PART VI

RESPONDING TO BREACHES OF INTERNATIONAL OBLIGATIONS

17 Countermeasures and Sanctions 521

18 The Means of Dispute Settlement 548

19 The International Court of Justice 573

20 The Use of Force and the International Legal Order 601

17

COUNTERMEASURES AND SANCTIONS

Nigel D White

<Start Feature>

SUMMARY

The issue of enforcement by means of non-forcible measures is one of the least developed areas of international law. Two legal regimes are relatively clear—non-forcible countermeasures taken by States (countermeasures) and non-forcible measures taken by international organizations (sanctions). The development of a restricted doctrine of countermeasures as the modern accepted form of self-help is considered, along with the partial centralization of coercion in international organizations. The problems within each of these regimes are examined, along with the limitations that have been placed upon their application. The coexistence of countermeasures based on a traditional view of international relations, alongside the post-1945 development of centralized institutional responses, is explored. Moreover, the range of State and institutional practice that seems to lie somewhere between the basic right of a State to take countermeasures to remedy an internationally wrongful act, and the power of international organizations to impose sanctions in certain circumstances, is considered. The legality of the continued use by States of non-forcible reprisals, retorsion, and wider forms of economic coercion is explored, as is the issue of collective countermeasures imposed either multilaterally or institutionally.

<End Feature>

I. INTRODUCTION: SELF-HELP IN

INTERNATIONAL LAW

Traditionally, States coexist in a legal system that is essentially consensual. States, no matter their disparities in size or strength, are sovereign and equal. Obligations are accepted by States either in treaty or custom by consent; they are not imposed by any higher authority. In its purest form such a legal condition existed in the eighteenth and nineteenth centuries. This period was one of self-help, in that if a State breached one of its obligations, the victim State(s) of such a breach could take both non-forcible and forcible measures to remedy or to punish that breach. Forcible measures could range from measures short of war, such as armed reprisals,[1] or could take the form of war. War itself could be a relatively minor exchange of fire, even mere confrontation without hostilities, or it could be a full-scale bloody conflict the causes of which could be relatively minor.

Before this period of absolute sovereignty and its accompanying self-help regime of enforcement, theories of natural law argued for a hierarchy of norms within the concept of an international society (Bull, 1992, pp 71–2). Moving forward to the advent of the League of Nations in 1919, created in the aftermath of the failure of the system of self-help, there emerged structures as well as norms that were again suggestive of a more hierarchical approach. The Covenant of the League of Nations purported to regulate, if not prohibit, war, and the organization it established potentially had weak authority over States. Brierly argued that the League was based on the principles of consensuality and voluntarism (Brierly, 1946, p 92), a view that would suggest that the organization did not upset the pre-existing order. McNair on the other hand thought that the League marked a move away from a system of purely private law between consenting States towards a system of public law (McNair, 1930, p 112) indicating a more hierarchical

---

[1] *Naulilaa* case (1928) 2 *RIAA* 1052.

system of regulation.

The idea of an international organization, with some measure of authority over States, took an even firmer grip on the imagination of States during the Second World War. The UN was created in 1945, its Charter containing in Article 2(4) a basic rule prohibiting the threat or use of force in international relations, as well as creating machinery to promote and restore international peace and security. The prohibition of force, which itself formed a core norm in an emerging corpus of peremptory norms of international law (*jus cogens*) from which States could not derogate, immediately cut back on the type of measures a State could lawfully take in response to a breach of international law. Self-help was reduced to half its former size by the UN Charter. Although States were still permitted to take forcible action in self-defence in response to an armed attack against them, forcible measures beyond that were prohibited by the new legal regime initiated by the Charter. Although some States and writers have repeatedly tried to resurrect the concept of armed reprisals (Bowett, 1972a) there does not appear to be any general acceptance of an erosion of the statement of law made by member States of the UN in 1970: 'States have a duty to refrain from acts of reprisal involving the use of armed force.'[2]

The prohibition in 1945 of forcible measures of self-help left the position of non-forcible measures untouched but at the same time unclear. Clarity was lacking because the doctrines that had emerged over the centuries were inevitably subject to many interpretations. In addition, the UN itself was given significant power to require member States to impose non-forcible measures against miscreant member States by virtue of Article 41 of the Charter. The developing Inter-American system of collective security

[2] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, UN Res 2625 (XXV) (24 October 1970).

also provided for the application of such measures,[3] a trend that was to be followed by some other regional organizations. A self-help system of non-forcible measures deriving from an earlier period of international relations, had to coexist with a system of centralized 'sanctions' based on notions of hierarchy and governance. In addition to the uncertainty that existed between the institutional level and the customary level, there was also a lack of clarity in the relationship between the universal organization (the United Nations) and other organizations. Article 53(1) of the UN Charter seems to provide that any non-forcible measures taken by regional organizations that amount to 'enforcement action' requires the authorization of the Security Council.

The concept of lawful non-forcible measures survived the new world order of the post-1945 period. Article 2(4) of the Charter prohibited the 'threat or use of force', and this was clearly construed as military force (but see Paust and Blaustein, 1974, p 417). State practice in the immediate post-1945 period provided evidence of the continuing relevance of non-forcible measures. As Elagab states: '[r]egardless of whether the conditions of legality had been complied with in each case, the crucial feature was the very fact of such claims being staked at all. This provides a presumption of continuity of counter-measures as a viable mode of redress' (Elagab, 1988, p 38). In the first decade after the UN Charter the USA adopted, *inter alia*, measures freezing the assets of China, Bulgaria, Romania, and Hungary. The coinage of the term 'countermeasures' in the *Air Services Agreement* case of 1978[4] and the codification of countermeasures by the International Law Commission (ILC), culminating in Chapter III of the Articles on State Responsibility of 2001,[5] represent its consolidation in the structures of international law. The inclusion of countermeasures was seen as a way of at least partially filling the lack

---

[3] Articles 8, 17, and 20 Rio Treaty, 1947, 21 UNTS 77.

[4] *Air Services Agreement* case (1978) 54 ILR 303.

[5] See Report of the International Law Commission on the work of its Fifty-third Session, UN Doc A/56/10, adopted 9 August 2001. The Articles and the Commentary are found in Crawford, 2002. The Articles will be referred to as ARSIWA (Articles on Responsibility of States for Internationally Wrongful Acts). The references to the Commentary are to Crawford's text.

of ‘ways and means of redress’ in the Articles.[6]

Despite the proliferation of international institutions since 1945, the ILC was confident in asserting in 2001 that countermeasures are inherent in a decentralized system where ‘injured States may seek to vindicate their rights and to restore the legal relationship with the injured State which has been ruptured by’ an unlawful act.[7] As noted by Alland, ‘countermeasures are a mechanism of private justice’, the result of which are ‘contradictions inherent in a self-assessed (ie auto-interpreted or auto-appreciated) decentralized policing of an international *ordre public*’ (Alland, 2002, pp 1223, 1235). Provost is even more explicit in depicting the weaknesses of such a system when he writes that ‘the right of states unilaterally to assess a breach by another state and to validate what would otherwise be an illegal act has the potential of significantly destabilizing international relations’ (Provost, 2002, p xv). An example of this involved Gulf States imposing an embargo in June 2017 against Qatar for allegedly supporting terrorism, including the demand that Qatar close the Al-Jazeera media network as well as desist in its support for Hamas, the Muslim Brotherhood, and Hezbollah, and cease its relations with Turkey and Iran. Although these are problematic as countermeasures in the narrow sense described later,[8] they are nonetheless non-forcible measures of self-help taken by Saudi Arabia, the UAE, Bahrain, and Egypt, which demonstrate the weaknesses of self-declared victim States acting as judge, jury, and executioner.

While injured States remain entitled to take certain non-forcible actions within a bilateral context against States responsible for a breach of international law, sanctions imposed by the UN and other international organizations create a hierarchical relationship between the organization and the implementing States (Gowlland-Debbas,

---

[6] Arangio-Ruiz, 1991, p 7.

[7] Crawford, 2002, p 281.

[8] But see *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)*, Memorial of Bahrain, Egypt, Saudi Arabia, and UAE, 27 December 2018, 53-8.

2001, p 2). After 1945, and arguably in a weaker sense after 1919 (but see Brierly, 1932, p 68), there no longer exists a pure system of self-help, and this has affected practice, as will be seen. States wanting to take measures against a responsible State may go to international bodies for authority/legitimacy; indeed it could be argued that they ought to do this when they are not the direct victims of the unlawful act.

