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ARTICLE

Third-Party Countermeasures: Making Custom Out of Ambiguous Practice?

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Abstract

In the wake of Russia's aggression against Ukraine, international lawyers and policy advisors are considering the tools that are available to third States that wish to respond to the serious breach of international law and support Ukraine. Within this context, the question of third-party countermeasures is once again highly relevant. Though the topic was contentious during the drafting of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), doctrine on third-party countermeasures often argues that they are permissible under customary international law, even while acknowledging that opinio juris is lacking. Whereas it has been argued that this subjective requirement can be inferred, this article maintains that, given the ambiguity surrounding unilateral sanctions practice, it is necessary to demonstrate that States believe that they are legally permitted to adopt wrongful sanctions in response to a prior breach of an obligation erga omnes (partes). It is argued that the International Law Commission was right to not include third-party countermeasures in the final ARSIWA and that, while sanctions practice has seemingly flourished over the years, there has been little progress in conclusively establishing that third-party countermeasures are accepted as custom, as illustrated by the discussion on the confiscation of Russian State assets.

Keywords: public international law; third-party countermeasures; obligations erga omnes (partes); customary international law; unilateral sanctions; confiscation of State assets

1. Introduction

When Russia launched its 'Special Military Operation' and invaded Ukraine on 24 February 2022, the international community reacted swiftly. Meetings were immediately held at the United Nations (UN) Security Council (UNSC) and the UN General Assembly (UNGA) organised an Emergency Special Session. Speaking before the UNSC, the United States (US) representative characterised Russia's operation as an aggression against Ukraine that 'threatens our international system as we know it. We have a solemn obligation to not look away. … In coordination with our allies

and partners, we are imposing severe and immediate economic costs on Russia'.[1] This sentiment was echoed by the delegate of the European Union (EU) Observer Mission during the UNGA's Emergency Session on 28 February 2022, who referred to Russia's invasion as the 'biggest aggression in Europe since the end of the Second World War'.[2] The EU joined the US in adopting 'unprecedented' sanctions.[3] Shortly after, the UNGA adopted Resolution ES-11/1, which '[deplored] in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter', by a majority of 141 Member States.[4] While the UNGA voting records demonstrate that a large majority of States recognise the wrongfulness of Russia's aggression, only a minority have imposed sanctions.

As illustrated by their reactions to Russia's aggression against Ukraine, the EU and US often consider unilateral sanctions to be an appropriate response to breaches of community norms (also known as obligations erga omnes (partes)), such as the prohibition of aggression. Unilateral sanctions are adopted by States pursuant to their national legislation or executive powers, or by international organisations against non-Member States or non-State actors in conformity with their constitutive instruments. These measures often constitute the imposition of a restriction or a withdrawal of a benefit. They come in many forms and there are various terms that represent this diversity: targeted sanctions, sectoral sanctions, unilateral coercive measures, restrictive measures, outcasting,[5] etc. The US and the EU are the most active sanction senders,[6] and States such as Canada, the United Kingdom (UK) and Australia often align with their restrictions. Nonetheless, there are stark divisions in States' views over their legality and these measures are heavily contested.[7] The result of these disagreements is that under international law unilateral sanctions are

[1] UNSC, 'Verbatim Record of the 8979th Meeting' (25 February 2022) UN Doc S/PV.8979, 1–2 (Mrs Thomas-Greenfield).

[2] UNGA, 'United Nations Stands with People of Ukraine, Secretary-General Tells General Assembly, Stressing "Enough is Enough", Fighting Must Stop, as Emergency Session Gets under Way' (28 February 2022) UN DOC GA/12404 https://press.un.org/en/2022/ga12404.doc.htm.

[3] European Council and Council of the European Union (EU), *EU Sanctions against Russia Explained* https://www.consilium.europa.eu/en/policies/sanctions-against-russia-explained/#sanctions. This outspoken and widespread condemnation has also been described as 'unprecedented': see O Corten and V Koutroulis, 'Tribunal for the Crime of Aggression against Ukraine – A Legal Assessment' (European Parliament Subcommittee on Human Rights, December 2022) https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf.

[4] UNGA Res ES-11/1 (2 March 2022) UN Doc A/RES/ES-11/1.

[5] 'Outcasting' is the expulsion of a Member State from an organisation to which it is a party and is a social sanction: see M Buscemi, 'Outcasting the Aggressor: The Deployment of the Sanction of "Non-Participation"' (2022) 116 AJIL 764.

[6] The term 'sanction sender' or 'sender' is derived from scholarship in political science and international relations. States and international or regional organisations that adopt sanctions are referred to as 'senders' and the 'targets' are the object of the restrictions (such as another State, a terrorist group, an individual etc).

[7] A Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?' (2017) 16 ChineseJIL 175; SP Subedi, 'The Status of Unilateral Sanctions in International Law' in SP Subedi (ed), *Unilateral Sanctions in International Law* (Hart 2021) 19.

largely unregulated and their legality is subject to debate.[8] While 'a rule of customary international law against economic sanctions does not exist',[9] there is, however, one overarching rule of thumb: a sanction is unlawful if it breaches an obligation owed by the sender to the target.

In short, whether a sanction is legally permissible depends on the applicable legal commitments between the sender and the target. As long as a sanction does not breach an obligation that the sanctioning State owes to the target of the sanction, it is a lawful act of retorsion. If the sanction involves causing the sender to breach an obligation that it owes to the target, it would be considered an internationally wrongful act, and the target could invoke the sender's responsibility.[10] It is here that countermeasures become relevant, as a countermeasure is recognised as a circumstance precluding wrongfulness. They are adopted by States, or an organisation, such as the EU, in response to a prior wrongful act, with the aim of inducing the State responsible for the initial wrongful act to comply with its international obligations and provide reparation. Under Articles 49 to 53 of the draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), a number of conditions need to be met in order for a sanction to constitute a lawful countermeasure. For example, a countermeasure should be a proportionate response to the injury suffered by the State, and to the extent possible it should be reversible and temporary.

Whereas countermeasures are well established under customary international law, third-party countermeasures are more controversial. These measures are implemented by States or international organisations that are not injured within the meaning of Article 42 ARSIWA. Rather, they are countermeasures adopted in response to breaches of obligations erga omnes (partes), codified by Article 48 ARSIWA, and the actor adopting the measures is not directly (or 'personally') harmed by the wrongful act. For instance, the EU considered confiscating Russian Central Bank assets. The rationale behind the confiscation would be to provide reparation to Ukraine for Russia's wrongful act, but it would arguably constitute a breach of Russia's State immunity. While the EU eventually opted for a different approach,[11] the question of confiscating State assets revived the debate over the legality of third-party, or collective, countermeasures. The legality of third-party countermeasures has been a source of

[8] N White and A Abass, 'Countermeasures and Sanctions' in M Evans (ed), *International Law* (5th edn, OUP 2018) 521, 524; D Hovell, 'Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions' (2019) 113 AJIL: Unbound 140.

[9] D Akande, P Akhavan and E Bjorge, 'Economic Sanctions, International Law, and Crimes Against Humanity: Venezuela's ICC Referral' (2021) 115 AJIL 493, 501.

[10] For a general discussion on 'legal' and 'illegal' sanctions, see T Ruys, 'Sanctions, Retortions and Countermeasures: Concepts and International Legal Framework' in L van den Herik, *Research Handbook on UN Sanctions and International Law* (Edward Elgar 2017) 19; ND White, 'Shades of Grey: Autonomous Sanctions in the International Legal Order' in Subedi (n 7) 61; I Bogdanova, *Unilateral Sanctions in International Law and the Enforcement of Human Rights: The Impact of the Principle of Common Concern of Humankind* (Brill Nijhoff 2022).

[11] Council of the EU, 'Immobilised Assets: Council Agrees on up to €35 Billion in Macro-Financial Assistance to Ukraine and New Loan Mechanism Implementing G7 Commitment' (Press Release, 9 October 2024) https://www.consilium.europa.eu/en/press/press-releases/2024/10/09/immobilised-assets-council-agrees-on-up-to-35-billion-in-macro-financial-assistance-to-ukraine-and-new-loan-mechanism-implementing-g7-commitment/.

disagreement since the International Law Commission (ILC) first considered the matter while drafting ARSIWA.

A legal opinion provided to the EU on the confiscation of Russian State assets to fund Ukraine's reconstruction advocates in favour of third-party countermeasures, claiming that the view that such measures are unlawful is 'rigid'.[12] This position is supported by scholarly works which have found that these measures are permissible under customary international law.[13] However, the issue is that these studies have acknowledged that opinio juris accepting third-party countermeasures as lawful is lacking.[14] Moreover, sanctions practice is highly ambiguous.[15] Actors that adopt unilateral sanctions justify them as policy tools and avoid putting forward legal justifications. Furthermore, it is often unclear whether a unilateral sanction is a retorsion, a wrongful act or a lawful countermeasure. Curiously, actors whose practice (according to some authors[16]) provides evidence that third-party countermeasures are permissible have been relatively silent on the matter, albeit with some exceptions. Finally, as noted above, the legality of unilateral sanctions is heavily disputed by a significant number of States.

Against this backdrop, this article argues that given the inherently political nature of unilateral sanctions and the uncertainty that surrounds their adoption, it is necessary to demonstrate that States and international organisations believe that they are legally permitted to adopt wrongful sanctions in response to a prior breach of an obligation erga omnes (partes). As such, due to the persistent ambiguity in sanctions practice and the absence of clear opinio juris, it is concluded that third-party countermeasures are currently not widely accepted and therefore are not (yet) permitted under customary international law.

To make this argument, Section 2 explains how this article approaches international custom and, in particular, opinio juris. It then returns to the debate that was held over third-party countermeasures during the drafting of ARSIWA. It does so because various analyses find that the final Special Rapporteur on State Responsibility, James Crawford, was wrong to not include third-party countermeasures in the final text.[17] Following a detailed analysis of the responses received from States to the provision on third-party countermeasures, it is argued that there was not enough support for its inclusion in ARSIWA. The sections thereafter review sanctions practice and the

[12] P Webb, 'Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine' (European Parliamentary Research Service, February 2024) 25.

[13] ibid 25 n 192 citing M Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017). Other relevant studies include: C Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005); E Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge 2010).

[14] Dawidowicz (n 13) ch 5, acknowledging that express opinio juris is hard to come by, but that it can be inferred. See also the following book reviews: M Dawidowicz, 'F Paddeu, *Third-Party Countermeasures in International Law* (CUP 2017)' (2018) 77 CLJ 427; M Dawidowicz, 'V Lanovoy, Third-Party Countermeasures in International Law (CUP 2017)' (2019) 113 AJIL 200.

[15] C Focarelli, 'International Law and Third-Party Countermeasures in the Age of Global Instant Communication' (2016) 29 QuestIntL: Zoom-In 17; Paddeu (n 14); Lanovoy (n 14).

[16] See especially Dawidowicz (n 13); Tams (n 13); Katselli Proukaki (n 13) and those who cite their work, such as Webb (n 12).

