construed.⁴⁹ Equally illustrative in this context is the fact that the ILC’s ARSIWA Commentary explicitly recognizes that acts of retorsion may include ‘*embargoes of various kinds*’.⁵⁰

In the end, it remains altogether unclear to what extent exactly the principle of non-intervention prohibits certain economic sanctions. Having regard to State practice and relevant resolutions of the General Assembly, for instance, Elagab concludes that ‘*there are no rules of international law which categorically pronounce either on the prima-facie legality or prima-facie illegality of economic coercion*’.⁵¹ In 1993, a UN panel of experts found insufficient consensus in international law to allow any instrument to be formed on the matter.⁵² The question has continued to puzzle legal doctrine. Jamnejad and Wood note that a withdrawal of benefits is less likely to contravene the non-intervention principle than more direct action such as embargoes.⁵³ Otherwise, they suggest, the answer lies in the element of ‘*coercion*’.⁵⁴ Thus, a trade embargo by State A against State B is deemed more likely to breach the non-intervention principle when State B is highly reliant on trade with State A (again, the US trade embargo against Cuba strikes as the obvious example of a highly coercive regime). Yet, the somewhat odd implication then is that, the more effective economic sanctions are in achieving their (often coercive) purpose, the more likely they will be incompatible with the non-intervention principle. Others have claimed that economic coercion becomes unlawful when it serves an improper motive or purpose⁵⁵ - although such suggestions inevitably introduce an element of legal uncertainty and subjectivity in the analysis. Some in particular emphasize that the non-intervention principle has a

measures not in accordance with international law and the Charter of the United Nations that impedes the full achievement of economic and social development, particularly in developing countries, that affects commercial interests.”).

⁴⁵ H. Lauterpacht, ‘Boycott in international relations’, (1933) 14 *British Yb. I.L.* 125, at 130, 140.

⁴⁶ B.E. Carter, *International Economic Sanctions: improving the haphazard U.S. legal regime* (Cambridge: CUP)(1988), at 6. See also N.D. White and A. Abass, loc. cit., supra n. 15, at 551.

⁴⁷ ICJ, *Nicaragua*, loc. cit., supra n. 36, at §§ 244-245.

⁴⁸ *Ibid.*

⁴⁹ M. Jamnejad and M. Wood, loc. cit., supra n. 35, at 370.

⁵⁰ ILC, loc. cit., supra n. 8, at 128.

⁵¹ O.Y. Elagab, *The legality of non-forcible counter-measures in international law* (Oxford: Clarendon Press)(1988), at 212-213.

⁵² See UN Secretary-General, ‘Economic measures as a means of political and economic coercion against developing countries’, 25 October 1993, UN Doc. A/48/535. See also M. Jamnejad and M. Wood, loc. cit., supra n. 35, at 370, note 106.

⁵³ M. Jamnejad and M. Wood, loc. cit., supra n. 35, at 371.

⁵⁴ *Ibid.*, at 370.

⁵⁵ R.B. Lillich, ‘Economic coercion and the international legal order’, (1975) 51 *International Affairs*, at 366; D.W. Bowett, ‘Reprisals involving recourse to armed force’, (1972) 66 *A.J.I.L.*, at 3-7.

core element, prohibiting coercion of political independence.⁵⁶ In a similar vein, Giegerich suggests that one should look at both the purpose of the retorsion and its coercive force: “[e]ven though a specific measure of retorsion does not as such violate international law, its use for an illegitimate end, namely an intervention, will render it unlawful if its coercive force is strong enough to pose a serious threat to the self-determination of the target State with regard to its *domaine réservé*.”⁵⁷ By contrast, Tzanakopoulos concludes that there is no pre-determined core of matters over which States can at all times decide freely, and that there is accordingly no fundamental right to be free from economic coercion.⁵⁸

Second, on a related note, the scope for permissible retorsions is restricted by limitations on the possibility for States to exercise (prescriptive) jurisdiction on an extra-territorial basis. States’ jurisdiction to apply their laws beyond their own territory is indeed subject to a variety of restrictions, stemming *inter alia* from the principle of ‘equity’, the principle of proportionality, or the doctrine of abuse of rights.⁵⁹ Another principle which may have a role to play in restraining the law of jurisdiction is precisely the aforementioned non-intervention principle.⁶⁰ Thus, in its 2004 opinion in the *Empagran* antitrust case, the US Supreme Court ruled that, pursuant to the customary non-intervention principle, it is to be assumed that Congress avoids extending the reach of US law when doing so would create a ‘serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs’.⁶¹ The Restatement (Third) of US Foreign Relations Law takes the view that, as a matter of international law, the exercise of jurisdiction is subject to a test of reasonableness (or a ‘rule of reason’ test), which requires weighing the different interests involved in the situation.⁶² It has, however, been questioned whether this position indeed reflects the present state of international law.⁶³ In particular, while States undeniably exercise jurisdictional restraint at times, it is not always clear to what extent they do so because an international legal rule obliges them thereto.⁶⁴

For present purposes, limitations on States’ exercise of jurisdiction are particularly relevant in the context of so-called ‘secondary’ sanctions, which expose natural and legal persons in third countries to sanctions in respect of certain actions that take place outside the jurisdiction of the State imposing the sanctions, notably when they conduct business with individuals, groups, regimes or countries that are the target of the ‘primary’ sanctions regime. In 1948, the United States was a vocal critic of the secondary boycott of Israel implemented by the Arab League, which required as a condition of sale of oil that third-State companies agree not to do business with Israel.⁶⁵ More recently, however, the United States has become the leading proponent of measures that have an extraterritorial effect. The

⁵⁶ L. Boisson de Chazournes, ‘Other non-derogable rights’, in J. Crawford, A. Pellet, S. Olleson (eds.), *The law of international responsibility* (Oxford: OUP)(2010), 1205, at 1209-11.

⁵⁷ T. Giegerich, *loc. cit.*, supra n. 32, at §§ 24-25 (the author also notes that the scope of the *domaine réservé* has been reduced considerably, implying that the likelihood that measures of retorsion will violate the non-intervention principle has diminished accordingly).

⁵⁸ See: A. Tzanakopoulos, ‘The right to be free from economic coercion’, 18 July 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2633065 (forthcoming in (2015) 4 *Cambridge Journal of International and Comparative Law*), at 17-18: “You want to know if there is a fundamental right of States to be free from economic coercion? There is not, unless you can identify some specific obligation that has been breached on the part of the reacting State or international organisation. Do you want there to be a fundamental right of States to be free from economic coercion? Splendid! Go out there and make one.”

⁵⁹ For an insightful overview, see: C. Ryngaert, *Jurisdiction in international law* (Oxford: OUP)(2015; 2nd ed.), at 145 et seq. ⁶⁰ *Ibid.*, at 154-156.

⁶¹ US Supreme Court, *F Hoffmann-La Roche Ltd et al v Empagran SA et al*, 124 S Ct 2359, 2366-2367 (2004).

⁶² American Law Institute, *Restatement of the Law – Third. The Foreign Relations Law of the United States* (St. Paul, American Law Institute Publishers) (1990), at § 403.

⁶³ See C. Ryngaert, *op. cit.*, supra n. 59, at 153.

⁶⁴ *Ibid.*, at 146.

⁶⁵ M. Rathbone, P. Jeydel and A. Lentz, ‘Sanctions, sanctions everywhere: forging a path through complex transnational sanctions laws’, (2013) 44 *Georgetown J.I.L.*, pp. 1055-1126, at 1070.

US secondary sanctions regimes, particularly those envisaged in the Helms-Burton Act⁶⁶ and the 1996 Iran and Libya Sanctions Act,⁶⁷ and which seek (or sought⁶⁸) to cut off foreign parties from access to the US financial and commercial markets if they conduct business with the primary sanctions targets, have, however, been strongly criticized, not only in legal doctrine,⁶⁹ but, more importantly, in State practice. Numerous States have indeed refused to recognize the extraterritorial reach of secondary sanctions and/or have adopted so-called ‘blocking statutes’, which e.g. impose penalties for compliance with the extraterritorial measures, and provide for non-recognition of judgments that give effect to them.⁷⁰ The most well-known example is undoubtedly Council Regulation No. 2271/96,⁷¹ which prohibits companies incorporated in the EU and nationals of an EU Member State residing in the EU from complying with the aforementioned US Acts. The extra-territorial reach of secondary sanctions has also been challenged before domestic courts in third States. Thus, in 1982 a Dutch court declined to allow the enforcement of US sanctions against a Dutch subsidiary of a US company.⁷² On a number of occasions, resistance of third States has led the United States to revoke certain sanctions or to agree to suspend the enforcement of secondary sanctions.⁷³ In all, while it would certainly go too far to suggest that States may make economic sanctions effective only in their own territory and that all forms of secondary sanctions must be categorically dismissed as improperly extra-territorial,⁷⁴ jurisdictional ‘overreach’ of sanctions regimes beyond the State’s own territory is likely to be challenged and may well be contrary to international law. More specific and authoritative guidance on the international jurisdictional validity of secondary sanctions, however, has yet to materialize.⁷⁵

⁶⁶ Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, 22 U.S.C. §§ 6021-6091 (1996).

⁶⁷ Iran and Libya Sanctions Act of 1996, §§ 4-5 Pub. L. No. 104-172 50 U.S.C. § 1701 (1996 & Supp. III 1997) (as amended by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195 (2010)).

⁶⁸ Note: The ‘secondary’ reach of the U.S. Iran sanctions was curtailed pursuant to the implementation of the Joint Comprehensive Plan of Action, concluded on 14 July 2015 between the P5+1 (text available at <http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/>). See also: U.S. Department of the Treasury, ‘Statement relating to the Joint Comprehensive Plan of Action ‘Implementation Day’ of January 16, 2016’, available at <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx>. But see, however: M. O’Kane, ‘Prime Minister Cameron challenges Barclays on Iran transactions’, 11 March 2016, <http://europeansanctions.com/2016/03/11/prime-minister-cameron-challenges-barclays-on-iran-transactions/> (relating to criticism from British PM David Cameron that Barclays continued to decline to process payments from Iran, a position which the bank justified by reference to continuing compliance risks under US law).

⁶⁹ For an overview, see e.g., J.A. Meyer, ‘Second thoughts on secondary sanctions’, (2009) 30 *Un. Penn. J.I.L.*, pp. 905-968, at 932-934 (with references). See also: C. Ryngaert, ‘Extraterritorial export controls (secondary boycotts)’, (2008) 7 *Chinese J.I.L.*, pp. 625-658.