II. COUNTERMEASURES

A. DEFINITION OF COUNTERMEASURES

Since the first use of the term in 1978 by the arbitral tribunal in the *Air Services Agreement* case, the term 'countermeasures' has been used to indicate non-forcible measures. However, the following discussion will illustrate that this has not necessarily clarified the matter, for the related doctrines of retorsion, reprisals (in a non-forcible sense), economic coercion, and economic sanctions remain. In effect, following the ILC Articles of 2001 the concept of countermeasures is a fairly narrow one at one end of a spectrum of non-forcible measures that may be taken in international relations. At the other end of the spectrum are sanctions undertaken by international organizations. In between there is something of a grey area where regulation is rudimentary, indeed, arguably, non-existent. In this section, the focus is on countermeasures on the grounds that they have become perhaps the most clearly defined type of non-forcible measures, having been the subject of many years of study by the ILC. The ILC's concept of countermeasures is the one portrayed here, although it must be noted that it may well constitute an example of the ILC progressively developing international law. It should be noted that the ILC's Special Rapporteur on the matter, James Crawford, commented only a few years before the adoption of the Articles that 'at present there are few established legal constraints on non-forcible counter-measures' (Crawford, 1994, p 65). As Bederman suggests, 'the central conceptual mission' of the ILC's Articles on

countermeasures is ‘the search for a polite international society’ (Bederman, 2002, p 819). Further he contends that the articles on countermeasures represent a ‘profound impulse toward social engineering for international relations … imagining a time in international life when unilateral and horizontal means of enforcement through robust self-help will be a thing of the past’ (Bederman, 2002, p 831). Nevertheless, while the ILC purports to define and constrain countermeasures, in so doing it leaves question marks hanging over the legality of a large segment of State practice on wider non-forcible measures.

Countermeasures ‘are intrinsically unlawful, but are justified by the alleged failing to which they were a response’ (Alland, 2002, p 1221). In its final Articles on State Responsibility of 2001, the ILC defined countermeasures as non-forcible measures taken by an injured State in response to a breach of international law in order to secure the end of the breach and, if necessary, reparation.[9] Non-forcible countermeasures may only be taken in response to an internationally wrongful act, and only against the State responsible for that act.[10] If such measures are taken without fulfilling these conditions, they themselves will constitute an internationally wrongful act, giving rise to State responsibility and possible countermeasures. According to the ILC, countermeasures are limited to the temporary non-performance of one or some of the international obligations of the injured State owed to the responsible State.[11] Cassese’s summation is perhaps stronger than that of the ILC, but useful nonetheless. He states that ‘in the event of a breach of international law, the injured State is legally entitled to disregard an international obligation owed to the delinquent State’ (Cassese, 2005, p 302). In ILC terms, countermeasures are not intended to be punishment for illegal acts, rather they

---

[9] Ibid.

[10] Article 49(1) ARSIWA. See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7, paras 83–5.

[11] Article 49(2)(3) ARSIWA.

are ‘an instrument for achieving compliance with the obligations of the responsible State’. Countermeasures are taken ‘as a form of inducement, not punishment’. The ILC’s definition does not restrict States taking countermeasures to suspension of performance of the same or very similar obligation. However, countermeasures are more likely to accord with the conditions of proportionality and necessity if they are so taken. Such measures, which correspond to the obligation breached by the responsible State, are sometimes called ‘reciprocal countermeasures’.[12]

‘The suspension or temporary non-performance of a treaty obligation, quite often the suspension of a trade agreement, and the freezing of the assets of a State under international obligations are primary examples of countermeasures’.[13] In ILC terms the paradigmatic case is the *US-French Air Services Arbitration* of 1978. This case concerned the application of a bilateral air services agreement that existed between the two countries. France had objected, as being incompatible with the treaty, to the so-called ‘change of gauge’ or change of type of aircraft by PanAm (a US air carrier) on its flight from the USA to Paris via London. The French authorities prevented PanAm passengers from disembarking in Paris. By the time of arbitration, the USA had initiated (but had not implemented) measures which would have prohibited certain French flights to the USA. The arbitral tribunal found that the change of gauge by PanAm was permitted under the treaty and that the US retaliatory measures were permissible countermeasures, which were not disproportionate to the violative actions taken by France. The arbitral tribunal stated: ‘[i]f a situation arises, which in one State’s view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by general rules of international law, pertaining to the use of armed force, to affirm its rights through “countermeasures”.’[14] Of course, the case

---

12 Crawford, 2002, pp 282–6.
13 Ibid, p 286.
14 *Air Services Agreement* case (1978) 54 ILR 303, 337.

reveals the inherent problem with countermeasures, indeed with measures of self-help more generally, in that the crucial element, the determination of the initial wrongful act, is a subjective one. As Alland makes clear, it is this 'self-assessed' aspect of countermeasures which 'manifests the danger they represent in the international legal order: they open the possibility to all States to take prejudicial measures contrary to the obligations incumbent on them on the basis of subjective unilateral claims' (Alland, 2010, p 1129).

Countermeasures are distinct from suspension or termination of treaty obligations due to material breach of a treaty within the meaning of Article 60 of the 1969 Vienna Convention on the Law of Treaties (VCLT). Measures taken under Article 60 affect the substantive legal obligations of the State parties while countermeasures are concerned with the responsibility that has arisen as a result of the breach. The aim of countermeasures is to rectify the legal relationship and their application should always be temporary.[15] Article 60 of the VCLT deals with 'material breach' of a treaty, whereas countermeasures may be taken in response to any breach, as long as they are proportionate. Article 60 specifies a procedure for suspension or termination of treaty obligations for material breach, which differs from the procedures required to take countermeasures. Action under Article 60 of the VCLT must be confined to the treaty being breached, while countermeasures are not so confined (Elagab, 1988, p 164). Article 60 of the VCLT provides for the possibility of termination of the treaty, or obligation, while, in principle, countermeasures are only temporary.

It is possible that a non-forcible measure taken by a State can be classified as both a response to a material breach and a countermeasure if it meets the different set of requirements for each. The International Court of Justice considered arguments

---

[15] Crawford, 2002, p 282.

concerning countermeasures and material breach in 2011 in a case involving a dispute between the Former Yugoslav Republic of Macedonia (FYR Macedonia) and Greece over violations of an Interim Accord agreed in 1995 by the two States in the context of the dissolution of Yugoslavia. The Court found that Greece had violated the Accord by objecting to FYR Macedonia's admission to NATO in 2008. Greece attempted to justify this action as a response to a material breach of the Interim Accord by FYR Macedonia and as a countermeasure to the same breach. The Court did find that FYR Macedonia had breached the Accord by the use of a symbol (the 'Sun of Vergina'). The Court dismissed the argument that Greece's actions could be justified as a response to a material breach under Article 60 of the Vienna Convention on the basis that it was not a serious enough breach, and also because the violation by FYR Macedonia had ceased in 2004 so that Greece's action in 2008 could not be seen as a response to that breach. Neither could Greece's actions be justified as a countermeasure because such measures are taken for the purposes of achieving a cessation of a wrongful act, and Macedonia had ceased its wrongful act in 2004.[16]

B. COUNTERMEASURES AGAINST ORGANIZATIONS

Given the growth of international organizations possessing international legal personality, with rights and duties under international law, there appears no reason why countermeasures cannot be taken by States or other organizations against international organizations that have committed internationally wrongful acts, or by organizations that are the victims of internationally wrongful acts. In principle countermeasures should be available to any entity possessing international legal personality, although in

[16] *Application of the Interim Accords of 13 September 1995 (the Former Yugoslav Republic of Macedonia* v *Greece), ICJ Reports 2011*, p 644, paras 162–4.

the current state of international legal development such actors are generally confined to States and a significant number of intergovernmental organizations. The ILC's work on the responsibility of international organizations, started in 2002, made good progress until it came to the issue of countermeasures in its 2008 report.[17] Although certain draft articles on countermeasures were posited in the report,[18] there was clearly some disagreement among the members of the ILC as to the value of including articles on countermeasures by and against international organizations.[19] Nonetheless, the final Articles, adopted in 2011 and taken note of by the General Assembly, contain articles on countermeasures against and by international organizations,[20] most of which are similar in content to those governing State responsibility. The final Articles of 2011 try to balance the logic of countermeasures being available to counter unlawful acts committed by international organizations (as international legal persons) and the desire to prevent member States precipitously taking unilateral countermeasures against the organization for perceived internationally wrongful or *ultra vires* acts. Given the problems the UN has been faced with in the past, with France and the Soviet Union withholding their peacekeeping contributions on the basis of the alleged *ultra vires* actions of the General Assembly in mandating peacekeeping forces in the Middle East and the Congo in the late 1950s and early 1960s, and the US practice of withholding financial contributions in the 1980s and 1990s, there is clearly a potential problem in recognizing that member States can take countermeasures against organizations in response to perceived unlawful acts (but see Tzanakopoulos, 2011, pp 189–92).

Arguably, however, States that believe they are victims of unlawful actions by an organization (for example by being targeted for economic sanctions) have very limited

---

17 ILC Report of Sixtieth Session (2008), A/63/10.

18 Ibid, paras 141–4.

19 Ibid, paras 148, 163.

20 Articles on the Responsibility of International Organizations, Articles 51–7, UN Doc A/66/10 (2011); taken note of in GA Res 66/100 (2011).

options to challenge the legality of such measures (with no right to bring a claim against an international organization before the International Court of Justice, for instance). Without giving member States means of holding organizations to account, arguably they should have the right to take countermeasures against the organization (O'Connell, 2008, pp 267, 271). Organizations, on the other hand, normally possess a number of means of controlling their members—expulsion, suspension, other non-forcible measures such as sanctions, and, as international legal persons, countermeasures (Dopagne, 2011, pp 178–91).