[17] Tams (n 13); Dawidowicz (n 13).

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legal positions put forward since ARSIWA's conclusion in 2001. While there have been some developments, opinio juris is largely absent and overall practice remains too ambiguous for one to conclude with confidence that third-party countermeasures are accepted under customary international law. This is illustrated by the discussion of the confiscation of Russian State assets in Section 4.1.

2. The necessity of opinio juris when practice is ambiguous

In 2018, the ILC adopted the Draft Conclusions on Identification of Customary International Law (Draft Conclusions) which approved of the two-element approach to the identification of customary international law that requires evidence of a general practice (objective element) and opinio juris (subjective or mental element),[18] and concluded that each element must be ascertained separately.[19] The ILC's two-element approach to customary international law is in line with the International Court of Justice's (ICJ or Court) judgments on the ascertainment of custom,[20] which is one of the sources of law that the Court may apply, as reflected in Article 38(1)(b) of the Statute of the ICJ. Many scholars have been sceptical of the two-element approach and have questioned whether there exists a uniform method to establish custom.[21] Monica Hakimi is critical of the 'rulebook' approach to custom codified by the ILC, advocating instead for an approach that more accurately captures how States engage with custom in practice. Describing the process as 'enigmatic and elastic',[22] she explains that custom 'emerges … through an unstructured process in which the participants apply variable criteria to justify their normative positions in [customary international law]'.[23] While her alternative is rather vague, she is right to point out that whether a given practice will become custom depends 'on how global actors interact with it over time'.[24] Actors will issue legal claims, which will become 'legally entrenched' depending on whether they support, ignore or challenge the practice in question. The creation and eventual

[18] International Law Commission (ILC), 'Draft Conclusions on Identification of Customary International Law' (2018) UN Doc A/RES/73/203, draft conclusion 2.

[19] ibid draft conclusion 3(2).

[20] Special Rapporteur Wood relied on jurisprudence, State practice and doctrine to support this approach: see e.g. ILC, 'Second Report on Identification of Customary International Law by Special Rapporteur Wood' (2014) UN Doc A/CN.4/672*, 7–15 and accompanying footnotes. Among the most cited: *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 44, para 77. See also *Asylum (Colombia/Peru)* (Judgment) [1950] ICJ Rep 277; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 392, paras 183–84, 207. However, the ICJ was not consistent in applying this approach in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Judgment) [2023] ICJ Rep 100, para 77.

[21] To cite but a few: S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417; C Tams, 'Meta-Custom and the Court: A Study in Judicial Law-Making' (2015) 14 LPICT 51; RH Geiger, 'Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal' in U Fastenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011) 673.

[22] M Hakimi, 'Making Sense of Customary International Law' (2020) 118 MichLRev 1487, 1520.

[23] ibid 1516.

[24] ibid 1510.

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crystallisation of custom is thus an ongoing, interactive process.[25] It is argued that this does not mean foregoing the two-element, or rulebook, approach altogether, but acknowledging that one must pay attention to how States justify their conduct and consider how it is received by others. This is the function of opinio juris. When actors justify their conduct in legal terms, they are signalling that it should be considered a 'legal practice'. Whether such practice is, or becomes, custom depends on how it is received by other States, who may accept it or contest it. It also matters how unequivocal the practice itself is, in the sense that it must be clear that the actors believe that they are acting in accordance with a legal obligation or right, or at least that they consider that there should be such an obligation or right.

Maurice Mendelson, who questioned the utility of opinio juris generally, found that this component counts when circumstances suggest that the practice should not be established as law,[26] such as when the reason for State practice is ambiguous. This occurs when various other factors can explain why a State conducted itself in a certain way and when it 'is not clearly referable to an existing legal rule'.[27] This means that, in the absence of opinio juris, one cannot be certain that States are acting on the basis of legal considerations, especially if there are other possible explanations. On the other hand, opinio juris is redundant:

> where there is a constant, uniform and unambiguous practice of sufficient generality, clearly taking place in a legal context and unaccompanied by disclaimers, with no evidence of opposition at the time of the rule's formation by the state which it is sought to burden with the customary obligation, or by another State or group of States sufficiently important to have prevented a general rule coming into existence at all.[28]

The influence of his approach can be found in the International Law Association's (ILA) 'Report on the Formation of Customary (General) International Law', of which Mendelson was Special Rapporteur. The ILA found, inter alia, that the subjective element is useful to distinguish practice that generates new customary rules from practice that does not.[29] Echoing Mendelson, the report affirms that practice will not count if the conduct does not take place in the context of international legal relations or if there are various other reasons explaining why a State might behave in a certain way; under these circumstances the conduct is too ambiguous.[30] The ILA also explained that the absence of opinio juris 'may mean that such a rule has not come into existence'.[31]

[25] See also J Brunnée and S Toope, 'International Law and the Practice of Legality: Stability and Change' (2018) 49 VUWLRev 429.

[26] M Mendelson, 'The Subjective Element in Customary International Law' (1996) 66 BYIL 177, 207.

[27] ibid 199.

[28] ibid 208

[29] International Law Association (ILA), 'Final Report of the Committee on Formation of Customary (General) International Law: Statement of Principles Applicable to the Formation of General Customary International Law' (London Conference, London, 2000) 34.

[30] ibid 34–38.

[31] ibid 31, para 5.

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Somewhat relatedly, Dahlman argues that opinio juris serves an important function in the creation of customary international law: it acts as a filter to prevent unwanted State practice from becoming custom.[32] As he writes: 'There are situations where a certain behaviour is generally practiced among States in spite of the fact that every State would prefer that no State would practice it. The function of opinio juris … is to prevent such practice from becoming customary law'.[33] Dahlman contends that if a State does not want its own behaviour to become law it will not justify its action in legal terms. Instead, it will say, for instance, 'that an important national interest is at stake'.[34] Dahlman's approach reflects the ICJ's attitude in the *Nicaragua* judgment when it assessed whether the principle of non-intervention had evolved to allow for a 'general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified'.[35] For such a right to take form in customary international law, there needed to be a settled practice and an accompanying opinio juris. The Court found that 'States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition'.[36] As for the US Government, the respondant in this case, it had justified its conduct on 'statements of international policy, and not an assertion of rules of existing international law',[37] and thus its conduct was not properly justified in legal terms. Practice was therefore not sufficient to result in the development of a new custom or an evolution of the principle of non-intervention.

Against this backdrop, this article argues that because the practice of prima facie wrongful unilateral sanctions is so ambiguous, it is necessary to identify opinio juris in order to assess whether third-party countermeasures are permitted as a matter of custom. The challenge is that the mental element is predominantly absent. The actors responsible for such practices are reluctant to characterise their measures in legal terms, generally referring to 'statements of international policy', and many States contest the adoption of unilateral sanctions and invoke international law when doing so. Each of these issues will be explored further below. It is first useful to situate the starting point of the analysis. It has been argued that the ILC erred when it decided not to recognise that these third-party countermeasures are custom in 2001,[38] but Section 3 finds that, given the feedback received by the ILC from States, the better option was to include collective countermeasures as a 'saving clause' under Article 54 ARSIWA. Sections 4 and 5 thereafter consider the evolutions in State practice and custom that have occurred since ARSIWA was concluded.

[32] C Dahlman, 'The Function of *Opinio Juris* in Customary International Law' (2012) 81 NordicJIL 327, 328.

[33] ibid 336. See also ibid 337: 'A behaviour that emerges as a general practice among states is not always desired. In some cases, every state would prefer that all states refrain from the behaviour in question.'

[34] ibid 339.

[35] *Military and Paramilitary Activities* (n 20) para 206.

[36] ibid para 207.

[37] ibid.

[38] Tams (n 13) 246.

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3. Third-party countermeasures at the ILC in 2001

3.1. Discussing responses to breaches of obligations in the collective interest

International law has devised various categories for acts of decentralised enforcement, which are reflected in ARSIWA. Depending on the applicable rules, a sanction will either qualify as a retorsion, an internationally wrongful act or a countermeasure. Provided a measure does not violate an obligation that the sending State owes to the target State, sanctions are an act of retorsion, a lawful albeit unfriendly act. Given their inherent lawfulness they do not (presumably) pose a problem under international law and the target of the sanction cannot invoke the sender's responsibility. Consequently, retorsions fall outside the scope of ARSIWA. This would evidently not be the case if the sanction breaches an obligation that the sender owes to the targeted State, in which case the sanction would constitute an internationally wrongful act. Under such circumstances, the countermeasure argument becomes relevant.

Given that international law aims to secure the respect of international obligations and the promotion of friendly and peaceful relations between States, justifying prima facie violations as self-help because the international system lacks central enforcement was no easy pill to swallow. Nonetheless, during the drafting of ARSIWA the majority of the ILC members preferred to recognise countermeasures as a necessary evil in a decentralised system rather than to leave them in 'the limbo of lawlessness'.[39] The ILC therefore incorporated substantive and procedural safeguards to minimise their potentially nefarious side effects.[40] The ILC could only go as far as codifying bilateral countermeasures, which are adopted by the directly injured State against the allegedly responsible State. This was despite the fact that, while State responsibility was under consideration, the world was shifting from bilateral relationships to 'communitarian obligations', which were reflected in the emergence of multilateral obligations, international crimes, peremptory norms and obligations erga omnes (partes). The latter term was introduced by the ICJ in the *Barcelona Traction* case in its well-known dictum,[41] which was subsequently incorporated into Article 48 ARSIWA.[42] According to Crawford, the Court's introduction of obligations owed to the

[39] ILC, 'Yearbook of the International Law Commission, Vol I' (2000) UN Doc A/CN.4/SER.A/2000, 272, para 52 (Mr Pellet).

[40] J Crawford, *State Responsibility: The General Part* (CUP 2013) 686.

[41] *Case concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain)* [1970] ICJ Rep 3 (*Barcelona Traction*) paras 33–34. However, discussions around the concept of multilateral obligations had started prior to the Court's formulation in *Barcelona Traction*, discussed in Tams (n 13) ch 2.

[42] C Tams, 'Law-Making in Complex Processes' in C Chinkin and F Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015) 287, 298–99. But see ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' in ILC, 'Yearbook of the International Law Commission, Vol II, Part Two' (2001) UN Doc A/CN.4/SER.A/2001/Add.1 (ARSIWA) art 48, commentary para 8. For further references by the Court to obligations erga omnes and their legal consequences after ARSIWA's adoption, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 159; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, paras 68–70; *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, paras 38–40.

international community as a whole was a manifestation of Special Rapporteur Ago's view that there are obligations in the public interest, a concept Ago initially conceived of as international crimes.[43]

With the concept of collective legal interests came the issue of their enforcement. The ILC believed that this shift should be mirrored in reactions to wrongdoing. Discussions revolved around the legal relationships that arise from a wrongful act, whether different types of norm violations trigger different consequences and who has standing to respond to wrongfulness and how. The broadening of actors who have a legal interest in the respect of these norms and who have standing to enforce them was salient throughout the drafting process,[44] which was often discussed under the auspices of the 'new legal relationship' that arises between the (non-)directly injured State and the State responsible for the wrongful act. The traditional view in international law was to focus on the bilateral relationship that emerged as a consequence of an internationally wrongful act.