⁷⁰ M. Rathbone et al., *loc. cit.*, supra n. 65, at 1070, 1071-1075. Also: J.A. Meyer, *loc. cit.*, supra n. 69, at 929-930, footnote 76. See also: Asian-African Legal Consultative Organization, *Unilateral and secondary sanctions: an international law perspective* (New Delhi: AALCO Secretariat)(2013), 268 p.

⁷¹ Council Regulation (EC) No. 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, O.J. 29 November 1996, L-309/01.

⁷² *Compagnie européenne des Pétroles, S.A. v Sensor Nederland, B.V.*, Dict. Ct. The Hague, 17 September 1982, transl. in (1983) 22 *I.L.M.* 66.

⁷³ See in particular the Memorandum of Understanding concerning the U.S. Helms-Burton Act and the U.S. Iran Libya Sanctions Act concluded between the EU and the United States on 11 April 1997, reprinted in (1997) 36 *ILM* 529. See also: A.F. Lowenfeld, *op. cit.*, supra n. 22, at 924. Overall, the promulgation of new sanctionable activities by the US has far outpaced the actual use of sanctions against foreign entities. M. Rathbone et al., *loc. cit.*, supra n. 65, at 1118.

⁷⁴ A.F. Lowenfeld, *op. cit.*, supra n. 22, at 915; J.A. Meyer, *loc. cit.*, supra n. 69, at 907.

⁷⁵ J.A. Meyer, *loc. cit.*, supra n. 69, at 907.

Note: the scope of application of EU restrictive measures is generally defined as follows: “*This Regulation shall apply: (a) within the territory of the Union, including its airspace; (b) on board any aircraft or any vessel under the jurisdiction of a Member State; (c) to any person inside or outside the territory of the Union who is a national of a Member State; (d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State; (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union.*” (see e.g., Article 49 of Council Regulation (EU) No. 267/2012 of 23 March 2012 concerning restrictive measures against Iran, O.J. 24 March 2012, L-88/1).

US embargoes and asset freezes, for their part, generally define persons ‘subject to the jurisdiction of the United States’ as encompassing the following categories: (a) any person, wheresoever located, who is a citizen or resident of the United States; (2) any person actually within the United States; (3) any corporation organized under the laws of the United States or of any

A third potential obstacle to the recourse to economic sanctions (possibly of a ‘secondary’ nature) stems from the WTO regime. Indeed, economic sanctions are by nature inconsistent with the principles of non-discrimination and most-favoured-nation treatment which are at the heart of the GATT regime. It follows that such sanctions, when undertaken between WTO Members, *prima facie* conflict with their GATT obligations.⁷⁶ At the same time, reference must be made to the ‘security exception’ contained in Article XXI GATT,⁷⁷ which makes clear that the GATT does not prevent Members from taking action pursuant to their obligations under the UN Charter (e.g., by implementing UN sanctions), and does not prevent any Member “*from taking any action which it considers necessary for the protection of its essential security interests*”, e.g. when “*taken in time of war or other emergency in international relations*”. There has been considerable debate in legal doctrine as to whether the exception of Article XXI GATT is essentially self-judging or not.⁷⁸ This issue is tackled in greater detail in the chapter by Andrew Mitchell in the present volume and is therefore not further explored here. Suffice it to note for present purposes that the extent to which WTO members are free to determine what is ‘necessary’ in the sense of Article XXI GATT has not yet been tackled directly by a WTO panel, in part because many ‘autonomous’ sanctions regimes have targeted non-WTO Members, and in part because WTO members may ultimately have little incentive to test the scope and fragility of the WTO system.⁷⁹ On the other hand, as the reactions to Sweden’s 1975 invocation of Article XXI to excuse measures protecting its domestic footwear industry illustrate,⁸⁰ the GATT’s ‘security exception’ cannot be invoked to justify measures that are wholly unrelated to security concerns or foreign policy objectives, but which rather serve a protectionist purpose.

Apart from the aforementioned considerations, several other obstacles may prevent the qualification of certain measures as mere ‘unfriendly’ retorsions. Thus, depending on the context and scope, economic sanctions may conflict with the (customary or treaty) rules on State immunity⁸¹ or with the requirement of Article VIII(2)(a) of the IMF Agreement (which provides that no IMF member ‘shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions’).⁸² Furthermore, they may contravene the customary rules on the treatment of aliens or rules on investment protection laid down in bilateral or multilateral investment treaties. For example, as van Aaken observes, ‘there is little doubt that a longer-term asset freezing, without due process, is an expropriation ... and a violation of [the principle of fair and equitable treatment]’.⁸³ The implication is that targeted sanctions may well contravene sending States’

State, territory, possession, or district of the United States; and (4) any partnership, association, corporation, or other organization, wheresoever organized or doing business, which is owned or controlled by persons specified in subparagraph (1), (2), or (3) of this paragraph. (Lowenfeld, at 902).

Reference can also be made to § 414 of the US Restatement (Third) of Foreign Relations Law (supra n. 62), which lists several situations where it is ‘*not unreasonable for a state to exercise jurisdiction for limited purposes with respect to activities of affiliated foreign entities*’. According to Lowenfeld, this paragraph sets out an intermediate position between that of the US government and that of those who regard any action by the parent country as an infringement of the sovereign rights of the host country of the subsidiary. A.F. Lowenfeld, *op. cit.*, supra n. 22, at 904. Consider also the ‘*territoriality*’ threshold set forth by Meyer: J.A. Meyer, *loc. cit.*, supra n. 69.

⁷⁶ In a similar vein, financial sanctions may contravene State obligations under the General Agreement on Trade in Services (consider e.g., Article XI GATS which states that a Member ‘*shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments*’.)

⁷⁷ Note: similar provisions can be found in Art. XIVbis(2) of the General Agreement on Trade in Services (GATS) and Article 73 of the Agreement on Trade-related aspects of intellectual property rights (TRIPS).

⁷⁸ See e.g., R.P. Alford, ‘The self-judging WTO Security Exception’, (2011) *Utah L.Rev.*, pp. 697-759.

⁷⁹ See e.g., A.F. Lowenfeld, *op. cit.*, supra n. 22, at 916-925.

⁸⁰ See the Chapter by Andrew Mitchell elsewhere in this volume.

⁸¹ See e.g. Article 21(1)(c) of the 2004 UN Convention on Jurisdictional Immunities of States and their Property, which provides for immunity from execution of central banks and other monetary authorities.

⁸² See e.g., P.-E. Dupont, *loc. cit.*, supra n. 27, at 312-316. See in particular the list of bilateral agreements with which the EU’s Iran sanctions regime would seem to conflict (*ibid.*, at 313, footnote 47).

⁸³ A. van Aaken, ‘International investment law and decentralized targeted sanctions: an uneasy relationship’, Columbia FDI Perspectives No. 164, 4 January 2016, available at <http://ccsi.columbia.edu/files/2013/10/No-164-van-Aaken-FINAL.pdf>

obligations under bilateral investment treaties, save inasmuch as the latter treaties contain a so-called ‘non-precluded measures’ (NPM) clause (which will often not be the case⁸⁴) and inasmuch as the clause is sufficiently broad to provide for an exemption for the sanctions concerned.⁸⁵ In addition, measures which pursue an objective incompatible with international law may also amount to an abuse of rights.⁸⁶ Targeted sanctions may of course also raise issues under human rights law, including under the right to property (albeit the latter right is not absolute).

As Giegerich points out, the increasing legalization of international relations has multiplied the instances in which an act by one State that would in earlier times have been rated as merely ‘unfriendly’ now violates international law.⁸⁷ The result is a sliding scale of self-help measures with a grey area between, on the one hand, measures which *ab initio* do not give rise to a wrongful act on the part of the State taking them, and are accordingly unregulated under international law (retorsions), and, on the other hand, measures which in principle do give rise to a wrongful act on the part of the State, but which are justified because (and insofar as) they meet the residuary requirements for the permissible recourse to countermeasures or because they can be justified by reference to a separate legal basis. Efforts to clear the grey area by means of an in-depth assessment of State practice are complicated by the fact that States adopting economic sanctions often leave open whether the measures concerned are deemed to qualify as retorsions or as countermeasures. Alternatively, it is possible that a State honestly, but erroneously, believes its measures qualify as retorsions. In such scenario, it may not be possible to requalify the measures as permissible countermeasures in light of the procedural and substantive requirements attached thereto,⁸⁸ as is explained in the next section.

3. Staying on safe legal grounds? – Countermeasures by injured States, UN sanctions and other consent-based sanctions and self-contained regimes

When sanctions involve conduct that would normally qualify as ‘internationally wrongful’ on the part of the acting State (because they involve a breach of a customary or treaty obligation binding upon the State concerned, or a general principle of international law), they cannot be qualified as retorsions. Yet, there may be separate legal grounds to justify, or excuse, such measures under international law (whether as a matter of ‘primary’ or ‘secondary’ law). The main possibilities are as follows:

- the measures concerned may constitute a proportionate response by an injured State against a prior unlawful act by the State targeted by the sanctions, adopted in accordance with the residuary regime for self-help through countermeasures under general international law;
- the measures may merely implement binding resolutions adopted by the UN Security Council pursuant to Article 41 of the UN Charter;

⁸⁴ *Ibid.* (the author notes that ‘[n]ew US and Canadian BITs contain non-precluded-measures clauses, including measures for the maintenance or restoration of international peace and security that permit resorting to sanctions. Most current European [International Investment Agreements] do not contain this clause. Thus, the only possibility of the host country to defend itself against a claim is through reference to customary international law, namely the law of countermeasures...’).

⁸⁵ For instance, in light of the EU sanctions against Russia, it is worth considering the scope of Article 99 of the (periodically renewed) Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, O.J. 28 November 1997, L-327/03. See further on NPM clauses: W.W. Burke-White and A. von Staden, ‘Investment protection in extraordinary times: the interpretation and application of non-precluded measures provisions in Bilateral Investment Treaties’, (2008)48 *Virginia J.I.L.*, pp. 307-410.

⁸⁶ T. Giegerich, *loc. cit.*, supra n. 32, at § 26.

⁸⁷ *Ibid.*, at § 11.

⁸⁸ *Ibid.*, at § 7.

- they may constitute a non-forcible measure adopted by another international organization against one of its Member States, adopted in conformity with the organization's constituent instrument;
- they may be adopted in accordance with the *lex specialis* of a so-called 'self-contained regime', such as the WTO regime, or may otherwise be grounded in the prior consent of the State targeted by the measures.