Ultimately, the 2011 Articles on the Responsibility of International Organizations came down on the side of the organization by providing a number of restrictions on when countermeasures can be taken against it. The Articles permit an injured State or organization to take countermeasures against an international organization for an internationally wrongful act. However, they contain a number of limitations in addition to the normal conditions attaching to countermeasures. Some of those additional limitations are aimed at reducing the over-use of countermeasures by disgruntled member States of the UN and other organizations. These limitations include a general one that provides that 'countermeasures shall, as far as possible, be taken in such a way as to limit their effects on the exercise by the responsible international organization of its functions'. Furthermore, countermeasures against a responsible organization: shall not be inconsistent with the rules of the organization; shall not be used where other appropriate means are available for inducing compliance; and, most significantly, shall not be taken by an injured State which is a 'member of a responsible international organization against that organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided

for by those rules'.[21] The 'rules of the organization' are defined as 'the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the Organization'.[22] These rules would clearly include the obligation to pay expenses under Article 17(2) of the Charter and equivalent provisions in the constituent treaties of the UN's specialized agencies. Certainly, the views of UNESCO on these restrictions suggest that UN organizations are not too concerned that the Articles will open them up to a rash of countermeasures by disgruntled member States: 'for international organizations of quasi-universal membership such as those of the United Nations system, the possibility for their respective Member States to take countermeasures against them would either be severely limited by the operation of the rules of those organizations, rendering it largely virtual, or would be subject to a *lex specialis*—thus outside the scope of the draft articles—to the extent that the rules of the organization concerned do not prevent the adoption of countermeasures by its Member States.'[23]

C. REPRISALS AND RETORSION

The ILC's definition of countermeasures has internal coherency. However, its failure to address the related concepts of non-forcible reprisals and retorsion leaves the impression that other types of non-forcible action taken by States remain unregulated and, on one view of international law, therefore permitted.[24] This means that, in reality, while States can engage in countermeasures that are quite specific, they may also be able to engage in wider non-forcible measures. Such measures may punish the responsible State (reprisals) as opposed to inducing it into compliance (countermeasures). On the other

---

[21] Articles on the Responsibility of International Organizations, 2011, Articles 51(1) 51(4), 52(1), 52(2).

[22] Ibid, Article 2(b).

[23] ILC Report of the Sixty-third Session, UN Doc 66/10 (2011), pp 151–2.

[24] *See 'Lotus', Judgment No 9, 1927, PCIJ, Ser A, No 10*, p 18.

hand, it could be argued that this approach, essentially permitting other non-forcible measures to be taken by States, makes something of a nonsense of the painstaking process of defining countermeasures. Why spend so many years defining lawful countermeasures, unless it is based on a presumption that wider action by States is unlawful? There was certainly a move by the ILC away from conflating countermeasures and reprisals, and countermeasures and sanctions.[25] The separation of these concepts though is not, by itself, concrete evidence that unilateral non-forcible measures, not coming within the ILC's doctrine of countermeasures, are unlawful. This issue will be returned to in particular when looking at wider practice on economic coercion and autonomous (or unilateral) sanctions.

Retorsion is conduct that does not involve the suspension of international obligations owed by the injured State to the responsible State, even though usually taken in response to unlawful acts on the part of the responsible State. 'Acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programs.'[26] Countermeasures could take the form of a suspension of a trade agreement, whereas acts of economic retorsion are based on a State's freedom to trade or not to trade (or deal more generally) with other States, although embargoes may well be both punitive and breach principles of international law, such as the principle of non-intervention. In general, an 'act of retorsion is an unfriendly but nevertheless lawful act by the aggrieved party against the wrongdoer. As such retorsion is not circumscribed by the international legal order' (Zoller, 1984, p 5). In imposing non-forcible measures against Iran, the US justified its measures under the security exception in Article XX of the Treaty of Amity, Economic Rights and Consular Relations agreed between Iran and the US in 1955,

---

[25] See the writings of earlier ILC Rapporteurs where these terms were used without real distinction: Arangio-Ruiz, 1994, p 21; Ago, 1979, p 47.

[26] Crawford, 2002, p 281.

which Iran had alleged the US had broken. In its judgment on aspects of Iran's claim under the 1955 Treaty, the ICJ dismissed the US arguments under Article XX of the Treaty as unconvincing, therefore concluding that the US had breached the treaty for which it was responsible and was under an obligation to compensate Iran.[27] Without that impartial judgment from a judicial body, the legal status of the non-forcible measures imposed by the USA would have remained uncertain.

Some writers, however, see countermeasures as encompassing both non-forcible reprisals and retorsion (Abi-Saab, 2001, p 38, citing Schachter, Virally, and Leban in support). In general Abi-Saab sees them as 'reactions permitted in international law to illegality' (Abi-Saab, 2001, p 37). However, that view was not adopted by the ILC, which, at least in its final Articles, keeps the concepts distinct and only concerns itself with delimiting countermeasures, keeping them apart from retorsion. Furthermore, the ILC, together with the International Court of Justice, distinguish countermeasures from reprisals by saying that countermeasures are instrumental while reprisals are punitive.[28]

Thus, non-forcible measures taken by a State may constitute countermeasures if they arise as a result of the suspension of international obligations owed to the responsible State. If they are not the result of the non-fulfilment of an international obligation owed to the responsible State, then they may be acts of retorsion. Whether this means that victim States have freedom to impose sanctions against States that have violated international law will be considered later. At first sight it seems odd that acts of retorsion, which could be more damaging than countermeasures, may be acceptable but this seems to reflect the underdeveloped state of international law in this area. It is the case that acts of retorsion, while not governed by a specific bilateral legal relationship between the responsible State and the injured State, are still governed by the limitations

[27] *Certain Iranian Assets (Islamic Republic of Iran v USA)*, ICJ Reports 2023, paras 108, 231.

[28] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7, paras 83–5.

of necessity and proportionality, and by general principles of international law, such as those prohibiting intervention or violation of basic human rights norms.

Cassese defines retorsion as 'any retaliatory act by which a State responds, by an unfriendly act not amounting to a violation of international law, to either (a) a breach of international law or (b) an unfriendly act, by another State'. He gives examples of the breaking off of diplomatic relations, discontinuance or reduction of trade/investment, withholding economic assistance, expulsion of nationals, heavy fiscal duties on goods from the offending State, or strict passport regulations (Cassese, 2005, p 310). As can be seen, these measures may be much more damaging than the fairly restrictive doctrine of countermeasures.

D. LIMITATIONS UPON COUNTERMEASURES AND OTHER NON-FORCIBLE MEASURES TAKEN BY STATES

The doctrine of countermeasures as defined by the ILC is specific. First of all, the response to an unlawful act can only be the suspension of an international obligation owed to the responsible State. This distinguishes countermeasures from reprisals and retorsion. Further, there are numerous other limitations governing the form and extent of that suspension. Countermeasures must not be forcible. This clearly applies to other types of non-forcible measures.[29] Furthermore, 'anticipatory non-forcible counter-measures are unlawful; since by definition they precede actual occurrence of breach' (Elagab, 1988, p 63). The same principle must be applicable to all non-forcible measures taken by States, since they are based on the occurrence of unlawful or

[29] Article 50(1)(a) ARSIWA; Article 2(4) UN Charter; *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, UN Res 2625 (XXV) (24 October 1970).

unfriendly acts (but see Buchan, 2022, pp 2-3). Countermeasures should be directed against the responsible State and not third-party States.[30] This too seems applicable to other non-forcible measures.

Countermeasures are temporary and should, whenever possible, be reversible so the future legal relations between victim State and responsible State can be restored.[31] If the measures taken punish the responsible State by inflicting irreparable damage on it, then they are not countermeasures.[32] Such punitive measures would appear to be non-forcible reprisals, the legality of which is not discussed by the ILC, but that body's movement away from the notion of punishment as the rationale for countermeasures indicates uncertainty about the legality of reprisals. This is supported by the International Court's statement in the *Gabčíkovo* case that the purpose of countermeasures is to 'induce the wrong-doing State to comply with its obligations under international law, and that the measures must therefore be reversible'.[33] It is noticeable that James Crawford, then Rapporteur, stated that the 'international community has moved away from the classical terminology of reprisals and towards the notion of countermeasures as temporary, reversible steps' (Crawford, 2001, p 66). As with many changes in international law it is not possible to draw a clear line between the demise of one concept or principle and the emergence of another; the transition is gradual.

Countermeasures and other non-forcible measures must be proportionate (Hofer, 2020, p 399). According to the ILC, they 'must be commensurate with the injury suffered, taking account of the gravity of the internationally wrongful act and the rights in question'.[34] Disproportionate countermeasures give rise to the responsibility of the

---

30 Article 49(1)(2) ARSIWA.
31 Articles 49(2)(3), 53 ARSIWA.
32 Crawford, 2002, p 287.
33 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7, paras 56–7.
34 Article 51 ARSIWA.

State taking them.[35] Taking a different approach, Franck asserts that the response must be proportionate to the initial unlawful act, equivalent to the biblical eye for an eye, tooth for a tooth approach (Franck, 2008, pp 715, 763). However, there appear to be difficulties in both the approaches of the ILC and Franck. The issue ought not to be one of proportionality to the unlawful act or the injury it causes, because this would suggest that countermeasures are taken to punish the responsible State, thus confusing countermeasures with reprisals. As Cassese states, 'in current international law the purpose of countermeasures must be seen … in impelling the offender to discontinue its wrongful conduct or to make reparation for it. If this is so, the proportionality must be appraised by establishing whether the countermeasure is such as to obtain this purpose.' This should mean that in certain cases a weak State may be subject to countermeasures that are quantitatively less than the injury suffered by a powerful State, if the measures are sufficient to bring an end to the illegal act (Cassese, 2005, p 306). The International Court has found that non-forcible countermeasures were disproportionate in the *Gabčíkovo-Nagymaros* case, although it provided little by way of explanation of why Czechoslovakia's assumption of control of part of the Danube in response to Hungary's violation of a treaty obliging it to undertake construction to aid shipping, energy development, and flood control on the section of the Danube shared by both countries was disproportionate.[36] This adds to the impression of indeterminacy in the principle of proportionality despite its possible elevation to a general principle of international law (Franck, 2008, p 716).