However, in the aftermath of the Second World War and the developments that had taken place in international law, the question was whether, depending on the importance of the norm breached, different types of internationally wrongful acts gave rise to different regimes of responsibility.[45] Special Rapporteur Ago proposed a draft article that encompassed different categories of breaches, international crimes and international delicts.[46] Yet, when Crawford became Special Rapporteur, he decided that Article 19 on international crimes would be replaced by Article 41 on serious breaches of international law and Article 48 on obligations erga omnes (partes). He also decided that international law made no distinction in responsibility based on the type of norm breached.[47] Instead, he proposed to make a distinction based on States' standing to respond to a breach; they either had an interest because they were directly affected, or because the breach concerned an obligation owed to the international community. Attention was then turned to collective countermeasures adopted in

[43] J Crawford, 'The International Court of Justice and the Law of State Responsibility' in C Tams and J Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013) 71, 77–78. On the evolution from international crimes to art 48, see D Alland, 'Countermeasures of General Interest' (2002) 13 EJIL 1221.

[44] See, for instance, Ago's commentary on the *Barcelona Traction* dictum: ILC, 'Yearbook of the International Law Commission, Vol II, Part I' (1976) UN Doc A/CN.4/291, Add.1, Add.2 and Corr.1, para 105. However, the broadening of actors with a right to react to certain wrongful acts was under consideration before 1970. See, e.g. ILC, 'Yearbook of the International Law Commission, Vol II' (1956) UN Doc A/CN.4/96, 182–83, discussing the distinction between civil and criminal responsibility. According to him, certain human rights violations would give rise to punishment: ibid para 51.

[45] See, e.g. ILC (1956) (n 44) para 57; ILC, 'Yearbook of the International Law Commission, Vol II' (1970) UN Doc A/CN.4/233, para 7; ILC (1976) (n 44) 24ff.

[46] ibid 54, para 155: art 18 ('Content of the International Obligation Breached'), which subsequently became art 19 ('International Crimes and International Delicts') in ILC, 'Yearbook of the International Law Commission, Vol II, Part 2' (1976) UN Doc A/CN.4/SER.A/1976/Add.l, 95. For an overview of the drafting process, see Dawidowicz (n 13) 86–110.

[47] ILC, 'Second Report on State Responsibility, by Mr James Crawford, Special Rapporteur' (1999) UN Doc A/CN.4/498 and Add.1–4, commentary to draft art 17, para 25, and commentary to draft art 19, paras 27–33.

reaction to breaches of obligations erga omnes (partes).[48] Although he recognised that it was hard to reach conclusions,[49] he nonetheless 'expressed the feelings of many'[50] when he recommended that 'international law should offer to States with a legitimate interest in compliance with [collective obligations], some means of securing compliance which does not involve the use of force'.[51] Reaching this conclusion, he proposed to include third-party countermeasures in draft Article 54 [2000]. However, the clause was eventually removed, notably due to the reactions of States, which are addressed in Section 3.2.

3.2. The reactions from governments to third-party countermeasures during the Sixth Committee debates

In the articles adopted on second reading in 2000, draft Article 54 [2000] provided that non-directly injured States may adopt countermeasures at the request of and on behalf of the injured State and that any State may adopt countermeasures in reaction to serious breaches of obligations erga omnes (partes).[52] Following the reactions from States, Special Rapporteur Crawford decided that the better view was to include third-party countermeasures in the form of a saving clause, a suggestion made by the UK.[53]

According to Christian Tams, the ILC erred in following the UK's proposal. He argues that Special Rapporteur Crawford was incorrect to conclude that governments were opposed to draft Article 54 [2000] and submits that the feedback from States during the second reading 'present a surprisingly nuanced spectre of views'.[54] Despite the fact that there were criticisms, he finds that 'an even larger number of governments … expressly or by implication, accepted that in the case of serious breaches of obligations erga omnes, all States could resort to countermeasures'.[55] He concludes that 'while article 54 [2000] undoubtedly proved controversial, it was by no means generally rejected … to the majority of States, such a provision would have been acceptable'.[56]

The review below of the comments made by governments during the UNGA Sixth Committee debates reveals that their feedback was indeed very nuanced. It is concluded that, although there were States that expressed support for draft Article 54

[48] ibid para 247.

[49] ibid 101ff.

[50] M Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?' (2002) 72 BYIL 337, 343, referring to ILC, 'Third Report on State Responsibility, by Mr James Crawford, Special Rapporteur' (2000) UN Doc A/CN.4/507 and Add.1–4*, 21.

[51] ILC (n 50) paras 395–405.

[52] ILC, 'State Responsibility: Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading' (21 August 2000) UN Doc A/CN.4/L.600*, draft art 54, paras 1-2.

[53] UNGA Sixth Committee (55th Session), 'Summary Record of the 14th Meeting' (23 October 2000) UN Doc A/C.6/55/SR.14, paras 31–32: 'The most difficult issue of all concerned the provision of draft article 54, paragraph 2, permitting a State to take countermeasures "in the interest of the beneficiaries of the obligation breached". … [I]t did not necessarily follow that all States could vindicate [obligations erga omnes] in the same way as directly injured States. … It was a difficult problem, and the solution was not obvious. One possibility might be the use of some form of saving clause.'

[54] Tams (n 13) 246.

[55] ibid 246–47.

[56] ibid 247–48. See also Katselli Proukaki (n 13) 201–02.

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[2000], a majority were either against its inclusion or feared the risk of abuse.[57] The following paragraphs categorise State feedback based on: first, those who called for draft Article 54 [2000]'s deletion (including when it was suggested to change it to a saving clause); second, those who feared its abuse; third, those who questioned how to coordinate third-party countermeasures with UNSC sanctions; and, fourth, those who accepted the draft Article's inclusion but required further guidelines.

3.2.1. The deletion of draft Article 54 [2000]

The US delegate supported the UK's suggestion to change draft Article 54 [2000] to a saving clause.[58] China argued in favour of the deletion of draft Article 54 [2000], which ran counter to the 'basic principle that countermeasures' could only be adopted by the injured State.[59] It maintained that the provision 'could provide a further pretext for power politics in international relations' and would be inconsistent with the principle of proportionality.[60] According to Cuba, draft Article 54(2) [2000] 'went well beyond the progressive development of international law' and draft Article 54 [2000] should be deleted.[61] In its written comments, Mexico rejected the 'saving clause' solution and also called for the deletion of draft Article 54 [2000], arguing that it was not supported by international law and that it raised serious difficulties.[62] Mexico also stated that Chapter VII of the Charter of the UN covered the consequences of serious breaches by a State of an obligation owed to the international community as a whole.[63] Japan found that the risk of abuse of collective countermeasures outweighed their potential benefits and also called for their removal from the draft Articles.[64] The Israeli delegate spoke against draft Article 54 [2000] on collective countermeasures, finding that such measures could have a destabilising effect and that the provision 'went beyond existing law and [was] unwarranted'.[65]

3.2.2. The fear of abuse

Turning to the fears of abusive practice, the Tanzanian delegate was uncomfortable with the general regime of countermeasures, even criticising their adoption by directly

[57] After a rather detailed analysis of the debates, Dawidowicz concluded that there was 'strong opposition': Dawidowicz (n 13) 110. See also M Dawidowicz, 'Third-Party Countermeasures: Observations on a Controversial Topic' in Chinkin and Baetens (n 42) 340, 341, writing that the 'most effective critique' against third-party countermeasures was the risk of abuse by powerful States.

[58] UNGA Sixth Committee (55th Session), 'Summary Record of the 18th Meeting' (27 October 2000) UN Doc A/C.6/55/SR.18, para 72 (US).

[59] UNGA Sixth Committee (n 53) para 41 (China). See also 'Comments and Observations received from Governments' (2001) UN Doc A/CN.4/515 and Add.1–3, 79 (China).

[60] UNGA Sixth Committee (n 53) paras 40–41 (China).

[61] UNGA Sixth Committee (n 58) para 59 (Cuba).

[62] UNGA Sixth Committee (n 59) 91, paras 2, 6 (Mexico).

[63] ibid para 6 (Mexico).

[64] UNGA Sixth Committee (n 53) para 67 (Japan). See also UNGA Sixth Committee (n 59) 67, paras 1, 11, 93 (Japan), calling for the deletion of draft art 54 [2000] and supporting the UK's suggestion to create a saving clause.

[65] UNGA Sixth Committee (55th Session), 'Summary Record of the 15th Meeting' (24 October 2000) UN Doc A/C.6/55/SR.15, para 25 (Israel).

injured States. They were described as 'a threat to small and weak States'.[66] The Iranian representative articulated Iran's concern that countermeasures may be used as a tool of economic coercion, referring to resolutions adopted by the UNGA,[67] and argued that collective countermeasures 'must be coordinated by the United Nations'.[68] Botswana found that draft Article 54 [2000] was too wide and open to abuse by powerful States.[69] The Iraqi delegate also expressed a general concern that countermeasures may be abused by more powerful States and that adequate safeguards were necessary.[70] The Republic of Korea found that it was necessary to reduce arbitrariness and to 'alleviate the influence of the more powerful States'.[71] The Greek representative defined countermeasures as 'an archaic notion, one which favoured more powerful States and thus had no place in an international community based on the sovereign equality of nations'.[72] Guatemala made no statement on third-party countermeasures but was troubled by the overall negative effects of countermeasures, especially when they could be equated to economic coercion, thus sharing Iran's concern.[73] Hungary,[74] Slovakia,[75] and Cyprus[76] were also worried about the potential abuse of countermeasures.

3.2.3. How to coordinate third-party countermeasures with UNSC measures

The issue of coordinating measures unilaterally adopted by States and those adopted by the UNSC was also raised. Algeria expressed its reluctance to include countermeasures and proposed that collective countermeasures should be adopted within an institutional framework.[77] Greece also suggested that draft Article 54(2) [2000] should be amended to include that 'countermeasures should not be taken unilaterally by any State if the organized international community was seized of the matter through the Security Council'.[78] The Russian delegation stated that:

> It would be unacceptable for any State to take countermeasures at the request of any injured State, because that would give the big Powers the opportunity to play the role of international policemen. The only exception concerned the acts referred to in Article 41. There were cases where such relations between States might also fall under the jurisdiction of international organizations responsible for security matters.[79]

[66] UNGA Sixth Committee (n 53) para 46 (Tanzania); see also paras 45–49 (Tanzania).
[67] UNGA Sixth Committee (n 65) para 13 (Iran).
[68] ibid para 17 (Iran).
[69] UNGA Sixth Committee (n 65) para 63 (Botswana).
[70] UNGA Sixth Committee (55th Session), 'Summary Record of the 16th Meeting' (25 October 2000) UN Doc A/C.6/55/SR.16, para 36 (Iraq).
[71] UNGA Sixth Committee (n 62) 94 (Republic of Korea).
[72] UNGA Sixth Committee (55th Session), 'Summary Record of the 17th Meeting' (27 October 2000) UN Doc A/C.6/55/SR.17, para 85 (Greece).
[73] UNGA Sixth Committee (n 65) para 43 (Guatemala).
[74] UNGA Sixth Committee (n 70) paras 56–57 (Hungary).
[75] ibid para 66 (Slovakia): 'Countermeasures, another controversial issue, represented a necessary element within a regime of state responsibility as a legal means for inducing a wrongdoing state to change its behaviour. However, the articles on countermeasures must be drafted carefully to avoid abuses.'
[76] UNGA Sixth Committee (n 58) para 32 (Cyprus).
[77] ibid paras 2–8 (Algeria).
[78] UNGA Sixth Committee (n 72) para 85 (Greece).
[79] UNGA Sixth Committee (n 58) para 51 (Russia).