The foregoing list of legal grounds is not exhaustive. By way of illustration, if a State is, for instance, the subject of an 'armed attack', the subsequent recourse to economic sanctions can be justified by reference to the concept of 'self-defence' as a ground precluding wrongfulness under Article 21 ARSIWA.⁸⁹

Countermeasures by injured States are in essence a form of 'self-help'. They constitute a remnant of the 19th-century doctrine of (peacetime) 'reprisals'.⁹⁰ Reprisals were defined in the *Naulilaa* case as '*acts of self-help by the injured State, acts in retaliation for acts contrary to international law on the part of the offending State, which have remained unredressed after a demand for amends.*'⁹¹ The permissibility of reprisals was seen as an inevitable corollary of the imperfect state of international law and the absence of a '*Court [or] central authority above the Sovereign States which could compel a delinquent State to give reparation.*'⁹² Reprisals could take many forms, including the refusal to pay a debt or the detention of foreign ships in a State's ports, but also recourse to armed force. With the advent of the *jus contra bellum* and the creation of a global collective security architecture, however, the vocabulary of 'reprisals', comprising both the use of force and other non-forcible measures, was replaced by two different concepts, notably: (1) self-defence, temporarily sanctioning the use of force, but contingent on the occurrence of an 'armed attack', and; (2) countermeasures, which may be triggered by any internationally wrongful conduct, but can only be non-forcible in nature.⁹³

As a matter of principle, it is uncontested that, under the law of international responsibility, internationally wrongful conduct by one State may lead other, injured, States to adopt so-called 'countermeasures', i.e. to engage in an act of non-compliance with an international obligation owed to the State that committed the initial breach. This holds true both for a State that suffers injury to its *direct* interests (e.g., in case of material damage to State property or non-material damage resulting from a breach of the State's territorial integrity or the inviolability of its diplomatic premises), as well as for a State that suffers injury to its *indirect* interests, notably when an internationally wrongful act causes injury to a natural or legal person that is a national of the State concerned (e.g., in case of mistreatment of a national abroad or the unlawful expropriation of a multinational company).⁹⁴ In spite hereof, recourse to countermeasures remains controversial. The main concerns – and which also apply in respect of recourse to 'retorsions' – consist in the fact that countermeasures generally favour the stronger party over the weaker, as well as the risk that they result in the escalation of inter-State disputes (especially where the States concerned hold genuinely different views on whether the initial conduct was unlawful or not).

⁸⁹ ILC, loc. cit., supra n. 8, at 74. For a critique of the ILC's approach to self-defence as a ground precluding wrongfulness, see: C. Farhang, 'Self-defence as a circumstance precluding the wrongfulness of the use of force', (2015) 11 *Utrecht L.Rev.*, pp. 1-18.

⁹⁰ On countermeasures, see e.g.: O.Y. Elagab, *op. cit.* n. 51, 255 p.; L.-A. Sicilianos, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense* (Paris : Librairie générale de droit et de jurisprudence)(1990), 532 p.

⁹¹ *Naulilaa Incident Arbitration* (Portugal v. Germany), (1928) 2 *R.I.A.A.* 1012.

⁹² Lassa Oppenheim, *International Law: a treatise. Vol. 2: War and Neutrality*, (London: Longmans)(1912; 2nd ed.), at § 43.

⁹³ J. Crawford, *op. cit.*, supra n.31, at 586.

⁹⁴ For a good overview concerning the nationality requirement, see e.g. P. Okowa, 'Admissibility and the law on international responsibility, in M.D. Evans, *op. cit.*, supra n. 15, pp. 477-508, at 481-494.

Against this background, and building on past State practice and case-law, the ILC has clarified the procedural and substantive restrictions on the recourse to countermeasures in the ARSIWA. The core limitations can be summed up as follows. First, an injured State may only take countermeasures against a State which is responsible for an internationally wrongful act (Art. 49(1) DADR). Where the existence of an internationally wrongful act is disputed, the State resorting to countermeasures does so at its own risk, and may incur responsibility if its assessment is held to be unfounded by an international judicial body.⁹⁵ Second, the countermeasures must be directed against the wrong-doing State (to the exclusion of third States), and must aim at inducing that State to comply with the obligation(s) concerned.⁹⁶ Third, countermeasures must be halted when the wrong-doing State resumes the performance of its obligations, and must therefore normally be reversible in nature.⁹⁷ Fourth, to avoid escalation and abuse, an essential requirement is that countermeasures be *proportional* to the initial wrongful act. In *Gabcikovo-Nagymaros*, the ICJ found that Czechoslovakia's unilaterally assuming control over a large percentage of the waters of the Danube was not commensurate with Hungary's suspension and abandonment of the construction works it was held to.⁹⁸ By contrast, in the *US-France Air Services Agreement* arbitration, the arbitral tribunal found that US measures prohibiting certain flights to the US were not disproportionate to France's preventing PanAm passengers from disembarking in Paris.⁹⁹ Often, evaluating proportionality '*can at best be accomplished by approximation*'.¹⁰⁰ Although countermeasures need not necessarily be related to the same (type of) obligation as the one originally breached, those that do are more likely to satisfy the proportionality requirement.

Having regard to 'the experiences of humanity and the rules of good faith',¹⁰¹ certain countermeasures are prohibited. In particular, as mentioned before, countermeasures may not affect the obligation to refrain from the threat or use of force (Art. 50(1)(a) DADR) – 'armed reprisals' are no longer permitted in the UN Charter era.¹⁰² In addition, countermeasures may not affect fundamental human rights norms, the obligations under international humanitarian law prohibiting reprisals, or other *jus cogens* norms (Art. 50(1)(a)-(c) DADR).¹⁰³ On a related note, it has been stressed that countermeasures operate on an inter-State level only, and cannot therefore remove the wrongfulness of breaches of obligations owed not to another State, but rather to natural or legal persons. Whether this excludes reliance on the doctrine of countermeasures to justify treatment of investors that is contrary to existing bilateral investment treaties remains subject to debate.¹⁰⁴ Article 50(2)(a) DADR moreover

⁹⁵ *Ibid.*, at 686.

⁹⁶ In *Interim Accord*, for instance, the ICJ found that Greece's objections to the former Yugoslav Republic of Macedonia's admission to NATO could not be justified as proportionate countermeasures since the objection was not aimed at achieving the cessation of a wrongful act by the latter State. ICJ, *Application of the Interim Accord of 13 September 1995*, (Former Yugoslav Republic of Macedonia v. Greece), Judgment 5 December 2011, ICJ Rep. p. 644, at § 165.

⁹⁷ Art. 49(2)-(3) DADR. The duty to choose measures that are reversible is not absolute. See: ILC, *loc. cit.*, supra n. 8, at 131.

⁹⁸ ICJ, *Case concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, (1997) *I.C.J. Rep.*, pp. 7-84, at §§ 83-87.

⁹⁹ *Air Services Agreement of 27 March 1946 between the United States of America and France*, 9 December 1978, *R.I.A.A.* Vol. XVIII, pp. 417-493.

¹⁰⁰ *Ibid.*, at § 83.

¹⁰¹ *Naulilaa*, *loc. cit.*, supra n. 91, at 1026.

¹⁰² *Guyana and Suriname*, Arbitral Award of 17 September 2007, 139 *I.L.R.* 566, at 702; GA Res. 2625 (XXV), 24 October 1970, Principle 1, § 6. Remark: it may be noted that States sometimes invoke the right of self-defence in respect of forcible actions that can hardly be qualified as anything other than punitive reprisals. At the same time, the fact that they steer clear from relying on the concept of 'countermeasures' to justify such actions affirms the fundamental illegality of armed countermeasures. Further: O. Corten, *Le droit contre la guerre* (Paris : Pedone)(2014 ; 2nd ed.), at 375-402.

¹⁰³ See e.g., Ethiopia-Eritrea Claims Commission, Prisoners of War – Eritrea's Claim 17, (2003) 135 *I.L.R.* 199, at 247: "Ethiopia's suspension of prisoner of war exchanges cannot be justified as a non-forcible countermeasure (...) because, as Article 50 [DADR] emphasizes, such measures may not affect 'obligations for the protection of fundamental human rights', or 'obligations of a humanitarian character prohibiting reprisals'."

¹⁰⁴ In *Corn Products*, the ICSID Tribunal effectively stressed that a countermeasure '*cannot... extinguish or otherwise affect the rights of a party other than the State responsible for the prior wrongdoing.*' Finding that the NAFTA conferred upon

affirms that a State taking countermeasures is not relieved from fulfilling its obligations under any dispute settlement procedure applicable between it and the responsible State. Finally, countermeasures may not affect the inviolability of diplomatic or consular agents, premises, archives and documents (Art. 50(2)(b) DASR).¹⁰⁵

Countermeasures are also subject to a number of procedural conditions. Thus, a State should first call upon the responsible State to fulfil its obligations,¹⁰⁶ and should moreover notify the target State of its intentions and offer to negotiate, save inasmuch as urgent countermeasures would be necessary to preserve its rights (Article 52 DASR). Finally, countermeasures are excluded while the underlying dispute is pending before an international judicial body.¹⁰⁷

It must be noted that the ILC does not confine the notion of ‘injury’ to breaches of an obligation owed to another State ‘individually’ (Art. 42(a) ARSIWA) (e.g., in the context of a bilateral synallagmatic treaty). Rather, the ILC accepts that, if a breach relates to an obligation owed to ‘*a group of States (...), or the international community as a whole*’ (Art. 42(b) DASR)), it may nonetheless be possible to identify an ‘injured State’ in one of two ways. First, a State may be ‘specially affected’ by the breach (e.g., in the case of a victim of aggression).¹⁰⁸ Second, the breach of an obligation owed to multiple States may be ‘*of such 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*’ (Art. 42(b)(ii) DASR). This scenario refers to ‘interdependent’ obligations that operate on an all-or-nothing basis (e.g., a multilateral disarmament regime), and where the breach by one State threatens the structure of the entire regime.