According to the ILC, countermeasures must not violate basic obligations under

---

[35] Crawford, 2002, p 294. See *Naulilaa* case (1928) 2 *RIAA* 1052 (disproportionate); *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7, para 87 (disproportionate); *Air Services Agreement* case (1978) 54 ILR 303 (proportionate).

[36] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7, para 87. See also Scobbie, 2004, p 1129 for discussion as to whether Israel's construction of a security wall is better analysed as a purported non-forcible countermeasure rather than the purported exercise of the right of self-defence, dismissed by the International Court in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004*, p 136, paras 139–40.

international law (namely those prohibiting the threat or use of force, protecting fundamental human rights,[37] or concerning obligations of a humanitarian character), and those arising under *jus cogens*. Countermeasures should not affect dispute-resolution procedures that are applicable. Countermeasures cannot be taken to impair consular or diplomatic inviolability.[38] Diplomatic law provides its own legal regime for dealing with illicit activities by members of diplomatic or consular missions.[39] 'If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations.'[40] Countermeasures must follow an unsatisfied demand by the injured State that the responsible State comply with its international obligation(s). The injured State must also notify the responsible State that it intends to take countermeasures and offer to negotiate, except in the case of urgent countermeasures necessary to preserve the injured State's rights (eg temporary staying orders or the temporary freezing of assets).[41] Furthermore, they must be suspended if the wrongful act has ceased and the dispute has been submitted to a tribunal with binding authority.[42]

The limitations discussed in this section are arguably applicable to other more controversial claims to non-forcible measures, with the exception of the suspension of diplomatic relations that seems to be an accepted act of retorsion in international relations. This seems to contradict the 'resident hostages' argument mentioned earlier. This is illustrative of the problem in defining countermeasures without addressing the

---

[37] Especially the non-derogable rights contained in the International Covenants—Crawford, 2002, p 289. See also CESCR General Comment No 8 (1997), UN Doc E/C.12/1997/8, 5 December 1997, paras 1 and 5.

[38] Article 50(1)(2) ARSIWA.

[39] *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, p 3, paras 84–6.

[40] Crawford, 2002, pp 292–3.

[41] Ibid, p 299.

[42] ARSIWA, Article 52. See also *Application of the Interim Accord of 13 September 1995 (the Former Yugoslavia Republic of Macedonia* v *Greece*), *ICJ Reports 2011*, p 644, para 164.

issue of retorsion. In general, Elagab states that in the case of a 'self-contained regime', where such a regime 'possesses its own mechanism for redressing the wrongful conduct, countermeasures should not be imposed' (Elagab, 1988, p 218). He refers to diplomatic law, but the same can be said of the WTO's procedures for dispute settlement, followed, if necessary, by a form of institutionalized countermeasures. Although they look like countermeasures, they are not measures imposed by dint of custom but by reason of the GATT treaty regime. They are thus similar in appearance to countermeasures, but the source of the rights and duties is the special treaty regime, and the limitations may be different (but see Gazzini, 2006, pp 737–41).

Thus, countermeasures may be excluded by special rules (eg a treaty which states that its provisions cannot be suspended)[43] or by a regime that dictates the way in which measures are taken by victim States (the primary example is the WTO).[44] Countermeasures are thus said to be 'residual' remedies,[45] reflecting the fact that States may choose to move away from a decentralized system of self-help by developing treaty regimes with their own processes of enforcement.

E. COUNTERMEASURES AND THIRD STATES

We turn now to the question of whether countermeasures as defined by the ILC can be taken by States other than the State directly injured. According to the ILC, countermeasures are normally taken by a State injured by an internationally wrongful act of another State. However, responsibility may be invoked by States other than the injured State acting in the collective interest.[46] Responsibility is not invoked by these third States as a result of injury to themselves but as a result of breach of an obligation

---

[43] EU treaties provide for their own system of enforcement—Crawford, 2002, p 291.

[44] The WTO system requires authorization from the Dispute Settlement Body before a member can take measures against another—Crawford, 2002, p 291.

[45] Crawford, 2002, p 283.

[46] Ibid, p 276.

to a group of States of which it is a member—obligations *erga omnes partes* (eg regional environmental or human rights regimes), or to the international community as a whole—obligations *erga omnes* (eg laws prohibiting genocide, aggression, slavery, racial discrimination, and self-determination).[47]

However, the ILC is careful to distinguish third States invoking responsibility from them taking countermeasures. The latter issue is left open. Such third States can demand cessation and performance in the interests of the injured State or the beneficiaries of the obligation breached.[48] 'The question is to what extent these States may legitimately assert a right to react against unremedied breaches',[49] *viz* by taking countermeasures against the responsible State. One problem in taking collective countermeasures is that of proportionality, although it is difficult to prove a violation of this principle if the aim is to stop a breach of an obligation owed *erga omnes*. In the absence of institutional sanctions imposed, for example, by the UN Security Council under Chapter VII of the Charter,[50] the legality of such measures is in doubt, though there seems to be some State and institutional practice to support the proposition that such measures are allowed (Katselli Proukaki, 2010, pp 90–209). However, practice is inconsistent, making the drawing of any conclusions as to *opinio juris* extremely difficult, if not impossible (Hofer, 2017, p 175).

Further, it is inaccurate to portray such 'collective' countermeasures as a replacement for centralized collective action through an international organization. The term 'collective countermeasures' gives the 'illusion of concerted action when in reality such collective countermeasures are individual initiatives—even though there is more

---

47 Article 48(1) ARSIWA. See *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ Reports 1970*, p 3, paras 33–4; *East Timor (Portugal* v *Australia), Judgment, ICJ Reports 1995*, p 90, para 29.

48 Article 48(2) ARSIWA.

49 Crawford, 2002, p 302.

50 Ibid.

than one such initiative at the same time' (Alland, 2002, p 1222). In addition, the subjective assessments of States as to whether to impose such countermeasures undermine the enforcement of these crucial norms (Alland, 2002, p 1237). However, it is true to say that to expect international institutions such as the UN Security Council to replace this subjective assessment with something more objective when considering whether to impose non-forcible measures under Chapter VII of the UN Charter would, in reality, 'be replacing one subjectivity (of states) by another (of the Security Council)' (Klein, 2002, p 1249). It is thus premature to argue that the UN Security Council's sanctioning machinery has, or indeed should, replace a system of collective countermeasures even though that system is very weak (Bills, 2020, p 117). In reality there currently exist two weak systems of non-forcible sanctions for the enforcement of community norms, one decentralized and one (partly) centralized.

Indeed, the practice arising from the decentralized system mentioned in the ILC's commentary leads it to conclude that 'the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognized entitlement of [third] States … to take countermeasures in the collective interest'[51] (but see Sicilianos, 2010, p 1148). Hence Article 54 of the ILC Articles states that a third State's right to take 'lawful' measures is not prejudiced by any of its other provisions on countermeasures. What are lawful measures in this context is an issue that is, in effect, left open (Klein, 2002, pp 1253–5; but see Alland, 2002, p 1233). Bederman's summary of the ILC's position on collective countermeasures characterizes it as the 'only possible political solution', which was 'to defer debate to another day and to allow customary international lawmaking processes to elaborate any conditions on the use of collective countermeasures' (Bederman, 2002, p 828).

---

[51] Ibid, p 305.

The ILC mentions the US prohibition in 1978 of export of goods and technology to Uganda and all imports from Uganda in response to alleged genocide by the government of Uganda.[52] This certainly appears to be a response to a breach of an obligation owed *erga omnes*, but it did not only concern the suspension of US treaty obligations, and therefore went beyond countermeasures as defined by the ILC. The US response appeared to be unilateral non-forcible measures, in effect sanctions, imposed to enforce community norms. The ILC also refers to measures taken by Western States against Poland and the Soviet Union in 1981 in response to internal repression by the Polish government. Measures included suspension of treaty landing rights for scheduled civilian aircraft. These actions seemed to take the form of countermeasures but were they a response to a breach of an obligation owed *erga omnes*? It is still difficult, though not impossible, to argue for a right to democracy in the twenty-first century, but in 1981 such an argument was mainly a political, not legal, one. The US countermeasures in the form of the suspension of treaty landing rights against South African airlines in 1986 seem to be a clearer example given the odium attached to the system of apartheid, and its categorization as a crime against humanity.