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Recognising that third-party countermeasures could be adopted in cases falling under draft Article 41 [2000] on 'serious breaches of essential obligations to the international community', the Russian Federation did seem to accept third-party countermeasures under draft Article 54 [2000] (which in 2025 is ironic) while at the same time raising the issue of coordination with measures adopted by the UNSC. It should be noted, however, that Russia criticised draft Article 41 [2000].[80] The latter was reiterated in draft Article 54(2) [2000], which provided that 'In the cases referred to in article 41, any State may take countermeasures, in accordance with the present Chapter in the interest of the beneficiaries of the obligation breached'.[81] This suggests that, while Russia apparently accepted collective countermeasures it believed their scope should be narrower.

3.2.4. The need for further guidelines

Speaking on behalf of the Nordic States, the Danish delegate did not make any specific comments on the draft provision entitled 'Countermeasures by States other than the injured States', but recognised that countermeasures were a sensitive issue that had to be properly regulated by the ILC. He further recalled that 'it was nevertheless crucial to establish strong safeguards against possible abuses of countermeasures'.[82] According to Indonesia, the law on countermeasures was still undergoing development. The Indonesian representative also stressed that countermeasures should not be a means to settle disputes between States.[83] Brazil stated that 'the right of the third State to take countermeasures on behalf of the injured State' needed further consideration.[84] Germany suggested that the options of the State indirectly injured should be more narrow than those of the directly injured State[85] and was concerned about the risk of disproportionate unilateral acts, 'which in reality were not justified by the interest they sought to protect'.[86] According to Argentina, collective countermeasures should be subjected to more restrictions than bilateral countermeasures.[87] They considered that draft Article 54 [2000] should be 'regarded as progressive development'.[88] Jordan noted that collective countermeasures were a 'new' concept introduced by the draft Articles and, although not against its inclusion in the final text, it called for more consideration of the question.[89] Slovenia stated that such countermeasures could be justified under certain circumstances but that the broad scope of draft Article 54 [2000] could give rise to abuse.[90]

[80] ibid para 52 (Russia).
[81] ILC, 'State Responsibility: Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading' (n 52).
[82] UNGA Sixth Committee (n 65) para 58 (Denmark).
[83] UNGA Sixth Committee (n 58) para 38 (Indonesia).
[84] ibid para 65 (Brazil).
[85] UNGA Sixth Committee (n 53) para 53 (Germany).
[86] ibid para 54 (Germany).
[87] UNGA Sixth Committee (n 65) para 66 (Argentina).
[88] UNGA Sixth Committee (n 59) 90 (Argentina).
[89] UNGA Sixth Committee (n 58) para 17 (Jordan).
[90] ibid para 27 (Slovenia).

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The South African delegation, speaking on behalf of the South African Development Community, seemed to be in favour of draft Article 54 [2000].[91] France's written comments suggested improvements that could be made to the provision,[92] thus indicating that it accepted the draft Article's inclusion in the final text.[93] Spain was very clear in stating that draft Article 54 [2000] was 'correct'.[94] Italy also seemed to accept the provision and suggested that it should go further.[95] Chile[96] and Costa Rica[97] also accepted that countermeasures could be adopted by non-injured States in cases of violations of obligations erga omnes. In their written comments, the Netherlands spoke of the 'innovative nature' of draft Article 54 [2000] but accepted it.[98] Australia's comments imply acceptance of the provision while requiring further clarification.[99] Austria submitted that 'countermeasures as a means of obtaining compliance for obligations erga omnes presented a thorny problem'.[100] The questions raised by the Austrian representative are related to the formulation of draft Article 54 [2000], without questioning the general idea of collective countermeasures.[101] Similar comments were made by the Polish delegation, especially concerning the link between third-party countermeasures and the UNSC.[102] Although recognising that there was a trend in international law whereby every individual State has recourse to countermeasures in response to serious breaches of obligations erga omnes, Poland also found 'that this practice has met important opposition within the international community'.[103] Such practice should therefore be 'subjected to some form of control by the international community'.[104]

The Indian delegate's statements on collective countermeasures were rather ambiguous. On the one hand, he stated a preference for the exclusion of countermeasures from ARSIWA altogether, as they could give rise to abuse.[105] On the other hand, he seemed to suggest that obligations erga omnes and responses to their violation are an area of progressive development, possibly suggesting that India was not against the proposal.[106] Nonetheless, as he called for the deletion of draft Article 41 [2000], which as mentioned justified the adoption of third-party

[91] UNGA Sixth Committee (n 53) para 25 (South Africa).
[92] UNGA Sixth Committee (n 65) paras 1–12 (France); UNGA Sixth Committee (n 59) 91 (France).
[93] But in 2019 France stated that collective countermeasures are not permissible (n 176).
[94] UNGA Sixth Committee (n 59) para 3 (Spain).
[95] UNGA Sixth Committee (n 70) para 26 (Italy).
[96] UNGA Sixth Committee (n 72) para 48 (Chile).
[97] ibid para 64 (Costa Rica). Though the delegate was not necessarily in favour of countermeasures because of the risk of abuse, he believed that they were necessary and welcomed 'the balance achieved in the draft articles between customary law and innovative elements aimed at promoting the progressive development of international law'. See also ibid para 65.
[98] UNGA Sixth Committee (n 59) para 1 (the Netherlands).
[99] UNGA Sixth Committee (n 70) para 41 (Australia).
[100] UNGA Sixth Committee (n 72) para 76 (Austria).
[101] ibid paras 76–79 (Austria).
[102] UNGA Sixth Committee (n 58) para 48 (Poland).
[103] UNGA Sixth Committee (n 59) 94 (Poland).
[104] ibid.
[105] UNGA Sixth Committee (n 65) para 29 (India).
[106] ibid para 31 (India).

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countermeasures under draft Article 54(2) [2000], it is unclear on what grounds collective countermeasures could be adopted.[107] Sierra Leone also expressed the concern that countermeasures may be abused. Though making no comment on draft Article 54 [2000], its representative stated that 'draft Articles 50 to 55 failed to state clearly that countermeasures were only legitimate as between two States in a relative sense'.[108] This raises questions as to whether or not Sierra Leone agreed that non-directly injured States could adopt countermeasures.

3.2.5. Takeaways from the debate

Based on this analysis, States that were not vehemently against draft Article 54 [2000] were still concerned that these measures may lead to abuse by powerful States and would obstruct multilateral measures adopted by the UNSC. They therefore required further safeguards. States that accepted draft Article 54 [2000] recognised that the provision was a new concept in international law. Although the draft ARSIWA suggested that third-party countermeasures be subjected to the same rules as bilateral countermeasures (draft Article 54(3) [2000]), this was not deemed sufficient. The ILC was required to provide further guidance as the rules governing the adoption of third-party countermeasures were very unclear. Having spent 50 years drafting ARSIWA, this was certainly too much to ask of the ILC. Consequently, even if draft Article 54 [2000] had made it into the final version, it still would have been a provision of progressive development of international law and not codification.

Furthermore, if States presumably adopting countermeasures in response to violations of obligations erga omnes (partes) believed that they were acting lawfully or contributing to international law's development, then one must wonder why they did not accept the inclusion of third-party countermeasures in the draft ARSIWA. This is the case of the US, the UK and Tanzania. In 1990, 11 years before the adoption of ARSIWA, Sicilianos wrote that Western States' opposition to third-party countermeasures was problematic in the sense that it appeared to contradict their practice and foreign policy decisions. He explained this inconsistency by the fact that these States were expressing their opposition to these measures because of their link to the concept of 'international crime', a concept they were against and which was at the basis of the provision on third-party countermeasures at the time.[109] In 2000, however, draft Article 41 on 'serious breaches of essential obligations to the international community' replaced draft Article 19 on 'international crimes'. Draft Article 54(2) [2000] expressly referred to Article 41. Even though third-party countermeasures were no longer based on the concept of international crimes, these States still objected to their inclusion in ARSIWA.

Over 20 years after the ILC adopted ARSIWA one could question whether its findings that the customary rules permitting countermeasures by non-directly injured States have yet to emerge are still valid. After all, the frequency at which certain non-directly injured actors respond to violations of obligations erga omnes (partes),

[107] ibid para 32 (India).

[108] UNGA Sixth Committee (n 70) para 51 (Sierra Leone).

[109] LA Sicilianos, *Les réactions décentralisées à l'illicite, des contre-mesures à la légitime défense* (Librairie Générale de Droit et de Jurisprudence 1990) 172–73.

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such as political and civil human rights violations, through (potentially unlawful) sanctions could suggest that third-party countermeasures are recognised under international custom. Sections 4 and 5 address this question, first focusing on practice and, subsequently, on opinio juris.

4. The ambiguity of sanctions practice

It is argued here that the practice concerning the imposition of unilateral sanctions is ambiguous. While sanctions practice has flourished over the decades, it remains a largely political practice dominated by the US and the EU. It is true that these tools are often justified as a means to uphold international norms, and one could argue that as the EU and the US are claiming to have the authority to enforce international law, they are providing legal claims.[110] However, as will be seen, they frame their restrictions as a sovereign right to make use of their economic power in pursuance of foreign policy interests, which include supporting the norms that, in their view, form the basis of the international order. Such statements suggest that they view their measures as retorsions. It is unclear if this practice actually constitutes wrongful sanctions that could eventually be justified as third-party countermeasures. This ambiguity is first illustrated by the debate over confiscating Russian State assets, after which Section 4.2 takes a broader view of unilateral sanctions practice.

4.1. Reluctance to seize Russian assets

One of the more severe sanctions that was adopted against Russia after the start of the war in February 2022 was the freezing of Russian Central Bank assets in foreign jurisdictions.[111] As the war progressed, discussions turned to whether the sanctioning actors should seize or confiscate the assets as a means to guarantee that Ukraine would receive reparation for the harm that it had suffered. Both the freezing and the confiscation of State sovereign assets led to the resurfacing of the debate on third-party countermeasures.

As always when it comes to sanctions, commentators disagreed on the initial question: whether the action was a retorsion or a wrongful act that required justification. According to Franchini, 'central bank sanctions are likely to violate several international legal principles and rules such as non-intervention, State jurisdiction,

[110] Hakimi (n 21) 1493.