In spite of this broad understanding of the concept of ‘injured State’, many of the economic sanctions regimes adopted by individual States (or, for that matter, by international organizations¹⁰⁹) in recent years are hard to fit in the ARSIWA (or DARIO) framework of permissible countermeasures. This is due to a number of reasons. First, in many cases it will be unclear whether the act(s) triggering the sanctions constituted a breach of international law on the part of another State in the first place. Second, even if this were the case, economic sanctions are often adopted by States (or international organizations) that do not, by any reasonable standard, qualify as ‘injured States’. The question whether (and to what extent) *non-injured* States (or organizations) can resort to countermeasures remains, however, highly controversial, as will be seen below. Third, even if economic sanctions constitute a response to prior internationally wrongful conduct and are taken by an injured State, questions may arise over their proportionality to the initial wrong.

investors ‘substantive rights separate and distinct from those of the State of which they are nationals’, the Tribunal found that the breaches of the NAFTA agreement could not be justified by reliance on the doctrine of countermeasures under general international law. See ICSID, *Corn Products International, Inc. v. United Mexican States*, Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, §§ 144 ff (esp. §§ 164, 167). By contrast, in the *ADM* case, the ICSID Tribunal took the view that investor’s rights were ‘derivative’ and therefore countermeasures could apply in principle. ICSID, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, Case No. ARB(AF)/04/05, Award, 21 November 2007, §§ 168-180. Further, see: M. Pappas, ‘Investment arbitration and the law of countermeasures’, (2008) 79 *British Yb. I.L.*, pp. 264-352, pp. 317 ff (esp. at 336). On the possibility of BITs including so-called NPM clauses, see *supra*.

¹⁰⁵ Consider also: ICJ, *Case concerning United States diplomatic and consular staff in Tehran (United States v. Islamic Republic of Iran)*, Judgement of 24 May 1980, at § 86. Indeed, as the ILC Commentary explains, if diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. ILC, *loc. cit.*, *supra* n. 8, at 134.

¹⁰⁶ See e.g., ICJ, *Gabčíkovo-Nagymaros, loc. cit.*, *supra* n. 98, at § 84.

¹⁰⁷ Art. 52(3)(b) ARSIWA; *Air Services Agreement of 27 March 1946 between the United States of America and France*, 9 December 1978, R.I.A.A. Vol. XVIII, pp. 417-493, at § 96.

¹⁰⁸ J. Crawford, *op. cit.*, *supra* n.31, at 546.

¹⁰⁹ As is further explained below, international organizations can similarly engage in countermeasures when they suffer injury as a result of the internationally wrongful act(s) of another State/organization. See: Articles 22, 51-57 DARIO.

Do these concerns also apply when the UN Security Council imposes mandatory economic sanctions pursuant to Article 41 UN Charter? The answer is mostly negative. First, it is clear that the concept of ‘injured States’ is irrelevant for purposes of assessing whether the Security Council can adopt such sanctions. The Council is indeed the executive body of an organization with virtually universal membership, tasked effectively with protecting community interests, notably by maintaining international peace and security in accordance with Chapter VII of the UN Charter. As such, its prerogative to take binding action, including through economic sanctions pursuant to Article 41 UN Charter, against States, non-State groups or specific individuals, stands beyond doubt.

Second, as indicated at the outset, for the Council to take action under Chapter VII, it need not establish a prior breach of international law, but must rather identify a ‘breach of the peace’, a ‘threat to the peace’ or an ‘act of aggression’ in the sense of Article 39 UN Charter. It has been correctly observed that the Security Council action under Chapter VII can very often be conceived as a response to a breach of international law. Thus, according to Pellet and Miron: “*in the overwhelming majority of cases, a threat to the peace or a breach of the peace will result from a breach of international law (...). (...) The practice of the Security Council confirms that, in most cases, the characterization of a situation as a threat to the peace is triggered by a violation of international law. (...) Sanctions thus become, beyond any doubt, a form of law enforcement.*”¹¹⁰ By way of illustration, Security Council action may be triggered by large-scale human rights violations or grave breaches of the law of armed conflict, by acts of terrorism, acts of piracy, etc. Yet, the substantive formalization of the Security Council practice cannot alter the fact that, ultimately, measures pursuant to Article 41 UN Charter ‘do not necessarily possess the character of ‘sanctions’ against a violation of international law’, but may also be triggered by actions other than violations of rules of international law.¹¹¹ Sanctions to counter WMD proliferation are case in point. Indeed, having regard *inter alia* to the ICJ’s Opinion on the *Legality of Nuclear Weapons*,¹¹² a State’s withdrawal from the nuclear non-proliferation regime pursuant to Article X of the NPT, and its subsequent efforts to build a nuclear arsenal, are not necessarily contrary to international law.¹¹³ In spite hereof, it is clear that the Council may, if it finds such development to pose a ‘threat to the peace’, respond by imposing economic sanctions.

Third, it is noted that the UN Charter leaves the Council relatively free from legal constraints.¹¹⁴ As is well-known, pursuant to Article 25 UN Charter, all Member States are obliged to implement binding resolutions adopted pursuant to Chapter VII. In accordance with Article 103 UN Charter, this obligation overrides¹¹⁵ contrary obligations States may be held to under multilateral or bilateral treaty

¹¹⁰ A. Pellet and A. Miron, loc. cit., supra n. 4, at §§ 16-23.

¹¹¹ N. Krisch, ‘Article 41’ in B. Simma, D.-E. Khan, G. Nolte, A. Paulus, N. Wessendorf (eds.), *The Charter of the United Nations: a Commentary. Vol. II* (Oxford: OUP)(2012; 3rd ed.), pp. 1305-1329, at § 9. Unless of course one were to construe the UN Charter as imposing a general legal obligation on States not to act in such a manner as would pose a threat to the peace and conceive this as a blanket obligation to be concretised by the UN Security Council in accordance with Article 39 UN Charter. See on this: A. Tzanakopoulos, loc. cit., supra n.58, at 13.

¹¹² ICJ, *Legality of the threat or use of nuclear weapons*, Advisory Opinion of 8 July 1996, ICJ Rep. 1996, 226.

¹¹³ Save perhaps, if one were to adopt the view, defended by the Marshall Islands in a string of cases pending before the ICJ (at the time of writing), that there exists an obligation under customary international law to pursue nuclear disarmament, *and* if one were to interpret this obligation broadly as prohibiting the acquisition of nuclear weapons in an absolute manner. See the documents on the *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* cases (Marshall Islands v. India; Marshall Islands v. Pakistan; Marshall Islands v. United Kingdom) on the ICJ’s website.

¹¹⁴ N. Krisch, loc. cit., supra n. 111, at § 19.

¹¹⁵ Note: there is some discussion as to whether the overriding effect of Article 103 UN Charter also plays when the Security Council merely ‘authorizes’ Member States to act in a given way, instead of ‘obliging’ them to do so. As Peters points out, however, Security Council ‘authorizations’ are ‘*stronger than mere hortatory recommendations. If Art. 103 were not applicable to such decisions, it would hardly find application at all – a result which does not do justice to the provision’s purpose of securing the effective operation of the Charter*’. A. Peters, ‘Article 25’, in B. Simma et al., *op. cit.*, supra n. 111, 851, § 201. Further: R. Kolb, ‘Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to

regimes (e.g., the GATT or a bilateral treaty of friendship). This is not to say that the Council's powers are unlimited. Clearly, as the International Criminal Tribunal for the Former Yugoslavia asserted in the *Tadic* case, "[t]he Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework of that organization. [It] is thus subjected to certain constitutional limitations, however broad its powers under that constitution may be."¹¹⁶ The Council is not *legibus solutus*. *Primo*, the Council's jurisdiction pursuant to Article 39 UN Charter is not unrestricted. On the one hand, the concept of a 'threat to the peace' (i.e., the broadest of the jurisdictional triggers mentioned in Article 39) has gradually been interpreted in an increasingly broader manner, and now encompasses acts and events that are mostly unrelated to inter-State armed conflict and that often relate to issues that would probably have been regarded as falling within the State's *domaine réservé* at the time the Charter was adopted. On the other hand, the concept's interpretation cannot be stretched to the absurd as encompassing every possible situation (as is illustrated by the fact that States have at times criticized what they alleged to be an overly broad interpretation of the concept by the Council¹¹⁷). Whether one believes that the concept has an objective core and that Article 39 imposes a legal obligation upon the Council,¹¹⁸ or rather believes that the interpretation by the Council is immune to judicial challenge but that the self-restraint of the Council members and the Council voting procedure act as a brake against overly broad interpretations,¹¹⁹ the outcome is arguably the same: not every breach of international law (even if it conflicts with community interests) gives rise to Chapter VII action. Thus, a single instance of torture of a suspected criminal can hardly trigger economic sanctions by the Council. The same is arguably true where a country breaches its obligations under a multilateral environmental treaty. *Segundo*, even where the Council has jurisdiction to act under Chapter VII, some substantive limitations do apply. For instance, it is often asserted in legal doctrine that the Council is bound by the principle of proportionality,¹²⁰ a view that is corroborated by repeated acknowledgments by the Council and its permanent members that it ought to minimize the adverse effects of its action.¹²¹ The proportionality test would nonetheless seem to apply in a more flexible manner than in the context of countermeasures by injured States. *Pro memorie*, in the latter case, injured States must ascertain that the countermeasures are proportionate to the original internationally wrongful conduct which they seek to end. In the former case, however, it would seem to suffice for the Council to make sure that the sanctions are useful for purposes of achieving the stated objective and that it take into account the potential fall-out of its actions in terms of adverse humanitarian consequences and possible negative implications for human rights. The suggestion that the Council is as such bound by general international law is unconvincing. Such position ignores the fact that (non-peremptory) customary rules can be set aside (*inter partes*) by treaty law (including by the UN Charter). It would imply, for instance, that the Council could not authorize Member States to board and arrest vessels flying the flag of another State in situations not foreseen in

Authorizations Adopted by the Security Council?', (2004) 64 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, pp. 21-35.

¹¹⁶ ICTY, *Prosecutor v. Tadic*, IT-94-1, Appeals Chamber, Decision on Jurisdiction, 2 October 1995, at § 28.

¹¹⁷ See e.g., UN Doc. S/PV.4568 (10 July 2002), at 3 (Canada), 16 (Jordan), 20 (Liechtenstein), 26-27 (Mexico), 30 (Venezuela). Or see e.g., UN Doc. S/PV.7498 (29 July 2015), 11/21 (Venezuela).

¹¹⁸ In this sense e.g., A. Tzanakopoulos, 'L'invocation de la théorie des contre-mesures en tant que justification de la désobéissance au Conseil de Sécurité', (2013) 47 *Revue belge de droit international*, pp. 78-109, at 86-87.

¹¹⁹ In this sense, e.g.: A.F. Lowenfeld, *op. cit.*, supra n. 22, at 858.

¹²⁰ A. Tzanakopoulos, *op. cit.*, supra n. 118, at 87; N. Krisch, *loc. cit.*, supra n. 111, at §§ 20-22.