The examples cited by the ILC of non-forcible measures imposed by regional organizations, mainly the EU, illustrate the even greater legal confusion when the analysis of such measures is elevated from the purely bilateral. In 1982 the EC, along with Australia, Canada, and New Zealand, adopted trade sanctions against Argentina in response to its invasion of the Falklands. Before the GATT, the EC justified these as measures taken by the 'Community and its Member States' on the basis of their 'inherent rights', meaning the right of self-defence (Zoller, 1984, p 105). In 1990 (before the UN Security Council imposed sanctions) the EC and USA imposed trade sanctions and froze Iraqi assets in response to Iraq's invasion of Kuwait. In both of

---

[52] Ibid, pp 302–4.

these episodes the non-forcible measures were in response to a breach of an obligation owed *erga omnes* (not to commit aggression) but they seemed to extend beyond mere countermeasures to take the form of multilateral economic sanctions. In 1998, in response to the crimes against humanity being committed in Kosovo, the EU imposed a flight ban and froze Yugoslav assets in response to the humanitarian crisis in Kosovo. In some countries the flight ban was a product of the suspension of treaty rights. The suspension of treaty rights and the freezing of assets seemed to be clear examples of countermeasures undertaken in response to a breach of a fundamental norm. Nevertheless, the EU has not limited itself to clear countermeasures in other instances. In response to violence and human rights violations that marred the run-up to the Presidential elections in Zimbabwe in March 2002, the EU imposed a travel ban, a freeze on financial assets, and an arms embargo. The Commonwealth, on the other hand, simply suspended Zimbabwe from membership, a power that is purely institutional. Both institutional responses do show, however, that there is practice that suggests that denial of democracy/democratic rights could now be seen as a breach of an obligation owed *erga omnes*. However, it is too early to state that this has crystallized into a rule of customary law given the uncertainty about the legal status of third-party countermeasures.

There is, however, growing practice that shows that States frequently resort to collective or third party non-forcible measures when there are clear breaches of community norms protected by obligations owed *erga omnes*, especially when the UN Security Council has been unable to act, for example Western States' measures against Russia in response to its military interventions in Ukraine starting in 2014, and EU, Arab League, and other third party non-forcible measures in response to the Syrian regimes crimes against humanity committed there since 2011 (Dawidowicz, 2017, pp 3–5). The imposition of sanctions by, *inter alia*, the US, UK and EU against Russian

assets, institutions and individuals in response to Russia's invasion of Ukraine in 2022 has been analysed in terms of its compatibility with third-party or collective countermeasures. In this regard, Kamminga examines arguably the most damaging sanction imposed on Russia and concludes that 'freezing Russia's foreign Central Bank assets was a reversible measure aimed at inducing Russia to halt its aggression against Ukraine. As such, it was permissible as a third-party countermeasure aimed at the cessation of a serious breach of an obligation under a peremptory norm of international law' (Kamminga, 2023, p 14).

What the examples we have described illustrate is that State and institutional practice is confused in a number of ways. First the wrongful acts involved are not always clearly breaches of obligations owed *erga omnes*. Secondly, non-forcible measures, especially trade sanctions, are not always a product of non-performance of existing obligations. Thirdly, some of the practice is institutional rather than by individual States, though the line between them is not clear. Zoller expresses doubts about the imposition of sanctions by regional organizations, in the sense of whether they are actually deploying sanctions as international legal persons, or whether, in reality 'the organization acts less as an organization than as a collectivity of the member States as a whole. When countermeasures are undertaken under these circumstances, it is legally hazardous to consider that they can genuinely be attributed to the organization as such' (Zoller, 1984, p 104). Zoller views the EC measures taken against Argentina in 1982 following its invasion of the Falklands, and against the Soviet Union in 1981 following the imposition of martial law in Poland, as a product of political cooperation by States, despite the fact that the measures against Argentina were imposed by a regulation adopted under Article 113 of the EEC Treaty (Zoller, 1984, pp 104–5). The line between countermeasures and sanctions can be unclear though the justification for the latter 'does not derive from general international law' (as with countermeasures), 'but

from the constituent instrument of the organization' (Alland, 2010, p 1135).

Crawford casts doubts on the role in international law of obligations *erga omnes*. The ICJ inspired the concept in the *Barcelona Traction* case but in a dictum wholly inapplicable to the case. When the Court was faced in the *Second South West Africa*[53] and the *East Timor* cases with concrete arguments based on *erga omnes*, it shied away from the application of the concept (Crawford, 2001, p 64). This may indicate doubts about the legal basis of collective measures taken outside the UN, by other organizations or third States. In reality, they are a modern form of non-forcible measure or sanction that are taken outside the narrowly defined countermeasures regime. They are, in essence, in the grey area between the doctrine of countermeasures as defined by the ILC, and the imposition of centralized sanctions. In that grey area the failure by the UN Security Council to impose sanctions when community norms against aggression and crimes against humanity are being breached is leading States and other organizations increasingly to take non-forcible measures against the responsible State.

Cassese suggests that in the case of countermeasures taken by third States in response to 'aggravated responsibility' (ie breach of fundamental rules), a precondition is that they have sought to bring the matter before an international organization. This can be the UN or a regional organization, with a view to settlement or the adoption of sanctions. This precondition is 'dictated by the inherent nature of this class of responsibility. This responsibility arises out of a gross attack on community or "public" values. The response to the wrongdoing must therefore be as much as possible public and collective.' However, 'if those bodies take no action, or their action has not brought about cessation of the wrong or adequate reparation … all States are empowered to take peaceful countermeasures on an individual basis' (Cassese, 2005, p 274). Although this

---

53 *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, p 6.

seems to be a useful suggestion, it is more by way of *de lege ferenda*, given that States do not always report to IGOs first. It also shows that Cassese does not think that regional or indeed individual countermeasures are subject to any need for prior UN *authorization*.

It certainly appears to be the case that regional organizations have in their practice taken non-forcible measures against member and non-member States without seeking authority from the Security Council. Practice by the OAS against Cuba and Venezuela in the early 1960s and against Haiti in the early 1990s, as well as the measures taken by the EU against Yugoslavia in the 1990s, all without UN authority or preceding UN measures, suggest that the requirement in Article 53 of the UN Charter that 'enforcement action' needs the authorization of the Security Council does not cover non-military, as opposed to military, coercive measures (see Charron and Portela, 2015, p 1369 (on the African Union)). Of course, if the Security Council goes on to take non-forcible measures under Article 41 of the UN Charter after determining that the situation is a threat to the peace, the Security Council 'takes over, and individual States may only take action to the extent allowed by the UN Charter (individual or collective self-defence), or recommended, authorized, or decided upon' by the Security Council (Cassese, 2005, p 275). This is achieved by dint of Article 25 of the Charter, which makes Security Council decisions binding on members of the UN. Article 103 gives obligations arising out of the UN Charter pre-eminence over obligations arising under any other international treaty, although it is not clear that this affects member States' customary duties (see Brzoska, 2015, p 1339).

III. ECONOMIC COERCION

While the ILC has defined lawful countermeasures with a high degree of abstraction and in quite a narrow way, thereby implicitly excluding reprisals, the reality of international

relations seems to be very different. Powerful States do not always appear to be constrained by the niceties of the requirements of countermeasures, they do not simply suspend obligations, they do not simply seek to remedy the illegality; what they seek is coercion and punishment by the application of sanctions often of an economic nature. While preferring a collective umbrella for these actions if possible, the USA, for example, is prepared to go it alone if necessary. Its sanctions regimes against Iran first imposed in 1979 and those against the Soviet Union in 1980 are cases in point. Neither could be authorized by the Security Council, and so the USA imposed them unilaterally. This has led one leading US commentator to state that 'the suggestion that economic sanctions are unlawful unless approved by the Security Council (or by a regional organization such as the OAS) is obsolete'. Furthermore, he states that 'sanctions have become sufficiently common—and often better than the alternatives—to have become tolerated (not to say accepted) as a tool of foreign relations' (Lowenfeld, 2001, p 96). Furthermore, US practice includes the imposition of extraterritorial sanctions (Beaucillon, 2016, p 103).[54] Even when the Security Council does agree on sanctions, for instance against North Korea for WMD proliferation,[55] the USA's own non-forcible measures, though largely similar, make no reference to them.[56]

The practice of unilateral or autonomous sanctions by States, singularly or collectively, is scattered amongst a handful of states. Along with the USA, other Western states explicitly legislating for such measures include the UK, Australia and New Zealand (White, 2021, pp 61-4). In 2018, the UK adopted the Sanctions and Anti-Money Laundering Act, which came into force upon the UK's withdrawal from the EU. This legislation embodies a right to impose 'autonomous sanctions' against other states and non-state actors on the basis that the UK will no longer be able to benefit from the EU's collective sanctioning competence. The idea that powers belonging to the EU as

---

[54] See, for example, US Helms-Burton Act 1996 and the D'Amato-Kennedy Act 1996 discussed in Cassese, 2005, p 305.

[55] See, for example, SC Res 1874 (12 June 2009) and, more recently, SC Res 2371 (5 August 2017).

[56] Executive Order 13466, promulgated by President Bush on 26 June 2008, renewed by President Obama on 24 June 2009.

an international organization with separate legal personality could be straightforwardly claimed by the UK as a non-EU member state Act does not withstand scrutiny unless there is a separate international, and not merely national, legal basis for such "autonomous" or unilateral sanctioning powers. The envisaged measures could potentially go beyond the conceptual framework enveloping countermeasures, for example such measures can be imposed under section 2 of the 2018 Act in order to 'promote respect for democracy, the rule of law and good governance', which would not necessarily breach international law.