[111] This was implemented by the Council Regulation (EC) 2022/334 of 28 February 2022 amending Council Regulation (EC) 833/2014 concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine [2002] OJ L57/1; President of the United States of America, 'Executive Order 14024 concerning Prohibitions Related to Transactions Involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation' (19 May 2023); Russia (Sanctions) (EU Exit) (Amendment) (No 25) Regulations 2022 (UK); Special Economic Measures (Russia) Regulations SOR/2014-58 (Canada); Ordonnance du 4 mars 2022 instituant des mesures en lien avec la situation en Ukraine, Doc RS 946 231 176 72 (Switzerland); Government of Japan, 'Japan Stands with Ukraine' (21 April 2022) https://www.japan.go.jp/kizuna/_userdata/pdf/2022/summer2022/japan_stands_with_ukraine.pdf. All cited in R van der Horst, 'Illegal, Unless: Freezing the Assets of Russia's Central Bank' (2023) 34 EJIL 1021, 1021 n 2.

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immunity, human rights and various international economic law treaties'.[112] When discussing these types of restrictions, most of the literature has focused on their compatibility with State immunity. Russian assets, such as those of the Central Bank, constitute State property and thus are immune from measures of constraint.[113] The latter are generally related to judicial proceedings, and the question is whether they also arise following executive and legislative decisions.[114] Ruys has argued that sovereign immunity only applies to judicial decisions and that an executive decision that orders the freezing of assets is not in violation of State immunity.[115] One wonders whether such a distinction undermines immunity. As Kamminga comments, 'it would be rather incongruous if Central Bank immunity could be invoked against intervention by the judicial branch but not against intervention by the executive branch'.[116] He also notes that some States have objected to the freezing of State assets.[117] Following an analysis of opinio juris against non-judicial measures of constraint (such as sanctions) directed against State property, Janig concludes that State immunity protects State property from executive and legislative acts.[118] For others, sovereign immunity applies to the actions of the legislature and the executive where those actions are judicial in nature.[119] The ICJ may eventually provide insight. At the time of writing, Iran has instituted proceedings against Canada for violating 'Iran's jurisdictional immunity and immunity from measures of constraint under customary international law', which it alleges results from a 'series of legislative, executive and judicial measures adopted by Canada against Iran and its property since 2012'.[120]

According to Brunk, while freezing Central Bank assets through executive action does not violate immunity, confiscation of such assets would, as it generally involves judicial action.[121] In her view, whereas States may very much want to confiscate Russian assets, they have not done so. To her, this is demonstrative of opinio juris: 'countries very much want to confiscate Russian central bank assets, but customary international law governing Central Bank immunity and countermeasures do not permit them to do

[112] D Franchini, 'When Finance Becomes a Weapon: The Challenge of Central Bank Sanctions under International Law' (2025) JITL&P 1, 7.

[113] UN Convention on Jurisdictional Immunities of States and their Property (adopted 2 December 2004, not yet in force) arts 19, 21. See also Franchini (n 112) 11.

[114] For a summary of the debate see P Janig, 'State Immunity from Non-Judicial Measures of Constraint' (2025) 74 ICLQ 179, 184–86.

[115] T Ruys, 'Immunity, Inviolability and Countermeasures: A Closer Look at Non-UN Targeted Sanctions' in T Ruys, N Angelet and L Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019) 670. See also I Brunk, 'Central Bank Immunity, Sanctions, and Sovereign Wealth Funds' (2023) 91 GeoWashLRev 1616.

[116] MT Kamminga, 'Confiscating Russia's Frozen Central Bank Assets: A Permissible Third-Party Countermeasure?' (2023) 70 NILR 1, 6. See also Franchini (n 112) 11; van der Horst (n 111).

[117] Kamminga (n 116) 8–9; Franchini (n 112) 11–12.

[118] Janig (n 113) 191–5. He also writes: 'there seems to be no opinio juris clearly suggesting that State immunity is generally irrelevant in the context of non-judicial measures of constraint', at 196.

[119] OA Hathaway, MM Mills and TM Poston, 'War Reparations: The Case for Countermeasures' (2024) 76 StanLRev 971, 1001–04.

[120] *Alleged Violations of State Immunities (Islamic Republic of Iran v Canada)* (ICJ, Application Instituting Proceedings, 27 June 2023) para 2.

[121] Brunk (n 115).

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so'.[122] She also notes that '[t]he absence of State practice of third-party countermeasures against Central Bank immunity suggests, in this context, that such measures are not permissible'.[123] Some scholars have argued that confiscating State assets would not fulfil the criteria for lawful countermeasures as these measures would not be proportionate as required by Article 51 ARSIWA, would not be temporary or reversible as required by Article 49 ARSIWA and may have broader ramifications that could harm fundamental human rights contrary to Article 50(1)(b) ARSIWA.[124] As always, these arguments are debated. Kamminga posits that the freezing and confiscation of Russian State assets would be unlawful but that this could be excused as 'a permissible third-party countermeasure to induce Russia to halt its aggression against Ukraine'.[125] To support this position, he refers to Canada's Special Economic Measures Act 1992, which allows Canada to confiscate foreign property, including that of a State, in response to a grave breach of international law.[126] He does not note that Canada is one of the few States to have expressed opinio juris against the adoption of collective cyber countermeasures.[127] Furthermore, while the Group of Seven (G7) collectively froze Russia's assets, Kamminga acknowledges that it 'did not couch their measure in these terms'.[128] So far, the language of collective countermeasures has been absent in G7 pronouncements and more generally, but it is clear that a number of legal, policy and financial issues are at stake that are leading States to be very cautious.

Because the majority of Russian State assets that have been frozen are held by Euroclear, a financial market infrastructure group in Belgium, the decision on whether to confiscate the funds lies with the EU. So far it has resisted US and UK pressure to do so. It appears that a legal team advised the European Commission that confiscation would be unlawful, particularly under domestic laws.[129] On 21 May 2024, the Council of the EU announced that the profits that had accrued from the assets' interest 'will be used for further military support to Ukraine, as well as its defence industry capacities and reconstruction'. This outcome would be 'consistent with applicable contractual obligations and in accordance with applicable laws'.[130] As always, the

[122] ibid 1655.

[123] ibid 1652.

[124] Franchini (n 112) 14–17. See also Brunk (n 115) 1653–56 on the non-reversible nature of confiscation. Hathaway, Mills and Poston consider that freezing assets does not meet the conditions found in ARSIWA, notably, that they do not seek to induce compliance and such measures are non-reversible: see Hathaway, Mills and Poston (n 119) 1007–11.

[125] Kamminga (n 116) 7, 11.

[126] ibid 10.

[127] Government of Canada, 'International Law Applicable in Cyberspace' (22 April 2022) https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/peace_security-paix_securite/cyberspace_law-cyberespace_droit.aspx?lang=eng.

[128] ibid para 7. The White House, 'G7 Leaders' Statement on Ukraine' (19 May 2023) https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/05/19/g7-leaders-statement-on-ukraine/.

[129] B Aris, 'EU Rules Out Seizing the Central Bank of Russia's €200bn of Frozen Money' *Intellienews* (23 June 2023) https://www.intellinews.com/eu-rules-out-seizing-the-central-bank-of-russia-s-200bn-of-frozen-money-282445/.

[130] Council of the EU, 'Extraordinary Revenues Generated by Immobilised Russian Assets: Council Greenlights the Use of Net Windfall Profits to Support Ukraine's Self-defence and Reconstruction' (Press

question remains whether this includes collective countermeasures. According to Webb, it is unclear whether the use of Russia's accrued profits in such a manner would comply with international law, as it depends on whether they are considered to be Russian property.[131]

The decision-making process has been difficult, as all EU Member States have to agree and concerns have been raised over the legal and financial fallout. Nonetheless, in June 2024, the G7 countries affirmed the decision 'to make available approximately USD 50 billion leveraging the extraordinary revenues of the immobilized Russian sovereign assets'.[132] The EU endorsed the proposal[133] and further concrete steps were taken when the Council of the EU announced the Ukraine Loan Cooperation Mechanism in October 2024,[134] which will use the Russian extraordinary revenues to enable Ukraine to repay the loans that it has received from the G7 countries.

Third States expressed opposition to confiscating Russian State assets. According to *Politico*, China, Saudi Arabia and Indonesia feared that the actions of the EU would set a precedent.[135] This could suggest that they are not convinced that there is, at present, a legal justification (such as third-party countermeasures) for such an action. Following lawsuits in Russia over Western sanctions, in May 2024, a Russian court ordered that Deutsche Bank assets in Russia which totalled €239 million, as well as those of Commerzbank totalling €93.7 million, should be seized.[136] It also ruled that assets and property belonging to UniCredit, estimated at €462.7 million, should be seized.[137] In February 2025, *Reuters* reported that Russia is set to adopt legislation that would enable it to seize foreign assets in retaliation against the restrictions imposed on it.[138] At the time of writing it is unclear if this legislation has been adopted, but Russian retaliation against European funds is feared, and there is also concern that investors might become reluctant to do business in the EU.

Release, 21 May 2024) https://www.consilium.europa.eu/en/press/press-releases/2024/05/21/extraordinary-revenues-generated-by-immobilised-russian-assets-council-greenlights-the-use-of-windfall-net-profits-to-support-ukraine-s-self-defence-and-reconstruction/.

[131] Webb (n 12) 41.

[132] Group of Seven (G7), 'Apulia G7 Leaders' Communiqué' (June 2024) https://www.g7italy.it/wp-content/uploads/Apulia-G7-Leaders-Communique.pdf.

[133] European Council Conclusions 15/24 of 27 June 2024, para 4 https://www.consilium.europa.eu/media/qa3lblga/euco-conclusions-27062024-en.pdf.

[134] European Parliament and Council of the EU Resolution 14083/24 of 4 October 2024 establishing the Ukraine Loan Cooperation Mechanism and Providing Exceptional Macro-Financial Assistance to Ukraine https://data.consilium.europa.eu/doc/document/ST-14083-2024-INIT/en/pdf; see also G7, 'G7 Leaders' Statement on Extraordinary Revenue Acceleration (ERA) Loans' (25 October 2024) https://www.g7italy.it/wp-content/uploads/G7-Leaders-Statement-on-Extraordinary-Revenue-Acceleration-ERA-Loans.pdf.

[135] G Sorgi, 'Russia's Friends Beg EU to Leave Frozen Assets Alone' *Politico* (2 April 2024) https://www.politico.eu/article/russia-frozen-assets-europe-confiscation-china-saudi-arabia/; see also G Sorgi, 'EU Capitals Fear Russian Retaliation and Cyberattacks after Asset Freezes' *Politico* (5 February 2024) https://www.politico.eu/article/russia-cyberattack-retaliation-asset-freezes-eu-war-ukraine/.