¹²¹ See e.g., Letter dated 13 March 1995 from the Permanent Representatives of China, France, the Russian Federation, the United Kingdom and the United States to the United Nations addressed to the President of the Security Council, UN Doc. S/1995/300, Annex 'Humanitarian impact of sanctions'; UNSC Presidential Statement 34 (1999), UN Doc. S/PRST/1999/34, at 3 ('The Security Council recalls the provisions of Article 39 of the Charter of the United Nations concerning measures to prevent armed conflicts. Such measures may include targeted sanctions, in particular arms embargoes and other enforcement measures. In imposing such measures the Council will pay special attention to their likely effectiveness in achieving clearly defined objectives, while avoiding negative humanitarian consequences as much as possible.');

SC Res. 1325(2000), 31 October 2000, § 16. For further references, see: N. Krisch, *loc. cit.*, supra n. 111, at § 21.

the law of the sea¹²² (whereas States would be free to provide for this possibility amongst themselves by concluding a bilateral or multilateral treaty). The better view is that, *absent an express intention to the contrary* on the part of the Council,¹²³ customary international law must be deemed to apply to its actions.¹²⁴ By contrast, it is broadly accepted that the Council is bound, not only by the provisions of the Charter itself, but also by peremptory norms of international law ‘from which no derogation is permitted’ (Article 51 VCLT).¹²⁵

Developments in recent years have made clear that when the Security Council explores the outer ends of its competence, this is not without risk. Thus, several regional and national judicial decisions have annulled or condemned domestic acts implementing targeted sanctions imposed by the UN Security Council for lack of compliance with fundamental human rights norms.¹²⁶ Even if national and regional judges have generally refrained from directly challenging the legality of Chapter VII resolutions as such,¹²⁷ these judgments place UN Member States between a rock and a hard place, and inevitably undermine the legitimacy and effectiveness of UN sanctions. The Security Council has responded by addressing some of the human rights concerns relating to its sanctions regimes, in particular by introducing the Office of the Ombudsperson,¹²⁸ yet these efforts continue to fall short of providing adequate guarantees e.g. with respect to the right to property and the right to be heard¹²⁹ (*inter alia* because the competence of the Ombudsperson is limited to the ISIL (Da’esh) and Al-Qaida sanctions regime).¹³⁰ It has also been argued in legal doctrine that when the Security Council oversteps its powers or otherwise breaches its obligations under international law, States can refuse to implement Chapter VII resolutions by relying on the concept of countermeasures as grounds precluding wrongfulness.¹³¹ Notwithstanding the foregoing reservations (and notwithstanding the uncertainty over the actual degree of State compliance with UN sanctions in reality more generally¹³²), it goes without saying that the Security Council is undeniably competent to impose sanctions on States, non-State groups or individual persons and entities alike – and has used this competence widely since the end of the Cold War.

Is the same competence also vested in other international organizations, in particular in various regional and sub-regional political organizations, such as the African Union, ECOWAS, the Organization of American States, the Arab League, the EU etc.? At the outset, it is noted that international organizations can resort to countermeasures when they suffer injury as a result of the internationally wrongful conduct of a State (or another international organization). Practice indeed illustrates that different international organizations have on various occasions had recourse to

¹²² Which the Security Council nonetheless regularly does. See e.g. SC Res. 2240(2015) of 9 October 2015 (in relation to human traffickers operating from the coast of Libya).

¹²³ Cf. ECtHR, *Al Jeddah v. United Kingdom*, Application No. 47708/08, Judgment of 7 July 2011, § 102 (*‘In interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights.’*).

¹²⁴ A. Tzanakopoulos, *op. cit.*, supra n. 118, at 88.

¹²⁵ *Ibid.*; A. Pellet and A. Miron, *loc. cit.*, supra n. 4, at § 51.

¹²⁶ See in particular: ECtHR, *Nada v. Switzerland*, Application No. 10593/08, Judgment of 12 September 2012, [2012] ECHR 1691; Court of Justice, *European Commission and others v. Yassin Abdullah Kadi*, Joined cases C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013, ECLI:EU:C:2013:518.

¹²⁷ But see General Court, *Yassin Abdullah Kadi v. Council of the European Union*, T-315/01, 21 September 2005, ECLI:EU:T:2005:332, at §§ 227-231 (later set aside by the Court of Justice in Joined Cases C-402/05 P and C-415/05 P, 3 September 2008, ECLI:EU:C:2008:461).

¹²⁸ See e.g. SC Res. 2161(2014), 17 June 2014. See further: <http://www.un.org/en/sc/ombudsperson/>.

¹²⁹ E.g. A. Pellet and A. Miron, *loc. cit.*, supra n. 4, at § 54.

¹³⁰ SC Res. 1267(1999), 15 October 1999, SC Res. 1989(2011), 17 June 2011; SC Res. 2253(2015), 17 December 2015.

¹³¹ See on this: A. Tzanakopoulos, *Disobeying the Security Council: countermeasures against wrongful sanctions* (Oxford: OUP)(2011), 243 p.

¹³² As Pellet and Miron observe, ‘only once did the Security Council decide sanctions against a State not complying with previous sanctions imposed upon another State’ (in the case of Liberia’s violation of the diamonds embargo against Sierra Leone). A. Pellet and A. Miron, *loc. cit.*, supra n. 4, at § 47.

countermeasures against individual States.¹³³ The possibility for injured international organizations to engage in countermeasures is affirmed and defined in Articles 22, 51-56 DARIO in much the same way as in the corresponding provisions of the ARSIWA. In addition, irrespective of the residuary regime for countermeasures under general international law, the constituent instruments of many international organizations contain provisions which enable the organization to take certain sanctions against a Member State. Thus, treaty instruments establishing international organizations typically foresee certain situations in which Members may be expelled, or their voting rights suspended (e.g., when they fail to pay the financial contributions due to the organization).¹³⁴ Article 23(1) of the Constitutive Act of the African Union, for instance, states that “[t]he Assembly shall determine the appropriate sanctions to be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union in the following manner: denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity or commitments, therefrom”.¹³⁵ ‘Institutional’ sanctions of this type are uncontroversial and generally need not (and often do not) constitute a reaction to a prior breach of general international law by the targeted Member State.

At times, however, institutional sanctions against Member States may go beyond the suspension of membership rights etc., and may, for instance, extend to the taking of fully-fledged economic sanctions. Thus, paragraph (2) of the aforementioned provision of the AU Constitutive Act states that “any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.” As hinted at before, the AU has applied this provision on various occasions.¹³⁶

Are such sanctions lawful under international law? The DARIO Commentary takes the view that they are. According to the ILC: “Sanctions, which an organization may be entitled to adopt against its members according to its rules, are per se lawful measures and cannot be assimilated to countermeasures.”¹³⁷ In a similar vein, Alland explains that “[s]anctions adopted by international organizations do not display the essential characteristic of countermeasures, that is, their intrinsic contrariety to what is normally required from them by international engagements.”¹³⁸ Prima facie, no breach of international law indeed appears to materialize when a Member State of a regional or sub-regional organization implements institutional sanctions (e.g., of an economic nature) adopted at the level of the organization, and in accordance with the rules of the organization, against another Member State. When the implementation of the sanctions vis-à-vis the targeted Member State amounts to nothing more than an ‘unfriendly’ act, no problems arise. Yet, even when such conduct would

¹³³ See: F. Dopagne, *Les contre-mesures des organisations internationales* (Louvain-la-neuve: LGDJ)(2010), 488 p.

¹³⁴ See e.g., Articles 5, 6 and 19 UN Charter. Consider also Article 7 of the Treaty on European Union (this clause allows for the temporary suspension of EU membership rights. As of yet, however, the clause has never been activated. A. Charron and C. Portela, loc. cit., supra n. 20, at 1378).

¹³⁵ Constitutive Act of the African Union, Lomé, 11 July 2000, 2158 UNTS No. 37733. Article 30 adds that “Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union”. Reference can also be made to Article 45 of the ECOWAS Protocol on Democracy and Good Governance, 21 December 2001, A/SP1/12/01.

¹³⁶ Note: the African Union and the European Union are not the only regional organizations that have adopted fully-fledged economic sanctions and/or targeted sanctions. There are also occasional examples of such sanctions by other organizations, including those adopted by ECOWAS against Sierra Leone (in 1997) or those adopted by the Arab League against Israel, and, more recently, against Syria. At the same time, save for the EU, regional organizations have primarily opted for the ‘traditional diplomatic sanction’ of suspending membership rights (in this sense: A. Charron and C. Portela, ‘The relationship between United Nations sanctions and regional sanctions regimes’, in T.J. Biersteker, S.E. Eckert and M. Tourinho (eds.), *Targeted Sanctions – the impacts and effectiveness of United Nations Action* (Cambridge: CUP)(2016), pp. 101-118, at 117.

¹³⁷ ILC, loc. cit., supra n. 9, at 47.

¹³⁸ D. Alland, ‘The definition of countermeasures’, in J. Crawford, A. Pellet, S. Olleson (eds.), *op. cit.*, supra n. 56, pp. 1127-1136, at 1135.

otherwise give rise to an internationally wrongful act in the relationship between the acting Member State and the targeted Member State (e.g., a breach of a bilateral treaty of friendship of commerce concluded between them), the conduct will not be regarded as such when it gives effect to a sanction adopted by an international organization pursuant to its rules against a member State. Two alternative (and interrelated) explanations come to mind: either the sanctioning mechanism foreseen in the constituent instrument of the organization can be regarded as a *lex specialis* regime accepted by the Member States of the organization and modifying the rules otherwise in place between them,¹³⁹ (and/or) the legality of the sanctions (and their implementation at the Member State level) can be explained by reference to consent as a ‘ground precluding wrongfulness’ in the sense of Article 20 ARSIWA.¹⁴⁰

Three reservations are nonetheless due. First, there has been some discussion as to whether economic sanctions taken by regional or sub-regional organizations are compatible with Article 53 UN Charter. This provision, which supersedes contrary treaty law by reason of the conflict provision of Article 103 UN Charter, provides that “*no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.*” As Bröhmer, Ress and Walter explain, however, several elements militate against interpreting this provision as ruling out economic sanctions by (sub-)regional organizations absent prior authorization by the UN Security Council.¹⁴¹ First, a systematic and teleological approach leads to the conclusion that non-military sanctions remain outside the scope of the term ‘enforcement’ as it is employed in Article 53 UN Charter.¹⁴² Thus, a proposal by Bolivia which would have expressly included economic sanctions within the scope of Article 53 was not withheld.¹⁴³ Second, State practice clearly suggests that non-military sanctions within the regime of a regional organization do not require prior Security Council authorization.¹⁴⁴ By way of illustration, when the Arab League froze all transactions with the Syrian central bank in late 2011, no Member of the UN claimed these measures to be unlawful.¹⁴⁵ More generally, it is worth recalling that economic sanctions do not automatically by their very nature give rise to a breach of international law – again, the ILC’s ARSIWA Commentary explicitly recognizes that acts of retorsion may include ‘embargoes of various kinds’.¹⁴⁶ Against this background, it seems absurd to hold that States cannot do collectively (by acting through a regional arrangement) what they would be permitted to do individually. In the end, the question as to what amounts to ‘enforcement action’ for purposes of Article 53 UN Charter would seem to be closely tied to what is regarded as ‘coercive’ in the context of the customary non-intervention principle (see *supra*). In any case, having regard to the peremptory character of the prohibition on the use of force,¹⁴⁷ the constituent instruments of (sub-)regional

¹³⁹ Cf. Article 55 ARSIWA; Article 64 DARIO.