The growing practice of autonomous sanctions reflects a view of international law that existed before 1945. Writing in 1933, Lauterpacht stated that 'in the absence of explicit conventional obligations, particularly those laid down in commercial treaties, a state is entitled to prevent altogether goods from a foreign state from coming into its territory'. The prevention of trade going the other way from the victim State to the responsible State seemed equally permissible in the pre-Charter period. Further, this is justified on the basis that 'in a community from which war in its technical sense has been eliminated and which has not reached the stage of moral perfection, pacific means of pressure are unavoidable. To prohibit them would mean to court the more radical remedy of war' (Lauterpacht, 1933, pp 130, 140). In a modern sense this still appears to be the case, subject to the requirements of the multilateral regime of the WTO. Non-forcible measures, ranging from countermeasures in the ILC sense to punitive economic sanctions, can be justified under the view that 'restrictions upon the independence of States cannot be presumed',[57] in other words on the basis of a State's freedom to trade. However, this basic tenet of sovereignty has to be balanced against another tenet—that of non-intervention. The sovereign freedom of a State must always be balanced against the infringement of the sovereignty of other States.

To take two obvious instances—the Arab oil embargo of 1973–4, and the US

[57] '*Lotus', Judgment No 9, 1927, PCIJ, Ser A, No 10*, p 18.

embargo against Cuba in place since 1962: these were much more coercive, hurtful, and intrusive than the regimes of countermeasures or acts of retorsion outlined by the ILC. Their motivations were political—to support the Palestinians and to undermine a communist regime respectively—they were not simply about the suspension of obligations in response to an illegal act in order to try and remedy that act.

Such embargoes appear to breach the law as stated in several General Assembly resolutions that prohibit coercive economic intervention that is intended to undermine the territorial integrity or political independence (and arguably other sovereign rights) of the target States.[58] It is interesting to note too that the General Assembly has regularly called for the ending of the US economic, commercial, and financial embargo against Cuba and, in doing so, it recalls the principle of non-intervention.[59] The problem is that State practice does not appear in conformity with this law (Bowett, 1972b, p 4). Lillich outlines a 'general principle that serious and sustained economic coercion should be accepted as a form of permissible self-help only when it is also compatible with the overall interests of the world community, as manifested in the principles of the UN Charter or in decisions taken or documents promulgated thereunder' (Lillich, 1975, p 366). However, this is suggested by way of *de lege ferenda*. Furthermore, the approach advocated by Lillich and Bowett is that nonforcible, principally economic activity and measures, must be presumed to be lawful unless there is evidence of intent by the sanctioning State—'measures not illegal per se may become illegal only upon proof of an improper motive or purpose' (Bowett, 1972b, pp 3–7). Given the unclear state of international law, that presumption could equally be replaced by the opposite proposition that such measures that interfere with the sovereign rights of another State

[58] GA Res 2131 (21 December 1965: Non-intervention); GA Res 2625 (24 October 1970: Friendly Relations); GA Res 3171 (17 December 1973: Permanent Sovereignty over Natural Resources); GA Res 3281 (12 December 1974: Charter of Economic Rights and Duties of States).

[59] Starting with GA Res 47/19 (24 November 1992).

are unlawful—that is certainly the General Assembly's view.[60]

Elagab considers State practice and Assembly resolutions and concludes rather ambivalently (but perhaps accurately) that 'there are no rules of international law which categorically pronounce either on the prima-facie legality or prima-facie illegality of economic coercion'. However, he is of the opinion that this does not leave economic coercion unregulated by international law; rather that 'individual rules of international law may be applied to determine the legality of economic conduct on a given occasion'. He seems to suggest that while non-forcible measures may involve some element of coercion, their regulation is subject to a separate legal regime (Elagab, 1988, pp 212–13), though this regime is subject to limitations including principles of international law. Thus, the sanctions against Cuba by the USA go far beyond countermeasures (and, indeed, reprisals and retorsion); they amount to coercion (White, 2015, pp 125–54). This is then subject to applicable rules of international law, such as *jus cogens* and fundamental human rights standards, and, it is argued here, to the principle of non-intervention, which (despite significant erosion over the years) has a core element prohibiting coercion of political independence (Boisson de Chazournes, 2010, pp 1209–11).

If a State wishes to overcome the principle of non-intervention and subject another State to sanctions then it has to seek authority from an international organization, even in the case of breaches of obligations owed *erga omnes*, unless the State confines itself to countermeasures. The UN Security Council clearly has the competence to override the domestic jurisdiction limitation in Article 2(7) of the UN Charter when acting under Chapter VII. The extent of this competence and the issue of whether other international organizations also possess it will now be turned to.

---

[60] See also GA Res 69/180 (18 December 2014, Human Rights and Unilateral Coercive Measures).

IV. SANCTIONS

A. UNDERSTANDING SANCTIONS

Non-forcible countermeasures, reprisals, and acts of retorsion clearly continue to occur in international relations. Analysis so far has raised a presumption against the legality of non-forcible measures that go beyond the doctrine of countermeasures as defined by the ILC, unless they are imposed for breaches of community norms (*erga omnes*) normally through institutional mechanisms. Reprisals are therefore illegal if they are imposed with the purpose of punishment or coercion of the sovereign will of the target State, and by means that are designed to achieve these ends. Punitive measures and deeper coercion than necessary to force the responsible State to stop its illegal act are best seen as sanctions. Of course, in a general sense all measures designed to enforce the law can be seen as sanctions. Conceptually, Kelsen depicted law as in essence a coercive order, an organization of force, a system of norms providing for sanctions (Kelsen, 1945). Despite the fact that sanctions exist under international law, their function and purpose are less clear when compared to sanctions under the domestic system, a disparity that has led to controversy about whether sanctions exist at all in international law.

Brierly notes that the ‘real difference … between municipal and international law is not that one is sanctioned and the other is not, but that in the one the sanctions are organized in a systematic procedure and that in the other they are left indeterminate. The true problem for consideration is therefore not whether we should try to create sanctions for international law, but whether we should try to organize them in a system’ (Brierly, 1932, p 68). Similarly Kunz observes that:

<Start Extract>

> the alleged absence of sanctions has been and is today the principal argument of those who deny that the rules of international law have the character of legal

rules. But general international law *has* sanctions … This is not a unique feature of international law, but it is common to all primitive, highly decentralized legal orders, whether municipal or international. Such legal orders have no central organs either for the making or application of legal rule or for the determination of the delict or the execution of sanctions. All these functions must be left to the members of the legal community; in international law, to the sovereign states. There are no collective but only individual sanctions, carried out by way of self-help; there is no monopoly of force at the disposal of a central law-enforcing organ; there is no distinction between criminal and civil sanctions; the sanctions are based on collective, not individual responsibility. (Kunz, 1960, p 324)

<End Extract>

While Kunz was writing at the height of the Cold War, with no real practice by the UN on sanctions, in the post-Cold War period it might be argued that there now exists a central sanctioning organ—the UN Security Council.

Schachter attributed the decentralized nature of sanctions under international law to an indifferent attitude in the international legal community to enforcement in general rather than to a formal system of structuring between law and politics. Accordingly,

<Start Extract>

for a long time compliance and enforcement were on the margins of UN concern. Like somewhat backward members of a family, their place was vaguely recognized, but not much was expected from them. The busy world of UN law-making and law applying carried on pretty much without serious consideration of means of ensuring compliance. Some prominent international lawyers dismissively referred to enforcement as a political matter outside the law. Within UN bodies comfort was taken in the pious hope that governments which acknowledged their legal obligations would carry them out, at least most of the

time. It was far from evident that they generally did so in some areas, but measures such as compulsory jurisdiction, mandatory fact finding and coercive sanctions were not considered acceptable or feasible. (Schachter, 1994, pp 9–10)

<End Extract>

Schachter, though, also points to the progress made on enforcement and compliance in the post-Cold War period.

Sanctions are different from countermeasures. Zoller is clear on this when she states that ‘a ‘countermeasure is a measure which has temporary effects and a coercive character, while a sanction has final effects and a punitive character. Moreover, sanctions have an exemplary character directed at other countries which countermeasures do not have’ (Zoller, 1984, p 106). For instance, the Security Council, through Resolution 1343, imposed sanctions on Liberia in 2001 following its determination that its government was supporting the Revolutionary United Front (RUF) in Sierra Leone, in violation of SC Resolution 1132 which had imposed sanctions against the rebel group. This was the first time the Security Council had imposed sanctions against a country because of its refusal to comply with sanctions against another country (Cortright and Lopez, 2002, p 82). Zoller further argues that ‘… countermeasures should always be temporary measures, they draw a line between the consequences of unlawful conduct in international law; they underline the difference between them and those measures which impose a final harm on the defaulting party and which could properly be designated by the term “sanctions”’. For this reason, ‘[c]ountermeasures … have to be placed within reparation and outside punishment’ (Zoller, 1984, p 75).

To be clearly lawful, sanctions have to be imposed by international organizations, representing the ‘centralized mechanisms’ suggested by Brierly (Gowlland-Debbas, 2001, p 6). The issue is not simply how many States were involved in the decision to

impose sanctions but rather whether the decision was taken by those States acting under the auspices of an organization competent to do so. Abi-Saab defines sanctions as 'coercive measures taken in execution of a decision of a competent social organ, ie an organ legally empowered to act in the name of the society or community that is governed by the legal system'. He distinguishes them sharply from 'coercive measures taken individually by States or group of States outside a determination and a decision by a legally competent social organ', including countermeasures. These 'are manifestations of "self-help" or "private justice", and their legality is confined to the very narrow limits within which "remnants" of "self-help" are still admitted in contemporary international law' (Abi-Saab, 2001, p 32).