[136] 'Russian Court Seizes Two European Banks' Assets amid Western Sanctions' *Al Jazeera* (18 May 2024) https://www.aljazeera.com/news/2024/5/18/russia-seizes-european-banksassets-as-a-part-of-a-lawsuit.

[137] ibid.

[138] E Fabrichnaya and A Marrow, 'Russia to Widen Asset Seizing Power with New Legislation, Sources Say' *Reuters* (7 February 2025) https://www.reuters.com/world/europe/russia-widen-asset-seizing-power-with-new-legislation-sources-say-2025-02-07/.

To conclude, the EU has refrained from confiscating Russian State assets and has opted for mobilising accrued profits instead. It is unclear if it avoided confiscation because it fears the political ramifications or if it considers that the measures would be difficult to justify legally, either because third-party countermeasures would not be permissible or because the criteria for their imposition would not be met in this case. Of course, it is likely that a combination of both legal and political considerations influences decision-making. Section 4.2 delves further into the ambiguity of sanctions, which are often justified as policy tools and whose legality is often unclear.

4.2. Unilateral sanctions as political practice, which may or may not require legal justification

When it comes to unilateral sanctions, State practice is hardly new but has increased since 2001. While it is not required that a general practice be universal or unanimous, it should be widespread and supported by a majority of States or international organisations,[139] particularly those whose interests are most affected.[140] All States are arguably affected by the adoption of collective countermeasures; they have the potential to be the adoptee or the target. State practice is dominated by a limited number of (mainly Western) States and the EU and therefore does not meet the requirements of a general practice that is needed to form customary law. Non-Western States engage in adopting unilateral sanctions, but less frequently than the US, the EU and those who align with them. Additionally, whereas practice should be consistent,[141] sanctions' adoption is selective and stained with double standards. States and international organisations are relatively consistent in the types of violations to which they respond, but they do not always react when similar violations of international law are at stake. Though there is no obligation to adopt sanctions, this inconsistency is also the source of objections to the imposition of unilateral sanctions.[142] While it is not surprising that a target State objects to unilateral coercive measures, it should be noted that they are frequently supported by an important number of (developing) States that object to the use of these measures as a foreign policy instrument.[143]

The US is very clear in stating that unilateral coercive measures are an essential foreign policy tool and an acceptable response to violations of international norms.

[139] ILC (n 18) conclusion 4(2): 'In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.' The term '[i]n certain cases' would include 'the practice of international organizations among themselves and in their relations with States', which is the case of the EU's restrictive measures adopted in its external relations: see ILC, 'Fifth Report on Identification of Customary International Law by Special Rapporteur Wood' (2018) UN Doc A/CN.4/717, 20, para 43. See also J Odermatt, 'The Development of Customary International Law by International Organizations' (2017) 66 ICLQ 491.

[140] ILC, 'Second Report on Identification of Customary International Law by Special Rapporteur Wood' (2014) UN Doc A/CN.4/672, para 52.

[141] ibid paras 55–57.

[142] Hofer (n 7) paras 54–55.

[143] See, e.g. assertions made by the Non-Aligned Movement, 'Kampala Final Outcome Document' (19th Summit of Heads of State and Government of the Non-Aligned Movement, Kampala, 19–20 July 2024) https://nam.go.ug/sites/default/files/2024-02/Kampala%20Final%20Outcome%20Document.pdf paras 11, 32(2), 34(2), 133.

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Speaking before the UNGA Third Committee in 2021, the US delegate explained their vote against the UNGA Resolution 53/141 on Human Rights and Unilateral Coercive Measures in the following manner:

> The text inappropriately challenged the sovereign right of States to determine their economic relations and protect legitimate national interests. It also attempted to undermine the ability of the international community to respond to offences that were contrary to international norms. Economic sanctions were a legitimate means of achieving foreign policy and other objectives, and the United States was not alone in that view or practice.[144]

In this case, sanctions are justified on both political grounds and to protect and promote international norms. Unilateral measures are described as a 'sovereign right' and as 'legitimate', suggesting that they would be acts of retorsion as opposed to wrongful acts in need of justification or countermeasures where restrictions would apply. Comparable reasoning was given in the US explanation of the vote against UNGA Resolution 58/198 on Unilateral Economic Measures as a Means of Political and Economic Coercion against Developing Countries:

> Sanctions were an appropriate, effective, peaceful and legitimate tool for addressing threats to peace and security. … In cases where the United States had applied sanctions, it had done so with specific objectives, including the promotion of democratic systems, the rule of law and respect for human rights and fundamental freedoms, or to respond to security threats.[145]

Although the EU abstained during the vote on this resolution, it was explained that:

> Sanctions should respect the principles of international law, including the international contractual obligations of the State applying them and the rules of the World Trade Organization. The European Union imposed restrictive measures in full conformity with its obligations under international law … .[146]

While the EU often reiterates that '[a]ll restrictive measures adopted by the EU are *fully compliant with obligations under international law*, including those pertaining to human rights and fundamental freedoms',[147] this is a rather broad claim. It is unclear if it understands 'international law' to include third-party countermeasures or if it believes that its restrictive measures are acts of retorsion.[148] In *Venezuela v Council*, the European Court of Justice (ECJ) had the opportunity to situate restrictive measures within international law but instead framed EU restrictive measures as an 'autonomous'

[144] UNGA Third Committee (76th Session), 'Summary Record of 7th Meeting' (9 November 2021) UN Doc A/C.3/76/SR.8, para 38.

[145] UNGA Second Committee (76th Session), 'Summary Record of 10th Meeting' (23 November 2021) UN Doc A/C.2/76/SR.10, para 2.

[146] ibid para 11 (Slovenia, speaking on behalf of, amongst others, the EU and its Member States).

[147] European Council and Council of the EU, *Why the EU Adopts Sanctions* https://www.consilium.europa.eu/en/policies/sanctions/ (emphasis in original).

[148] For the opposite interpretation, see: Dawidowicz (n 13) 254, according to whom such statements reflect opinio juris that third-party countermeasures are permissible. This would mean that the EU believes its sanctions are unlawful but that their wrongfulness can be precluded. In the present author's view, this is one particular reading of the EU's statements but there are various possible interpretations.

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foreign policy. As Kassoti writes, the General Court 'proclaimed that the EU's *external* sanctioning power stems from its *internal* mandate to observe international law and to advance democracy, the rule of law and human rights'.[149] While the judgment can be criticised on a number of grounds,[150] the point here is that that ECJ did not engage with the debate under international law and therefore did not provide legal clarity. Rather, it seems to have supported the stance that unilateral sanctions are foreign policy tools that are somehow independent from international law.

In sum, actors that adopt unilateral sanctions reiterate that they have the sovereign right to implement coercive measures to protect their interests and the interests of the international community. Though States will justify sanctions as a response to a breach of international law, they are usually considered a foreign policy instrument. According to Dawidowicz, this would imply that they believe they can adopt third-party countermeasures:

> Even if States have not explicitly invoked the concept of third-party countermeasures … they have relied on it in substance. In other words, States have adopted prima facie unlawful unilateral coercive measures based on an explicit legal rationale; namely, the enforcement of obligations erga omnes (partes). This rationale neatly corresponds to third-party countermeasures as a legal category.[151]

It is difficult to follow this reasoning. While sanctioning entities clearly believe that they are entitled to use their economic power to enforce community norms, the key question is whether they can adopt third-party countermeasures to uphold these norms or if such enforcement measures must be acts of retorsion. To the extent that the sanctions would constitute acts of retorsion, this would not be problematic under the law of State responsibility. However, difficulties arise when the measures constitute wrongful acts that require justification. The responsibility of the sending entity could be invoked unless the sender is able to raise a circumstance precluding wrongfulness. This is not an element that is addressed by the senders. It is perfectly plausible that they believe their sanctions are acts of retorsion that do not require justification,[152] which seems to be the approach adopted in *Venezuela v Council,* or they wish to preserve the argument that their measures are retorsions.

Sanctions are a grey area of international law. As it is not a straightforward task to identify an unlawful sanction, actors may prefer to leave the issue open and unregulated by international law. They may also not want to justify themselves unless they are required to, for instance before a judicial body, and even in these circumstances they have not invoked third-party countermeasures. Sanctioning countries have been called upon to justify their measures before the ICJ and the ECJ, with the sanctions being justified as measures that fell within a treaty's security exception, thus suggesting that they were acts of retorsion.

[149] E Kassoti, 'Beyond Collective Countermeasures and Towards an Autonomous External Sanctioning Power? The General Court's Judgment in Case T-65/18 RENV, Venezuela v Council' (2024) 9 European Papers 247, 249 (emphasis in original). See also Case T-65/18 RENV *Venezuela v Council* ECLI:EU:T:2023:529, para 113.

[150] See Kassoti (n 149).

[151] Dawidowicz (n 13) 252.

[152] Ruys (n 10) 32; see also 47.

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Before the ICJ, in *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v US)* Iran has accused the US of violating the 1955 Treaty of Amity, Economic Rights and Consular Relations. However, the US claims that its sanctions fall within the treaty's security exception, Article XX(1).[153] In the case before the ECJ, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others,* Rosneft, a Russian-owned company that had been targeted by the EU, challenged the legality of the EU's restrictive measures under the EU-Russia Partnership and Cooperation Agreement (Agreement). The ECJ ruled that these measures were compatible with the Agreement as they constituted security measures under Article 99(1) Agreement.[154] Even in other fora, sanctioning States do not raise the third-party countermeasures argument. For example, Qatar contested the legality of the sanctions adopted against it by Saudi Arabia, the United Arab Emirates, Bahrain and Egypt, who justified their measures under the framework of collective security,[155] as security exceptions under the Agreement on Trade-Related Aspects of Intellectual Property Rights[156] and then eventually as countermeasures under Article 49 ARSIWA, but not as collective countermeasures.[157] As already mentioned, the ECJ did not engage with this question in *Venezuela v Council*, preferring to frame restrictive measures as a form of autonomous sanctions.

Having argued that State practice is ambiguous due to the political nature of sanctions and because it is difficult to establish when unilateral sanctions are wrongful acts that require justification, Section 5 turns to the question of opinio juris.

5. The missing subjective element

An important issue that has not received sufficient attention in the literature is the fact that neither the EU nor the States that have adopted sanctions have indicated their belief as to the law to demonstrate the opinio juris needed to support the recognition of third-party countermeasures under customary international law. Section 5.1 reviews how doctrine has assessed opinio juris and to what extent States have provided evidence of the subjective element since ARSIWA's conclusion in 2001, and then Section 5.2 argues why opinio juris cannot be inferred from practice and needs to be assessed separately.

[153] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Relations (Islamic Republic of Iran v United States of America)* (ICJ, Preliminary Objections Submitted by the United States of America, 23 August 2019) 68ff.

[154] Case C-72/15, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* ECLI:EU:C:2017:236 (28 March 2017) paras 110–116.

[155] See, e.g. UNGA Plenary (72nd Session), 'General Debate' (22 September 2017) UN Doc A/72/PV.18, 17, 33 (United Arab Emirates), 33 (Egypt), 31–34 (Qatar).