¹⁴⁰ In a similar vein: J. Crawford, *op. cit.*, supra n.31, at 707, note 199.

¹⁴¹ J. Bröhmer, G. Ress and C. Walter, ‘Article 53’, in B. Simma et al., *op. cit.*, supra n. 111, 1478, at §§ 1-49. But, against this, see: A. Orakhelashvili, ‘The impact of unilateral EU economic sanctions on the UN collective security framework: the cases of Iran and Syria’, in A.Z. Marossie and R. Bassett (eds.), *Economic Sanctions under International Law* (The Hague: TMC Asser Press)(2015), pp. 3-21 (‘Article 53 proscribes enforcement measures without further qualifying them as forcible or non-forcible’).

¹⁴² J. Bröhmer, G. Ress and C. Walter, *loc. cit.*, supra n. 141, at § 16.

¹⁴³ See *Ibid.*, at § 14.

¹⁴⁴ See *Ibid.*, at §§ 24-25. For a possible (rare) exception, see e.g.: J. Grauvogel, ‘Regional sanctions against Burundi: a powerful campaign and its unintended consequences’, GIGA Working Paper No. 255, September 2014, at 9 (the author notes that Burundi launched a campaign against the embargo imposed on it by the OAU in 1996, claiming that the embargo was illegal because only the United Nations could impose sanctions).

¹⁴⁵ J. Bröhmer, G. Ress and C. Walter, *loc. cit.*, supra n. 141, at §§ 24-25.

¹⁴⁶ ILC, *loc. cit.*, supra n. 8, at 128.

¹⁴⁷ On which e.g.: O. Corten, *op. cit.*, supra n. 102, at 341-359.

arrangements cannot create a legal basis for *military* interventions against a Member State (or *a fortiori* against a third State) that would otherwise be unlawful under the law on the use of force.¹⁴⁸

Second, the relationship between institutional sanctions against a Member State, on the one hand, and countermeasures by an organization against a Member State, on the other hand, may give rise to confusion. The two may be difficult to tell apart (some of the examples of countermeasures cited by the ILC in the DARIO Commentary should perhaps rather be qualified as institutional sanctions instead).¹⁴⁹ Against this background, there has been concern over the risk that States targeted by institutional sanctions might contest their legality on the grounds that they would allegedly be incompatible with the restrictions on countermeasures (e.g., the requirement of proportionality), and invoke this to justify recourse to counter-countermeasures of their own against the organization concerned.¹⁵⁰ Conversely, some have criticized the possibility for international organizations to circumvent the restrictions on institutional sanctions foreseen in their respective constituent instruments by relying on the (possibly broader leeway granted by the) doctrine of countermeasures instead.¹⁵¹ Some would have preferred the ILC to exclude the possibility for States to take countermeasures against international organizations of which they are a member, or even to exclude the possibility of countermeasures altogether on a reciprocal basis in the relationship between an organization and its Member States.¹⁵² Yet, suggestions to this end were not picked up by the ILC. Instead, the ILC identified certain additional – and sensible – restrictions on the recourse to countermeasures by an organization against its Member States and *vice versa*. Thus, the DARIO Commentary acknowledges that the rules of an international organization may, implicitly or explicitly, restrict or forbid recourse by the organization to countermeasures against its members.¹⁵³ Otherwise, Articles 22(2)-(3) DARIO and Articles 52(1)-(2) DARIO only allow for countermeasures in the relationship between an organization and its Member States (in both directions) as long as (a) the countermeasures are not inconsistent with the rules of the organization; (b) no appropriate means are available for otherwise inducing compliance with the obligation breached, and; (c) the countermeasures are not intended to respond to a breach of an obligation under the rules of the organization themselves (unless such countermeasures are provided for by those rules). It follows from the foregoing that the extent to which the rules of an international organization leave room for the recourse to countermeasures in the relations between the organization and its Member States under general international law must be determined on a case-by-case basis. As far as the EU is concerned, for instance, the ready availability of judicial remedies would seem to exclude such option.¹⁵⁴ This was confirmed by the Court of Justice in *Commission v. Luxembourg and Belgium*: “*except where otherwise expressly provided, the basic concept of the Treaty requires that Member States shall not take the law in their own hands. Therefore the facts that the Council failed to carry out its obligations cannot relieve the defendants from carrying out theirs.*”¹⁵⁵

¹⁴⁸ This also applies in relation to Article 4(h) of the Constitutive Act of the AU, which refers to “*the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.*” See on this: J. Bröhmer, G. Ress and C. Walter, ‘Article 53’, *loc. cit.*, supra n. 141, at §§ 35-36. Further : B. Kioko, ‘The right of intervention under the African Union’s Constitutive Act: from non-interference to non-intervention’, (2003) 85 *I.R.R.C.* pp. 807-825.

¹⁴⁹ See e.g., Y. Kerbrat, ‘Sanctions et contre-mesures: risques de confusion dans les Articles de la CDI sur la Responsabilité des Organisations internationales’, (2013) *Revue belge de Droit international*, pp. 103-110.

¹⁵⁰ *Ibid.*, at 108.

¹⁵¹ *Ibid.*, at 109.

¹⁵² See *Ibid.*

¹⁵³ ILC, *loc. cit.*, supra n. 9, at 47.

¹⁵⁴ *Ibid.*, at 84-85.

¹⁵⁵ Joined Cases 90/63 and 91/63, *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, [1964] ECR 625, at 631.

Third, some constituent instruments of regional and sub-regional political organizations make provision for sanctions, including general economic sanctions, not only against Member States of the organization as such (which, by virtue of their accession to the constituent instrument, have accepted the sanctioning mechanism), but also against non-Member States. Article 215 of the Treaty governing the Functioning of the European Union (TFEU), for instance, refers to decisions providing “*for the interruption or reduction, in part or completely, of the Union’s economic and financial relations with one or more third countries, where such restrictive measures are necessary to achieve the objectives of the Common Foreign and Security Policy (CFSP)*”.¹⁵⁶ It is clear that such treaty rule is *res inter alios acta* for third States that are targeted by EU restrictive measures.¹⁵⁷ Accordingly, the treaty rule cannot provide a legal basis for EU sanctions against third States that would otherwise be unlawful. Such legal basis must be found elsewhere in general international law.

By analogy with the general permissibility of (economic) sanctions by a (sub-)regional political organization adopted against a Member State in accordance with the rules of the organization, sanctions of this kind are normally permissible when they are adopted in accordance with the *lex specialis* of a so-called ‘self-contained regime’,¹⁵⁸ such as the WTO regime, or when they are otherwise grounded in the prior consent of the State targeted by the measures. It is clear that (bilateral or multilateral) treaties can, and often do, make specific provision for the legal consequences of breaches of particular provisions.¹⁵⁹ It is perfectly possible, for instance, for a bilateral treaty to determine that a certain fine is due when a party fails to meet its obligations. As far as multilateral treaties go, reference can be made, by way of illustration, to the compliance mechanism under the Kyoto Protocol, where an Annex I Party that fails to meet its emission reduction requirements may, for instance, be excluded from the so-called ‘flexible mechanisms’ (such as emissions trading).¹⁶⁰ Occasionally, treaty regimes may even provide for fully-fledged economic sanctions (embargoes, import and export restrictions). A notable example in this context concerns the (qualified) possibility for WTO Members to take retaliatory trade sanctions pursuant to Article 22 of the Dispute Settlement Understanding¹⁶¹ when another WTO Member has been found in breach of its obligations and fails to comply with the recommendations and rulings of an *ad hoc* Panel (or the WTO Appellate Body). As far as the legality of these built-in sanctions vis-à-vis States Parties is concerned, *mutatis mutandis* the same is true as for institutional sanctions by (sub-)regional political organizations (see *supra*). The legal basis can be found in the *lex specialis* regime installed by the States Parties between themselves and/or by reference to the notion of consent as a ‘ground precluding wrongfulness’.

A delicate question in this context is whether the sanctioning mechanisms provided for in specific treaty regimes are ‘exclusive’ – that is to say, whether the room for self-help otherwise permissible under general international law is thereby excluded. This question will often not be explicitly addressed in the treaty itself.¹⁶² Absent guidance in the treaty, by analogy to what was said before in respect of (sub-)regional political organizations, an *ad hoc* approach is needed, having regard to the purposes and object of the special regime.¹⁶³ Merely labelling a treaty regime as ‘self-contained’ does

¹⁵⁶ Consolidated version of the Treaty on the Functioning of the European Union, O.J. 26 October 2012, C-326/47.

¹⁵⁷ A. Pellet and A. Miron, loc. cit., supra n. 4, at § 64.

¹⁵⁸ On ‘self-contained regimes’, see e.g.: B. Simma and D. Pulkowski, ‘Leges speciales and self-contained regimes’, in J. Crawford, A. Pellet, S. Olleson (eds.), *op. cit.*, supra n. 56, pp. 139-163; M. Noortmann, *Enforcing international law: from self-help to self-contained regimes* (Aldershot: Ashgate)(2005), 194 p.

¹⁵⁹ J. Crawford, *op. cit.*, supra n.31, at 104.

¹⁶⁰ Further: M. Montini, ‘The compliance regime of the Kyoto Protocol’, in W.Th. Douma, L. Massai and M. Montini (eds.), *The Kyoto Protocol and beyond: legal and policy challenges of climate change* (The Hague: TMC Asser Press)(2007), pp. 95-109.

¹⁶¹ 1869 U.N.T.S. 401.

¹⁶² J. Crawford, *op. cit.*, supra n.31, at 105.