Cassese notes that the trend in the 'international community is for international bodies, principally international organizations, to react to gross breaches of international law' by means of sanctions (Cassese, 2005, pp 310–11). This practice became more evident after the end of the Cold War. One common trait of this practice is the utilization of sanctions by international organizations to counter unconstitutional removals of governments among their membership. Sanctions were first used by the OAS against the military junta in Haiti in 1992, and there were similar scenarios with regard to ECOWAS in Liberia (1989–97) and Sierra Leone (1997–2001). This practice has been further entrenched by the use of sanctions by ECOWAS, for example, to reverse unconstitutional governmental take-overs in Togo in February 2005, Mali and Guinea-Bissau in 2012, and, more recently, Niger in 2023.

While countermeasures are taken by individual States, sanctions are imposed within a collective context, normally by an international organization. This development corresponds to the growth in recognition of community interests, representing the 'creation of international institutional responses to violations of … core norms' (Gowlland-Debbas, 2001, p 7). Sanctions imposed by the Security Council under

Article 41 of the Charter can include full or partial trade, financial, commercial, and arms embargoes, and are therefore, generally, of an economic nature. Schachter states that 'sanctions under Article 41 have come to be seen as quintessential type of international enforcement. The language of Article 41 is broad enough to cover any type of punitive action not involving use of armed force' (Schachter, 1994, p 12). Gowlland-Debbas argues that although Chapter VII measures imposed by the Security Council were not intended to be restricted to cases of noncompliance with international law, the practice of the Council has moved considerably towards dealing with responsibility of States for breaches of international law (Gowlland-Debbas, 2001, p 9; cf Zoller, 1984, pp 106–7). The determination of Iraq's responsibility for its invasion of Kuwait, and the requirement for it to pay compensation, is a case in point.[61] Before taking action under Chapter VII, the Council is required by Article 39 of the UN Charter to determine the existence of a 'threat to the peace', 'breach of the peace', or 'act of aggression'. The Council can thus deal with threats to or breaches of the peace that do not constitute internationally wrongful conduct. Aggression would appear to be more a determination of breach of international law, although the history of the definition of aggression shows that there is a reluctance to delimit the Security Council's competence in purely legal terms. Thus, it is true to say that sanctions imposed by the UN serve much wider purposes than the concept of countermeasures as defined by the ILC.

It is relevant to ask whether economic measures taken by regional organizations are subject to the legal regime governing organizational sanctions or that governing countermeasures. Countermeasures are not punitive; they are taken to ensure that the responsible State ceases its violation, and, if applicable, provides reparation. They are instrumental—their aim is to achieve a restitution of a legal relationship (Crawford, 2001, p 61). It follows that there appears to be grounds for regional organizational

[61] SC Res 687 (3 April 1991).

autonomy to authorize the imposition of countermeasures against a member State for breach of either regional or international community norms. Action taken by the regional organization outside its membership must be justified as countermeasures for breach of an international community rule, not merely a regional one.

Given the requirements of Article 53 of the UN Charter, which requires that regional organizations wanting to take enforcement action must secure authorization to do so from the UN Security Council, question marks may be raised against non-forcible action that goes beyond countermeasures. For example, measures taken by regional organizations that are designed to be punitive or aimed at achieving a change in regime (Sossai, 2017, ch 17), seem to stretch beyond countermeasures and blur the distinction between sanctions and countermeasures. For example, in March 2005, ECOWAS imposed sanctions against Togo in order to reverse the unconstitutional take-over of government in that country. Clearly these were coercive measures designed to achieve regime change, albeit in response to an earlier unconstitutional regime change in that country. It could be argued, however, that the sanctions imposed by ECOWAS on Togo were not illegal under Article 53 of the Charter since Togo, as an ECOWAS member State, had agreed to an ECOWAS treaty that empowers ECOWAS to take such measures against any member State under specific circumstances (see Abass, 2004, p 163).

In contrast to other regional organizations, the EU's sanctioning competence is external facing and targeted at non-member States and individuals, although measures only bind EU member States.[62] Nevertheless, the measures exercised by the EU are not confined to the internal legal system of the EU. Instead, they are outwardly directed at other actors on the international plane and, therefore, have to be justified under the rules

[62] Art. 29 of the Treaty on European Union; Art. 215 of the Treaty on the Functioning of the European Union.

of international law, specifically the still-disputed doctrine of collective countermeasures (Gestri, 2016, p 99). If the EU's external non-forcible measures extend beyond the parameters of countermeasures, for example to become coercive measures of the type attributed to the UN Security Council, the legal ground becomes increasingly unstable in that they would represent steps towards claiming autonomous external sanctioning powers by a regional organization, and would represent a challenge to the universal collective security system.

Gestri has stated that with a number of sanctions programmes in place, often imposed autonomously from the UN Security Council, the EU has become a 'key player in the sanctions game' and, despite its claim to always act in full conformity with international law, the 'EU can be regarded as a trailblazer by the advocates of the controversial doctrine of collective countermeasures in reaction to *erga omnes* obligations, having on numerous occasions adopted sanctions without being individually affected by the breach of international law allegedly committed by the target state' (Gestri, 2016, p 99). Furthermore, Gestri points to the power of the EU to influence third States to bring their conduct towards the target State into line with the EU's measures, and the broadening jurisdictional scope of EU sanctions in spite of its criticisms of the extraterritorial extension of sanction regimes by the US (Gestri, 2016, p 79).

Collective countermeasures taken in response to violations of fundamental international laws remain controversial but, on a spectrum of legality, a strong argument can be made in their favour, especially in the absence of sanctions imposed by the UN Security Council. When the Security Council is deadlocked in the face of calls for responses to violations of fundamental rules, the EU (and other regional organizations) might be able to fill the void by agreeing on measures to be imposed in response to violations of international law when the Security Council cannot, enabling measures to

be taken against regimes elites for violations of human rights (for example, in Zimbabwe),[63] and for committing aggression (for example, by Russia against Ukraine in 2014 and again in 2022).[64]

B. LIMITATIONS UPON SANCTIONS

Article 103 of the UN Charter provides that obligations arising for member states under the Charter prevails over conflicting obligations arising for those states under other international treaties. One effect of this provision is that mandatory sanctions adopted by the Security Council under Article 41 of the UN Charter will result in obligations for member States that prevail over conflicting obligations arising for them from other international treaties. The Security Council has adopted Article 41 sanctions in a number of instances, initially against states and increasingly against regime elites and non-state actors. Sanctions regimes have proliferated since the end of the Cold War starting with comprehensive sanctions against Iraq (1990-2003) following its invasion of Kuwait. The comprehensive regime against Rhodesia (1966–79) and the arms embargo against South Africa (1977–94) were the only instances of *mandatory* sanctions imposed by the Security Council during the Cold War. The Security Council has also adopted non-forcible measures directed at stopping assistance to terrorists in the wake of the attacks against the USA on 11 September 2001,[65] and has followed this up with general measures aimed at preventing the spread of weapons of mass

[63] EU targeted sanctions against regime individuals in Zimbabwe (Council Decision 2011/101/CFSP of 15 February 2011, OJ L 42, 6).

[64] Targeted sanctions were imposed against certain Russian individuals responsible for actions which undermined or threatened the territorial integrity, sovereignty and independence of Ukraine following the 2014 intervention in Crimea (Council Decision 2014/145/CFSP of 17 March 2014, OJ L 78, 16); and further measures followed the invasion of Ukraine by Russia in 2022 (Council Decision 2022/329/CFSP of 25 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 50, 25).

[65] SC Res 1373 (28 September 2001).

destruction, especially to non-State actors.[66] These measures are binding on all States and are directed at *activities* (for example financing terrorists) rather than the past sanctions regimes that were binding on all States but were targeted at *certain States*, including those allegedly supporting terrorism (for example, Libya, Sudan, and Afghanistan). This apparent expansion in the legislative powers of the Security Council has caused considerable discussion (Happold, 2003; Talmon, 2005).

As a consequence of UN sanctions regimes, member States may be required to suspend some of their treaty relations with the target State—eg trade treaties or civil aviation treaties. Article 103 of the Charter provides a dispensation for implementing States from the performance of these treaty obligations (Gowlland-Debbas, 2001, p 18). The justification for this must be that the UN was established, or has become recognized, as having the competence to uphold and protect community norms and can therefore direct a collection of States to take measures which would otherwise be unlawful. This partial constitutionalization of sanctions would also suggest that non-members should also comply with UN directives, certainly to the extent that the Council requires them to take action to combat breaches of fundamental rules. Requiring non-member States to take action beyond that is problematic, although Article 2(6) of the Charter suggests that non-member States should comply if this is deemed necessary to maintain international peace and security. It is questionable whether other organizations have this competence in theory, although they may take collective countermeasures within their region on the basis of regional laws (*erga omnes partes*). In practice, regional organizations have taken wider non-forcible measures or sanctions to enforce obligations owed *erga omnes* as well as *erga omnes partes*, although this practice can be said to have only taken hold because the UN has ultimately not condemned it either specifically or in a general sense.

---

[66] SC Res 1540 (28 April 2004).