[156] World Trade Organization, *Saudi Arabia: Measures concerning the Protection of Intellectual Property Rights, Report of the Panel* (16 June 2020) WT/DS567/R, 46.

[157] *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v Qatar)* (ICJ, Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates, 27 December 2018) 53–58.

5.1. Doctrine's assessment of opinio juris and the views expressed by States

The most in-depth analyses on collective countermeasures, conducted by Tams, Katselli Proukaki and Dawidowicz, recognise that the subjective element is lacking but nonetheless conclude that they are accepted as a norm of customary international law and that the ILC erred in not including them in ARSIWA.[158] Relying on these works, Bills[159] and Bogdanova[160] both find that collective countermeasures should be considered permissible. Referencing Katselli Proukaki and Dawidowicz, Kamminga also notes that 'State practice appears to be moving to a situation in which the entitlement to take countermeasures no longer distinguishes between directly and indirectly injured States'.[161] A report prepared by Webb cites Dawidowicz to argue that practice supporting third-party countermeasures is now 'virtually uniform', yet recognises that States may not label their own practice in this manner.[162]

Lim and Mitchell (who mainly reference Dawidowicz) note that the legality of third-party countermeasures, or collective countermeasures, is contested but appear to accept them in their analysis on how States have responded to Russia's aggression against Ukraine. In their view, the response of Western States to Russia 'constitutes the development of third-party collective countermeasures outside of UN authorisation'.[163] Their assessment of the UNGA Sixth Committee debates on the matter of third-party countermeasures equally finds that only a minority of States were against Crawford's initial proposal to include them in the final version of ARSIWA,[164] which is disputed above.

Hathaway, Mills and Poston's analysis also affirms that both elements of custom are met.[165] Their article includes some instances of State practice, including sanctions adopted by non-Western States (such as those adopted against South Africa for its apartheid regime, or the League of Arab States' sanctions against Syria). The examples are not supported by opinio juris, which, according to the authors, can be tacit. To give two final examples, Moiseienko argues in favour of third-party countermeasures as an appropriate policy in response to grave breaches but acknowledges their debated legality,[166] and Schmitt and Watts reach a balanced conclusion that 'the legality of

[158] See especially Tams (n 13); Katselli Proukaki (n 13); Dawidowicz (n 13).

[159] A Bills, 'The Relationship between Third-party Countermeasures and the Security Council's Chapter VII Powers: Enforcing Obligations Erga Omnes in International Law' (2020) 89 NordicJIL 117, 119.

[160] Bogdanova (n 10) 82–85, 309–10. Bogdanova's study also includes: C Hillgruber, 'The Right of Third States to Take Countermeasures' in C Tomuschat and JM Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Martinus Nijhoff 2006); C Rotblat, 'Weaponizing the Plumbing: Dollar Diplomacy, Yuan Internationalization, and the Future of Financial Sanctions' (2017) 21 UCLAJIL and Foreign Affairs 311; T Stoll et al, 'Extraterritorial Sanctions on Trade and Investments and European Responses' (European Parliament Committee on International Trade, 2020).

[161] Kamminga (n 116) 7.

[162] Webb (n 12) 25.

[163] CL Lim and RM Mitchell, 'Neutral Rights and Collective Countermeasures for *Erga Omnes* Violations' (2023) 72 ICLQ 361, 376.

[164] ibid 380.

[165] Hathaway, Mills and Poston (n 119) 1027–28.

[166] A Moiseienko, 'Legal: The Freezing of the Russian Central Bank's Assets' (2023) 34 EJIL 1007, 1016–17. See also A Moiseienko, 'Seizing Foreign Central Bank Assets: A Lawful Response to Aggression?' (SSRN, 17 April 2023) 45 https://ssrn.com/abstract=4420459.

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collective countermeasures is that the matter is unsettled, with no clear obstacle standing in the way of either view'.[167]

Other commentators have disagreed on the legality of third-party countermeasures. Reviewing Dawidowicz's monograph, Lanovoy notes that State practice is unclear and that little is said on opinio juris.[168] Questions relating to methodology are also raised by Focarelli, who is ultimately not convinced that third-party countermeasures are established custom.[169] Brunk also appears sceptical, noting that '[t]hird party countermeasures … are generally contested and their legality is unclear in *all* circumstances'.[170] Finally, Jackson and Paddeu's detailed assessment on the legality of countermeasures in the general interest concludes that, even if one adopts a flexible approach to custom, 'the best that can be said is that the law remains uncertain'.[171]

Interesting developments regarding opinio juris have occurred over the last few years. In 2019, the Estonian president publicly endorsed third-party countermeasures: 'Estonia is furthering the position that States which are not directly injured may apply countermeasures to support the State directly affected by the malicious cyber operation'.[172] In 2023, Poland expressed 'the view that the evolution of customary international law over the last two decades provides grounds for recognising that a State may take countermeasures in pursuit of general interest as well', adding that States may adopt these measures in response to aggression.[173] Ireland, Costa Rica and Italy have also expressed support for their permissibility.[174] New Zealand has been cautiously open to the idea but non-committal.[175]

In contrast, the French Government has asserted that '[c]ollective counter-measures are not authorised',[176] and the US appears reluctant to endorse third-party countermeasures. As noted by Jackson and Paddeu, while the US has ardently supported Ukraine and condemned Russia's aggression, it has adopted the rather unique position of claiming that it is an injured State under Article 42 ARSIWA, stating it is affected by Russia's aggression by being one of Ukraine's allies 'who have bankrolled its economy and military during the war'.[177] This sleight of hand purportedly allows the US to adopt countermeasures under Article 49 ARSIWA, and avoid the debate on countermeasures adopted by States other than the directly injured State. Canada has rejected third-party countermeasures, stating that it 'has considered the concept

[167] Schmitt and Watts (n 172) 397.
[168] Lanovoy (n 14) 202–03.
[169] Focarelli (n 15) 17.
[170] Brunk (n 115) 1652 (emphasis in original).
[171] M Jackson and F Paddeu, 'The Countermeasures of Others: When Can States Collaborate in the Taking of Countermeasures?' (2024) 118 AJIL 231, 246.
[172] MN Schmitt and S Watts, 'Collective Cyber Countermeasures?' (2021) 12 Harvard National Security Journal 373, 376.
[173] P Roguski, 'Poland's Position on International Law and Cyber Operations: Sovereignty and Third-Party Countermeasures' (*Just Security*, 18 January 2023) https://www.justsecurity.org/84799/polands-position-on-international-law-and-cyber-operations-sovereignty-and-third-party-countermeasures/.
[174] Jackson and Paddeu (n 171) 244.
[175] Schmitt and Watts (n 172) 376.
[176] ibid.
[177] Jackson and Paddeu (n 171) 245.

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of "collective cyber countermeasures" but does not, to date, see sufficient State practice or opinio juris to conclude that these are permitted under international law'.[178] This position is rather unclear: is it disputing third-party countermeasures in general or only in the context of cybersecurity (as suggested by the statement)? The same question could also be raised in relation to Estonia's statement quoted in the previous paragraph. China has stated that there is disagreement over whether 'measures taken by States other than an injured State' are lawful.[179] Jackson and Paddeu also note that Algeria, Denmark, Russia, the UK and the Netherlands have expressed uncertainty, noting that the question remains unsettled.[180] The position of the Netherlands however appears to have evolved since Russia's aggression. The Dutch Advisory Committee on Questions of International Law recommended that the Netherlands may adopt third-party countermeasures in response to serious breaches of international law,[181] which the Dutch Government endorsed in April 2024.[182] In essence, while it remains difficult to come to a clear conclusion, there have been some shifts in favour of third-party countermeasures in recent years.

Some may suggest that it is time to move on and simply accept third-party countermeasures. However, this is a rather one-sided perspective that favours the policy of a minority of States and serves to legitimise a practice that is still hotly contested by a large number of States.[183] The response to the wars in Ukraine and Gaza illustrates that States do not agree on how third parties should respond to disputes, even when a peremptory norm is at stake. For example, Brazil and China have preferred to remain neutral and have abstained from adopting sanctions, arguing that dialogue between Russia and Ukraine should be promoted to reach a peace agreement.[184] In February 2022, while the US and the EU announced the adoption of sanctions against Russia, Brazil, Bolivia, Kenya and Syria expressed reservations and called for caution.[185]

[178] Government of Canada (n 124).

[179] UNGA Sixth Committee (71st Session), 'Summary Record of the 9th Meeting' (7 November 2016) UN Doc A/C.6/71/SR.9, para 74, cited in Jackson and Paddeu (n 171) 244.

[180] Jackson and Paddeu (n 171) 245.

[181] Commissie van advies inzakevolkenrechtelijke vraagstukken ('Advisory Committee on Public International Law') (CAVV), 'Rechtsgevolgen van een ernstige schending van een regel van dwingend recht: de internationale rechten en plichten van staten bij schending van het agressieverbod' (Government of the Netherlands, CAVV Advice No 41, 17 November 2022) 13–15 https://www.adviescommissievolkenrecht.nl/publicaties/adviezen/2022/11/17/rechtsgevolgen-van-een-ernstige-schending-van-een-regel-van-dwingend-recht.

[182] CAVV, 'Kabinetsreactie op CAVV-advies nr. 41: Rechtsgevolgen schendingen dwingend recht' (Advisory Committee on Public International Law, CAVV Response to Advice No 41, 11 April 2024) https://www.adviescommissievolkenrecht.nl/publicaties/kabinetsreacties/2024/04/11/kabinetsreactie-schending-dwingend-recht: 'stelt het kabinet zich, met de CAVV, op het standpunt dat het nemen van dergelijke tegenmaatregelen in het algemeen belang toegestaan is' ('the cabinet takes the position, with the CAVV, that taking such countermeasures in the public interest is permissible') (author's translation).

[183] Hofer (n 7).

[184] J Horge and T Rodrigues, 'Brazil Is Ukraine's Best Bet for Peace' (*Foreign Policy*, 2 May 2023) https://foreignpolicy.com/2023/05/02/brazil-russia-ukraine-war-lula-diplomacy-active-nonalignment/; P Sauer and A Hawkins, 'Xi Jinping Says China Ready to "Stand Guard over World Order" on Moscow Visit' *The Guardian* (20 March 2023) https://www.theguardian.com/world/2023/mar/20/xi-jinping-vladimir-putin-moscow-ukraine-war.

[185] UNGA (n 2).

A few months later, during another Emergency Special Session before the UNGA, Bangladesh stated: 'we believe that antagonism, like war, economic sanctions or countermeasures cannot bring good to any nation. Dialogue, discussion and mediation are the best ways to resolve disputes'.[186] This is not to say they do not consider Russia's behaviour unlawful, but that they find the dispute should be resolved by other methods. That said, States that contest unilateral sanctions are also inconsistent. While the most ardent sanction senders have withheld from sanctioning Israel, Malaysia, which has reportedly stated that it does not recognise unilateral sanctions,[187] banned ships under the Israeli flag from entering its ports in response to 'the ongoing massacre and brutality against Palestinians'.[188] Under the law of the sea, this would be considered a retorsion, but it could also raise questions under the prohibition of discrimination.[189]

Finally, the argument could be made that there are instances of implicit opinio juris because sanctioning States have arguably adopted prima facia wrongful restrictions. Section 5.2 argues that opinio juris should not be inferred from State practice and should be assessed separately.