¹⁶³ *Ibid.*; B. Simma and D. Pulkowski, loc. cit., supra n. 158, at 148.

not provide the answer.¹⁶⁴ WTO case-law, for instance, confirms that when a WTO Member wishes to respond to a breach by another Member of its obligations under the WTO agreements, it can do so only within the applicable treaty framework: “*in WTO, countermeasures, retaliations and reprisals are strictly regulated and can take place only within the framework of the WTO/DSU.*”¹⁶⁵ By contrast, in 2007 an ICSID Tribunal found that outside Article 2019, the North American Free Trade Agreement (NAFTA) made ‘no express provision for countermeasures’ and that NAFTA thus left mostly unaffected the default regime for countermeasures under customary international law.¹⁶⁶

4. *Entering murky legal terrain? – the ongoing debate on third-party countermeasures*

In the end, situations can and do arise where individual States and/or regional organizations have recourse to economic sanctions on an ‘autonomous’ basis (i.e., without these sanctions merely implementing mandatory UN Security Council measures), but where the sanctions (1) conflict with relevant treaty or customary rules (and accordingly cannot be qualified as mere ‘unfriendly’ retorsions), and moreover (2) cannot be explained under the traditional doctrine of ‘countermeasures’ by injured States or organizations, nor by reference to any other consent-based sanctioning regime. In such scenario, must we conclude that the measures are ultimately unlawful? Or are there alternative justifications, e.g., if the measures ostensibly pursue a legitimate aim – in particular if they seek to protect community interests?

The residuary permissibility of countermeasures by States or international (in particular regional) organizations that are not themselves injured by the internationally wrongful conduct of another State has long been subject to debate. In its 1970 *Barcelona Traction* judgment, the ICJ – seemingly retreating from its more conservative (and criticized) stance in the *South West Africa* cases¹⁶⁷ – famously distinguished between obligations vis-à-vis another State in the field of diplomatic protection, and ‘obligations of a State towards the international community as a whole’, and which ‘by their very nature (...) are the concern of all States’.¹⁶⁸ Since then, it has become accepted that States (and organizations) other than the injured State (/organization) are entitled to invoke the responsibility of another State in case of a breach of an obligation that protects a collective interest of the group (‘*erga omnes partes*’), or an obligation that is owed to the international community as a whole (‘*erga omnes*’).¹⁶⁹ This was confirmed, for instance, by the ICJ judgments in *Belgium v. Senegal*¹⁷⁰ and (implicitly) in the recent *Whaling* case.¹⁷¹ At the same time, if the ICJ has confirmed that all States can

¹⁶⁴ J. Crawford, *op. cit.*, supra n.31, at 105.

¹⁶⁵ WTO Panel Report, *United States-Import Measures on Certain Products From the European Communities*, WT/DS165/R, 17 July 2000, § 6.23, footnote 100. Note: on the compatibility of trade sanctions undertaken for foreign-policy objectives as between WTO Members, see the section on ‘retorsions’ above.

¹⁶⁶ ICSID, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, Case No. ARB(AF)/04/05, Award, 21 November 2007, §§ 120-123. Note: two months after the Award in the former case, however, another ICSID Tribunal concluded that countermeasures could not preclude wrongfulness against an investor claiming under Chapter XI of the NAFTA Agreement. At the same time the Tribunal emphasized that it was not pronouncing ‘on whether countermeasures can preclude wrongfulness under the NAFTA as a whole’, but merely considered that the doctrine of countermeasures did not apply under Chapter XI NAFTA. ICSID, *Corn Products International, Inc. v. United Mexican States*, Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, §§ 144 ff (esp. §§ 162, 191).

¹⁶⁷ ICJ, *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment 18 July 1966, ICJ Rep. 1966, p. 6, at § 99.

¹⁶⁸ ICJ, *Barcelona Traction* (Belgium v. Spain), 5 February 1970, (1970) ICJ Rep. 3, at § 33.

¹⁶⁹ See Article 48 ARSIWA; Article 49 DARIO.

¹⁷⁰ ICJ, *Questions relating to the obligation to prosecute or extradite* (Belgium v. Senegal), Judgment of 20 July 2012, ICJ Rep. 2012, 422, at §§ 68-69.

¹⁷¹ ICJ, *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), Judgment of 31 March 2014, available at <http://www.icj-cij.org/docket/files/148/18136.pdf>. Consider also: ITLOS, *Responsibilities and obligations of States*

invoke the international responsibility of another State in respect of a breach of an *erga omnes* norm before an international court or tribunal, its case-law contains no positive indications that non-injured States (or organizations) can similarly proceed to taking countermeasures. Quite the contrary, in its *Nicaragua* judgment, the Court in fact appears to rule out third-party countermeasures.¹⁷²

When assessing the matter in the context of the ARSIWA, the ILC found several instances where (non-injured) third States had reacted to breaches of international law by economic sanctions or other measures, as when the United States prohibited the export of goods and technology to, and all imports from, Uganda in 1978, pursuant to alleged genocide by the Ugandan government against its population.¹⁷³ At the same time, the ILC found that practice on the subject was ‘limited and rather embryonic’.¹⁷⁴ In light hereof, it concluded that “*the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest.*”¹⁷⁵ As a result, it decided to leave the matter open, to be determined by the further development of international law. The ‘savings clause’ of Article 54 DADR thus provides, in a circular manner, that the DADR “[do] not prejudice the right of any State [other than an injured State], entitled (...) to invoke the responsibility of another State, to take lawful measures against that State to ensure the cessation of the breach (...)” (emphasis added). A decade later, the ILC adopted the same approach in the DARIO Commentary. While acknowledging (in a single footnote) that practice ‘includes examples of a non-injured international organization taking countermeasures against an allegedly responsible State’ (as with the EU’s measures in reaction to systematic human rights violations in Burma), the Commission refrained from cutting the Gordian knot.¹⁷⁶

In the aftermath of the adoption of the ARSIWA, a number of scholars have mapped additional evidence in State practice of countermeasures by third States or organizations, overlooked in the ILC Commentary, or have drawn attention to new practice that has materialized in more recent years. Thus, according to Tams, the ILC ‘could have said more’ than it did in Article 54 ARSIWA.¹⁷⁷ Katselli similarly identifies a tendency in State practice toward accepting third-State countermeasures.¹⁷⁸ Dawidowicz for his part has demonstrated that such measures – whatever the preferred terminology¹⁷⁹ – have emanated from States on all continents (with the exception of Latin America) and from international organizations such as the EU, the AU and ECOWAS.¹⁸⁰ And with regard to the EU sanctions against Iran, Dupont has observed in 2012 that “*if this practice of unilateral ‘sanctions’ is*

sponsoring persons and entities with respect to activities in the area (Request for advisory opinion submitted to the Seabed Disputes Chamber), Advisory Opinion of 1 February 2011, ITLOS Reports 2011, p. 10, at § 180.

¹⁷² ICJ, *Nicaragua*, loc. cit., supra n. 36, at § 249: “The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate countermeasures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify countermeasures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.”

¹⁷³ ILC, loc. cit., supra n. 8, at 137-138.

¹⁷⁴ *Ibid.*, at 137.

¹⁷⁵ *Ibid.*, at 139.

¹⁷⁶ ILC, loc. cit., supra n. 9, at 89, footnote 338.

¹⁷⁷ C. Tams, *Enforcing obligations erga omnes in international law* (Cambridge: CUP)(2005), at 249.

¹⁷⁸ See E. Katselli Proukaki, *The problem of enforcement in international law: countermeasures, the non-injured state and the idea of international community* (London: Routledge)(2010), 331 p.

¹⁷⁹ Dawidowicz identifies no less than eight different denominations for sanctions in the absence of direct injury. See: M. Dawidowicz, ‘Public law enforcement without public law safeguards? An analysis of State practice on third-party countermeasures and their relationship to the UN Security Council’, (2006) 77 *British Yb. I.L.*, pp. 333-418, at 333.

¹⁸⁰ *Ibid.* See also the forthcoming monograph by the same author: M. Dawidowicz, *Third-Party countermeasures in international law* (forthcoming with Cambridge University Press).

*not challenged by at least some actors in the international arena, it may be that the case of Iran constitutes a precedent to many other instances of 'unilateral' coercive measures".*¹⁸¹

It is beyond the scope of the present contribution to offer an overview and analysis of the relevant State practice. Suffice it to note that an assessment of relevant State practice in this domain (with a view to ascertaining the permissibility of third-party countermeasures under customary international law) is a complex endeavor. As indicated before, it will often be unclear whether certain economic sanctions qualify as mere 'retorsions' or as countermeasures by injured States, or whether they constitute a reaction to a breach of norms owed to the international community as a whole or are simply inspired by foreign-policy objectives (unrelated to a prior wrongful act). It may also be questioned to what extent certain sanctions adopted by regional organizations (such as the AU) against their own members and in accordance with their constituent instrument may, or should, be 'double-counted' as customary evidence supporting the permissibility of third-party countermeasures. In a similar vein, when third States or organizations adopt economic sanctions in reaction to armed aggression by another State (and pursuant to a request by the victim State), can or should such measures be explained by reference to (collective) 'self-defence' as a ground precluding wrongfulness (Article 21 ARSIWA), rather than as an illustration of third-party countermeasures? Most crucially, an analysis of relevant customary practice is greatly obfuscated by the general lack of express *opinio juris*: as noted, States and regional organizations generally refrain from explicitly qualifying their actions as 'retorsions', as 'countermeasures by injured States' or as 'third-party countermeasures', etc. – let alone that they should take an express stance on the precise extent to which they consider third-party countermeasures to be permissible (or not).

Furthermore, in assessing the impact of this practice, one cannot ignore the fact that a majority of the international community has consistently voted in favour of General Assembly resolutions 'urging' States 'to eliminate the use of unilateral coercive economic measures against developing countries that are not authorized by relevant organs of the United Nations or are inconsistent with the principles of international law as set forth in the [UN] Charter'¹⁸² or to 'cease adopting or implementing any unilateral measures not in accordance with international law, ... the Charter of the United Nations..., in particular those of a coercive nature...'.¹⁸³

While an authoritative answer remains lacking, the importance of the discussion can hardly be overstated. On the one hand, it is argued that to allow third-party countermeasures would contribute to strengthening the international rule of law, inasmuch as it would increase the cost of non-compliance with international law (especially where there is no directly injured State (think of a regime committing widespread human rights violations against its own population), or where the State injured by the breach is not in a position to engage in countermeasures vis-à-vis a (more powerful) offending State). On the other hand, some caution that to leave the enforcement of collective/community interests at the mercy of individual States or organizations (especially the more powerful ones), acting based on their own understanding of international legality, is a recipe for chaos and subjectivism,¹⁸⁴ and possibly for escalation of disputes. This is all the more so since the proportionality of third-party countermeasures may be particularly difficult to verify.