5.2. Assessing opinio juris separately from practice

It could be argued that as there are instances of prima facie unlawful sanctions adopted in response to breaches of obligations erga omnes (partes), there is implicit opinio juris that third-party countermeasures are permitted. An example of this is the EU's airspace ban against Russian air carriers and a series of other aviation restrictions against Russia.[190] In response, Russia adopted a series of counter-sanctions[191] and filed a complaint over the restrictions before the International Civil Aviation Organization (ICAO), arguing that they breach the Chicago Convention on International Civil Aviation (Chicago Convention).[192] A plausible argument could be made that the restrictions against Russia constitute a form of discrimination in violation the of Chicago Convention. While Article 9 Chicago Convention permits States to 'restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory' in cases of military necessity, public safety or an international emergency, such measures cannot single out one State in particular. It remains to be seen if EU Member States will invoke the third-party countermeasure argument before the ICAO

[186] UNGA (11th Emergency Special Session), 'Verbatim Record: 14th Plenary Meeting' (12 October 2022) UN Doc A/ES-11/PV.14, 16. See also UNGA (11th Emergency Special Session), 'Verbatim Record: 18th Plenary Meeting' (23 February 2023) UN Doc A/ES-11/PV.18, 2 (Hungary).

[187] 'Malaysia Tells US It Doesn't Recognise Sanctions Imposed Unilaterally' *Middle East Monitor* (9 May 2024) https://www.middleeastmonitor.com/20240509-malaysia-tells-us-it-doesnt-recognise-sanctions-imposed-unilaterally/.

[188] 'Malaysia Bans Israel-Flagged Ships from Its Ports in Response to Gaza War' *Al Jazeera* (20 December 2023) https://www.aljazeera.com/news/2023/12/20/malaysia-bans-israeli-affiliated-and-israel-bound-ships-from-its-ports.

[189] A Honniball, 'Port States, Coastal States and National Security: A Law of the Sea Perspective on the 2017 Qatar-Gulf Crisis' (2020) 116 Marine Policy 103817.

[190] For an overview, see D Woodworth, 'Moscow's Diplomatic Moves in Montreal: Voting Dilemmas for the ICAO Council' (2024) 49(3) Air & Space Law 269, 271–72.

[191] ibid 273–74.

[192] ibid 275.

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Council, which, as noted above, they have thus far refrained from doing. It is also clear from the above that there are differences of opinion among EU Member States on the legality of collective countermeasures.

Studies that have found that third-party countermeasures are accepted under customary international law while acknowledging that opinio juris is lacking have argued that the mental element can be inferred from practice.[193] The sending States believe that their sanctions constitute third-party countermeasures without stating so explicitly. Tams' analysis is based 'on the assumption that in absence of specific indications to the contrary, the conduct of States will be based on the accompanying legal conviction; opinio juris can thus usually be inferred from State practice'.[194] Tams and Dawidowicz find that there is no evidence suggesting that States do not believe that their conduct cannot be legally justified, or that they only base their action on moral or political grounds.[195] It is also argued that politically motivated conduct does not mean that opinio juris is lacking: 'While [the] decision to resort to countermeasures (as opposed to other forms of response) might have been influenced by political considerations, their assessment of the underlying dispute was legally relevant'.[196] Dawidowicz references Ian Brownlie's 'burden of proof argument'[197] to justify that opinio juris can be inferred from State practice: 'in absence of any antecedents to the contrary, the [ICJ] has presumed that a uniform conduct of States is accompanied by the relevant opinio juris'.[198] This is slightly ironic if Brownlie's reaction to draft Article 54 [2000] during the ILC debates is considered:

> In reality, Article 54 constituted neither the law nor its potential progressive development. Progressive development related to some existing foundations, but practice was inconsistent in the extreme. … In addition to that inconsistent practice, there was no evidence of an opinio juris in the material. … In reality, Article 54 was not about countermeasures: it was about sanctions, it was incompatible with the Charter and it was neither *lex lata* nor *lex ferenda*. Perhaps a new category would need to be invented for it: *lex horrenda*.[199]

This article argues that, as one of the constituent elements of customary international law, opinio juris needs to be treated separately from State practice. To assume that a general and established State practice necessarily means that the States responsible for the conduct believe that they are acting legally would mean that the mental element is superfluous. While this approach has been advocated by legal scholars,[200] to simply infer opinio juris from State practice would amount to double

[193] Tams (n 13) 238–39; Dawidowicz (n 13) 253.

[194] Tams (n 13) 238.

[195] ibid 239. 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 BYIL 333, 413–14.

[196] Tams (n 13) 239.

[197] I Brownlie, *Principles of Public International Law* (5th edn, OUP 1998) 7–11, on burden of proof and opinio juris.

[198] Dawidowicz (n 13) 414–15. See also Tams (n 13) 239.

[199] ILC, 'Yearbook of the International Law Commission, Vol I' (2001) UN Doc A/CN.4/SER.A/2001, para 2.

[200] Mendelson (n 26).

counting[201] and mean that the same weight would not be given to each constitutive element, an approach that was rejected by the ILC in draft Conclusion 3(2) of its 'Report on Identification of Customary International Law', which provides that: 'Each of the two constituent elements is to be separately ascertained.'[202] This may be considered a formalistic or unrealistic approach to custom, but as discussed throughout, opinio juris can assist in preventing unwanted State practice from becoming custom,[203] which makes it especially useful when practice is ambiguous. In *Nicaragua v Colombia*, the ICJ inferred State opinio juris from practice: 'The Court considers that the practice of States … is indicative of opinio juris, even if such practice may have been motivated in part by considerations other than a sense of legal obligation.'[204] In that case, the Court found that practice was sufficiently widespread and uniform, and had taken place over a long period of time so as to justify proceeding by induction.[205] While the approach taken was not without controversy,[206] if it were applied in assessing whether third-party countermeasures are custom, it would not assist as sanctions practice is neither widespread, consistent nor uniform. Furthermore, States' reluctance to confiscate Russian State assets shows that there are instances of States refraining from adopting potentially unlawful restrictions, which could indicate they do not believe third-party countermeasures are permitted.

As has also been seen, most actors have refrained from explicitly justifying their sanctions as third-party countermeasures when given the opportunity. It is true that 'it is a general feature of practice that States reacting to a violation of international law will "only reluctantly" officially qualify their reaction as a countermeasure or "reprisal"'.[207] Nonetheless, States have been given the opportunity to qualify their reactions during debates before the UNGA Sixth Committee and other international fora, as discussed above. States whose own practice gave rise to the ILC's inclusion of draft Article 54 [2000] suggested that the provision be changed to a saving clause. Doctrine should be critical of the fact that these States were unwilling to formally express support for the adoption of third-party countermeasures in response to violations of obligations erga omnes (partes). Their attitudes could be interpreted as a 'deliberate withholding of consent' that their own practice be recognised as law.[208] This 'withholding of consent' brings to mind the ICJ's judgment in *North Sea Continental Shelf*. Denmark and the Netherlands alleged that the Federal Republic of Germany's conduct amounted to acceptance of the equidistance method, yet it had not ratified the Geneva Convention

[201] Double counting is when state practice implies opinio juris, see J Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 EJIL 523, 526.

[202] ILC, 'Draft Conclusions on Identification of Customary International Law' (n 18).

[203] Dahlman (n 32).

[204] *Nicaragua v Colombia* (n 20) para 77.

[205] ibid.

[206] ibid Dissenting Opinion of Judge Tomka, paras 51–63; Dissenting Opinion of Judge Robinson, paras 14–20; Dissenting Opinion of Judge Skotnikov, paras 16–19; Separate Opinion of Judge Xue, paras 47–48.

[207] A Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP 2011) 188.

[208] ILA (n 29) 31. See also Mendelson (n 26) 193: 'absence of consent at the relevant times'.

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on the Continental Shelf of 1958. This element was of importance to the Court, which indicated that:

> [I]f there had been a real intention to manifest acceptance or recognition of the applicability of the conventional régime then it must be asked why it was that the Federal Republic did not take the obvious step of giving expression to this readiness by simply ratifying the Convention.[209]

Under these circumstances, the fact that opinio juris is absent is all the more significant. In conclusion, practice is too ambiguous to forego the assessment of States' 'legal beliefs' when assessing whether third-party countermeasures are considered custom.

6. Concluding remarks

James Crawford once wrote: 'nowadays it seems that international law develops more rapidly than international society does'.[210] This aptly captures the disconnect between the development of obligations in the collective interest and the lack of means available to States to respond to their breach. The question of enforcement has always been subject to discussion and led to questions of international law's effectiveness, but its lack becomes even more glaring when it comes to responding to breaches of obligations in the collective interest. State practice (especially that of the EU and the US) is clear that unilateral sanctions can be considered a tool of enforcement, yet they are unclear about where their own measures lie under international law and reactions from other States illustrate that the matter is contested.

Although unilateral sanctions have flourished and doctrine has suggested that third-party countermeasures are permitted under customary international law, this article has argued that practice is too ambiguous and opinio juris too absent to reach this conclusion with confidence. In order to substantiate this argument, the analysis returned to the origins of the debate that occurred while the ILC was drafting ARSIWA. Focusing on the reactions of States to the inclusion of third-party countermeasures in ARSIWA, it argued that Special Rapporteur James Crawford was correct to opt for a saving clause in the final text. Many States were concerned that collective countermeasures would lead to abuse and raised questions over how unilateral reactions could be reconciled with UNSC sanctions. Even States that were in favour of including collective countermeasures wondered how they should be regulated. Many of the issues surrounding the adoption of third-party countermeasures remain valid today. Since the ILC wrapped up the codification of State responsibility, sanctions practice has proliferated and so too have legal ambiguities.

To conclude, the present author considers that third-party countermeasures are currently not permitted under customary international law, due to issues in establishing the two constitutive elements of customary international law. As Paddeu notes, 'most analyses of customary law will be subject to varied methodological

[209] *North Sea Continental Shelf* (n 18) para 28.

[210] J Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts' in Fastenrath et al (n 21) 224.

critiques',[211] and the reader may object that the approach advocated here is too rigid, or that expectations may be unrealistic. Nonetheless, it is the author's view that it is not the responsibility of doctrine to justify State conduct. If actors are genuinely committed to enforcing obligations erga omnes (partes) through third-party countermeasures, they should engage with international law and provide legal clarity. That being said, it is acknowledged that a gradual shift may be underway. In the wake of Russia's aggression against Ukraine and in the context of ongoing deliberations on cyberattacks, States are tentatively accepting collective countermeasures. Considering that political positions can lead to legal developments, it remains to be seen which view will prevail.

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[211] Paddeu (n 14) 429.

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