In light of the increasing recourse to 'autonomous' economic sanctions by individual States and organizations that are inspired by breaches of international law (e.g., breaches of international human

¹⁸¹ P.-E. Dupont, *loc. cit.*, supra n. 27, at 335.

¹⁸² GA Res. 70/185, 22 December 2015.

¹⁸³ GA Res. 70/151, 17 December 2015. For other references, see supra note 43.

¹⁸⁴ E.g., B. Simma, *From bilateralism to community interest in international law*, (1994) 250 *R.d.C.*, 217, at 331.

rights law, of the law of armed conflict, of the prohibition on the use of force,...) and that are hard to fit within one of the legal bases identified in the previous section, the time may ultimately be ripe to shift the debate from the binary question whether third-party countermeasures are permissible or not, to defining the possible boundaries to their use.

First, with regard to the question *who* might adopt or authorize such measures, an interesting recurring element in the debate is the stronger support in legal doctrine for the permissibility of sanctions by international, regional and sub-regional *organizations* than for countermeasures by individual third States.¹⁸⁵ This position is understandable and has an undeniable appeal. Legal doctrine has always displayed greater sympathy towards collective interventions under the authority of a body of States than for interventions by individual States.¹⁸⁶ Thus, it could be argued that third-party countermeasures ought to be regarded as permissible when adopted pursuant to a recommendation by the UN Security Council or the UN General Assembly. In addition, the idea that measures adopted by a regional or sub-regional organization are endowed with a greater degree of legitimacy and are less likely to be inspired by selfish motives, arguably holds merit with regard to sanctions undertaken by (non-injured) regional or sub-regional organizations within their own (sub-)region against a Member State. As explained above, if the sanction is adopted against a Member State pursuant to an express provision of the organization's constituent instrument, in principle no problems arise (see *supra*). Yet, even if the constituent instrument does not make express provision for such sanctions, it may be recalled that the UN Charter recognizes the role of regional arrangements for the peaceful settlement of disputes within the region concerned. By the same token, it could be argued that they generally possess the competence to adopt (or recommend) countermeasures in reaction to breaches of *erga omnes* norms within the confines of their membership – subject, however, to the additional restrictions for the application of countermeasures in the relationship between an organization and its Member States as identified in the DARIO (see *supra*).

The same argument cannot, however, so readily be extended to the adoption by regional or sub-regional organizations of economic sanctions against third States (possibly far removed from their own (sub-)region). Indeed, there seems to be something counterintuitive and perhaps even arbitrary in accepting that a regional or sub-regional organization could engage in third-party countermeasures against non-Member States, whereas individual States would be prohibited from so doing (or, alternatively, that regional or sub-regional organizations should possess greater leeway in this respect than individual States). Inasmuch as sanctions adopted by a regional or sub-regional organization against a non-Member State are intrinsically *res inter alios acta* for the targeted State,¹⁸⁷ it is difficult to see why one would be permissible but the other not. To put it bluntly: why would the United States, China or India (with a respective population of ca. 320 million, 1.2 billion and 1.4 billion inhabitants) not be competent to individually have recourse to the same third-party countermeasures as the European Union, the African Union, or, for instance, the three-member Benelux (which groups the States of Belgium, the Netherlands and Luxembourg, with a total population of less than 30 million)? One is hard pressed to see how the sole fact that sanctions are adopted by an institutional grouping of States, rather than by States individually, can of itself be a determining factor in this context.

Second, another delicate issue relates to the *type(s) of acts* that might justify recourse to third-party countermeasures. At the outset, it must be stressed that the prior occurrence of an internationally

¹⁸⁵ See e.g. N.D. White and A. Abass, loc. cit., supra n. 15, at 559.

¹⁸⁶ See e.g., Lassa Oppenheim, *International Law: a treatise. Vol. 1: Peace*, (London: Longmans)(1912; 2nd ed.), at § 136; Gustave Rolin-Jaequemyns, 'Note sur la théorie du droit d'intervention – à propos d'une lettre de M. le Professeur Arntz', (1876) 8 *Revue de Droit international et de législation comparée*, at 697 et seq.

¹⁸⁷ A. Pellet and A. Miron, loc. cit., supra n. 4, at § 64.

wrongful act by the targeted State is a *sine qua non*, if there is to be an international community built on the rule of law. Conversely, a serene debate is needed on the question whether any breach of an *erga omnes* norm can trigger third-party countermeasures,¹⁸⁸ or whether such possibility is reserved to particularly serious or systematic breaches. One does well in this context to recall that breaches of *erga omnes* norms are, regrettably, a recurrent feature throughout the globe. One need only to look at the periodic state reports published by the human rights treaty bodies or the Human Rights Council to realize that human rights violations are not confined exclusively to authoritarian and failing States. Many scholars are, for instance, of the view that the United States post-9/11 War on Terror went hand in hand with various fundamental breaches of the law of armed conflict and international human rights law. In a similar vein, the European Court of Human Rights repeatedly finds individual Member States guilty of serious human rights violations.¹⁸⁹ In addition, it is recalled that the proportionality of third-party countermeasures may be particularly hard to assess. In light of these two factors, the risk exists that (especially stronger) States could invoke breaches of *erga omnes* norms as an excuse to engage in economic sanctions that are in reality inspired by other, political, motives.

Third, should recourse to third-party countermeasures be subject to certain *formal requirements*, additional to those expressly laid down in the ARSIWA and DARIO in respect of countermeasures by injured States and organizations (and which in particular require a prior notification and an offer to negotiate)? In order to increase transparency and to limit the risk for abuse, a positive answer would seem preferable. Cassese, for one, previously suggested that, prior to taking third-party countermeasures in reaction to a breach of fundamental rules of international law, third States should first seek to bring the matter before an international organization, whether the UN or a regional organization.¹⁹⁰ Alternatively, a more far-reaching option would be to permit the targeted State – if so desired – to trigger a judicial review of the legality of the countermeasures adopted against it (this would entail an assessment not only of the necessity and proportionality of the countermeasures, but also e.g. of the alleged unlawful conduct of the targeted State). Furthermore, one could find inspiration in the formal requirements surrounding the most extreme form of self-help, viz. the right of self-defence, where States responding to an armed attack are required, in accordance with Article 51 UN Charter, to formally notify any action taken in self-defence to the UN Security Council.¹⁹¹ Requiring States and organizations to formally notify countermeasures to the United Nations, thereby indicating the direct cause for the measures, the nature of the action undertaken (type, duration, etc.), and explaining the proportionality thereof, might go some way in mitigating the legitimate reservations vis-à-vis third-party countermeasures and could, possibly, contribute to strengthening the determinacy of the legal framework.

¹⁸⁸ Or, *mutatis mutandis*, any breach of an *erga omnes partes* norm protecting a collective interest (e.g., in the realm of arms control law or international environmental law).

¹⁸⁹ Consider e.g. ECtHR, *Cestaro v. Italy*, Application No. 6884/11, Judgment of 7 April 2015 (where Italian anti-riot police units were found to have committed torture).

¹⁹⁰ A. Cassese, *International Law* (Oxford: OUP)(2005; 2nd ed.), at 274. See also: N.D. White and A. Abass, loc. cit., supra n. 15, at 550. (considering this a useful suggestion). It may be recalled in this context that Special Rapporteur Arangio-Ruiz initially proposed that the recourse to countermeasures by injured States be subject to a general requirement that the injured State exhaust ‘all the amicable settlement procedures available under general international law, the Charter of the United Nations or any other dispute settlement instrument to which it is a party’. See Draft Article 12 in ILC, Fourth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, (1992) vol. II(1) *Yb. I.L.C.*, at 22 (and see *ibid.*, pages 13 ff for an overview of State practice in support of such requirement)). This provision was eventually watered down to a requirement that the State taking countermeasures fulfil ‘its obligations under any dispute settlement procedure applicable between it and the responsible State’ (Art. 50(2)(0) ARSIWA).

¹⁹¹ But see, for a (perhaps overly) critical appraisal of the reporting requirement under Article 51 UN Charter: J.A. Green, ‘The Article 51 reporting requirement for self-defense actions’, (2015) 55 *V.J.I.L.*, pp. 563-624.

5. Conclusion

As explained in the present chapter, the concept of ‘sanction’ is understood in various different ways. In particular, it is sometimes defined by reference to a measure’s objective (i.e., the aim to respond to a breach of international law), the identity of the author (i.e., an international organization) or the nature of the measures involved (economic sanctions and ‘targeted’ sanctions).

In the end, the notion does not have a single established meaning in international law, but can refer to measures that are fundamentally different from a legal perspective. Various factors are relevant in this context: who is the author of the measures? (the UN Security Council, a regional organization or an individual State...); are the measures *a priori* incompatible with a treaty or customary norm binding upon the author?; are the measures undertaken in reaction to internationally wrongful conduct by the targeted State?; if so, is the author of the measures ‘injured’ by that wrongful conduct?; in the case of an international organization, are the measures undertaken in accordance with the rules of the organization, and are they undertaken against a Member State?; has the targeted State otherwise consented to the possibility of becoming the target of the measures concerned?, etc.

Whether sanctions are ultimately lawful or not requires a case-by-case assessment. First, they may at times amount to mere ‘unfriendly’ retorsions that by and large remain below the radar of international law. It may be a complex exercise, however, to ascertain whether or not sanctions do or do not contravene any treaty or customary obligations binding upon the author. For instance, the precise extent to which the non-intervention principle or the international law of jurisdiction limits the permissible scope for such sanctions remains unclear. Second, in the alternative, sanctions can be lawful because they are undertaken pursuant to a binding Chapter VII resolution of the UN Security Council, because they are undertaken by an ‘injured’ State or organization pursuant to the ARSIWA and DARIO rules on countermeasures, or because they find their legal basis in some *lex specialis* regime or are otherwise consented to by the targeted State. An important grey area nonetheless remains. In particular, as explained in the final section above, the legality under general international law of third-party countermeasures undertaken to protect community interests remains shrouded in mystery. In light of the multitude of variables involved, it is uncertain whether State practice can be expected to provide clarity in the near future.¹⁹² The international legal framework governing the recourse to sanctions – however that term be understood – will nonetheless remain fundamentally incomplete as long as no greater clarity is shed on this outstanding issue, leaving the recourse to economic sanctions at least partly to the mercy of political considerations and power games.

¹⁹² And with the ILC having circumvented the issue, one should perhaps look to the ‘invisible college’ of international lawyers (esp. in the form of its more visible manifestations such as the International Law Association or the International Law Institute) to press for answers.