If the Security Council or the General Assembly only recommend sanctions, it is questionable whether this entitles States (if they choose) to suspend treaty obligations. Since there are no legal obligations created by a recommendatory resolution (except perhaps a duty to consider), Articles 25 and 103 of the UN Charter do not come into play, although some commentators argue that the authority of the UN is sufficient to entitle member States to breach trade agreements (Lowenfield, 2001, p 97). Even mandatory sanctions imposed by the Security Council do not *ensure* that all members comply. The sanctions committees established by the Council to oversee implementation try to ensure this but there has been limited attempts to force non-complying States into action.

It is only with the adoption of comprehensive regimes, especially that imposed against Iraq in the period 1990–2003, that the focus has turned to possible limitations upon sanctions under principles of international law or specific regimes such as international human rights law. The Committee on Economic, Social and Cultural Rights' General Comment of 1997 made it clear that sanctions regimes should not violate basic economic, social, and cultural rights, on the basis that unlawfulness of one kind should not be met with unlawfulness of another.[67] In 2000, the Bossuyt Report, which emerged at the behest of the Sub Commission on the Promotion and Protection of Human Rights, proposed six tests for evaluating the effectiveness of sanctions.[68] The Bossuyt Report recommended that sanctions be based on a valid reason, specifically target the parties responsible for the threat or breach of peace, exclude the targeting of humanitarian goods, and be imposed for a limited time.

The UN may impose sanctions not on the basis of a response to a breach of international law but with the aim of restoring peace and security. It is arguably the case

---

[67] General Comment No 8, UN Doc E/C.12/1997/8, (1998) 5 *IHRR* 302.

[68] The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights (The Bossuyt Report), E/CN4/Sub.2/2000/33, 21 June 2000.

that in these situations, *a fortiori*, it must protect the human rights of the target State's population. If the International Court actively reviews a sanctions regime in the future—a possibility raised by the *Lockerbie* cases, 'considerations of proportionality might be examined by the Court'. 'If a particular form of sanctions results in injury to innocent civilians or causes serious harm to the environment and has no discernible impact on the targeted delinquent regime, would it be improper for the Court to say that the measures taken are disproportionate to the goals to be achieved?' (Dugard, 2001, pp 88–9). In reality there are two limitations here, namely those of human rights norms as well as the general principle of proportionality, although the two are closely related. Sanctions regimes must not cause serious human rights violations, though causation is notoriously difficult to prove in these situations, especially when sanctions regimes always contain an exception for humanitarian supplies. In addition, they must be proportionate to the end being aimed at, either the restoration of peace and security by the withdrawal of an aggressor State,[69] or some specific acts that would lead to the termination of a threat to the peace. For example, in the case of sanctions imposed on Libya in 1992, this amounted to the handing over of the two suspects and the renunciation of terrorism by Libya.[70] In the case of Rhodesia, the first attempt by the UN at a comprehensive sanctions regime,[71] the aim was to end white-minority rule in that country.

C. TARGETED OR SMART SANCTIONS

To adapt Zoller's words, it is true to say that '[i]n the field of countermeasures and law enforcement, the international legal order has not yet reached a very advanced stage. Most of the time, as the rain in the New Testament, [sanctions] draw no distinction between the just and the unjust; they affect both the state and its citizens, or more

---

69 SC Res 661 (6 August 1990) (Iraq).
70 SC Res 748 (31 March 1992).
71 SC Res 253 (29 May 1968).

precisely the state through its citizens. This situation is a direct result of the primitive doctrine of collective responsibility' (Zoller, 1984, p 101). The Iraqi citizens suffered from the effects of sanctions in the period 1990–2003 because of the responsibility of their government. The response has been to modify and target sanctions more accurately on those who are really responsible—the leaders of the regimes, or non-State actors responsible, for example, for acts of terrorism or for supporting terrorism. While the Security Council has tempered its general sanctions regimes out of concern for the human rights of the general population, preferring instead targeted or smart sanctions against individuals, those more directed measures can also be seen as falling foul of human rights protections of the targeted individuals (Happold, 2016, pp 92–8).

Since 1999, starting with Resolution 1267, the Security Council has in place a scheme of targeted measures, under Chapter VII of the Charter,[72] whereby an individual whose name is placed on the Security Council's list of individual members, or supporters, of the Taliban or Al-Qaeda (and an increasing number of other non-state groups) has their assets and funds frozen by member States, as well as being subject to a travel embargo.[73] Although there is some debate as to whether these sanctions are 'administrative' rather than 'criminal', 'preventive' rather than 'punitive' (Bianchi, 2006, pp 905–7), thereby causing uncertainty as to the human rights of the individuals listed, there seems to be increasing judicial recognition that such measures, without any safeguards, violate the human rights of the individuals concerned (Keller and Fischer, 2009, p 257). In the *Kadi* judgment of 2008 the European Court of Justice found that the EU's incorporation of obligations under SC Resolution 1267 violated the European

[72] SC Res 1267 (15 October 1999, against the Taliban) and SC Res 1333 (19 December 2000, against Al-Qaeda). SC Res 1267 (15 October 1999) and 1989 (17 June 2011) established what is now the UN Security Council Al Qaeda Sanctions Committee to oversee an 'Al-Qaeda sanctions list', composed of individuals and entities which it considers pose threats to international peace and security due to their links with Al-Qaeda. SC Res 2170 (15 August 2014) extended this list to members of the so-called Islamic State.

[73] https://www.un.org/securitycouncil/sanctions/information

fundamental rights of Mr Kadi, who had been listed by the Council's 1267 Committee and therefore had his assets frozen without recourse to a remedy. However, the Court gave the European bodies the chance to redraft the regulations in a way that was human rights-compliant.[74] The argument that Article 103 of the Charter means that the obligations created by Resolution 1267 prevailed over human rights treaty obligations did not succeed, at least in that case (Cardwell, French, and White, 2009, p 237; de Wet, 2013, p 787; Willems, 2014, p 39).

The development of 'smart sanctions' (Cortright and Lopez, 2000, pp 4–5), both against regime elites and non-State actors (White, 2021, pp 74-80), is a recent one, and the question of whether they will be effective in achieving their aims by targeting the regimes and leaders of States as well as individuals such as terrorist suspects while alleviating the suffering of the civilian population remains to be seen. Indeed, in terms of success, sanctions in their raw form rarely achieve their primary purposes. Sometimes it is the combination of economic and military measures that produces the required change in the targeted State, for example: Rhodesia in 1979 (guerrilla campaign); Haiti in 1994 (threat of force by the USA); Serbia in 1995 (use of force by NATO and Muslim/Croat army); and Iraq in 1991 (Coalition action). On other occasions it is the combination of sanctions plus diplomacy. Thus, it appears that economic sanctions are not by themselves an alternative to military coercion (or indeed diplomacy), but must be used in combination with other foreign policy tools. Normally, they must be used in combination with diplomacy; only exceptionally should they be used in combination with military action when States are acting under the right of self-defence or under the authority of the UN. The UN Secretary-General recognized this

[74] See decision of the European Court of Justice in *Kadi and Al Barakaat International Foundation* v *Council*, Joined Cases 402/05 and 415/05, [2008] ECR I-6351. See also the decision of the UN Human Rights Committee in *Sayadi and Vinck* v *Belgium* (2009) 16 *IHRR* 16; the decision of the European Court of Human Rights in *Nada* v *Switzerland*, no 10593/08, Judgment of 12 September 2012; and the decision of the European Court of Human Rights in *Al-Dulimi and Montana Management Inc.* v *Switzerland*, [GC] no 5809/08, ECHR 2016.

when he observed that ‘sanctions, as preventive or punitive measures, have the potential to encourage political dialogue, while the application of rigorous economic and political sanctions can diminish the capacity of the protagonists to sustain a prolonged fight’ (Cortright and Lopez, 2000, p 2).

V. CONCLUSION

This chapter has demonstrated that there are two elements of legal clarity in the area of non-forcible measures - sanctions and countermeasures. First, countermeasures taken under the doctrine enunciated by the ILC and the *Air Services* case are lawful (subject to limitations concerning, *inter alia*, human rights and proportionality). Secondly, non-military sanctions imposed by the UN Security Council under Chapter VII are lawful (subject to the limitations of human rights and proportionality). This would suggest that the topic dealt with under the title of this chapter is straightforward—unfortunately it is not. The clashes between the continuance (at least in the non-forcible realm) of self-help with greater centralization in the post-Charter era, combined with the perennial clash between States’ freedom of action and the principle of non-intervention, mean that much of the area between countermeasures and UN sanctions is unclear.

This chapter demonstrates that measures in that space are, on balance, illegal, with the probable exceptions of countermeasures imposed by third States for breaches of obligations owed *erga omnes* or *erga omnes partes*, and arguably acts of retorsion. Arguably, such measures can be taken through organizations other than the UN, as can more punitive or coercive economic sanctions, subject to censure by the Security Council or, arguably, the General Assembly. In convincing the world of the legality and therefore the legitimacy of non-forcible measures, States are best advised to stick to the doctrine of countermeasures. If they want to take deeper, more punitive or coercive measures, they should seek authority of a regional organization, and preferably, though

not necessarily, the UN. The requirement of convincing an organization helps to ensure that such measures are taken for the purpose of protecting a community norm, and are not taken out of pure self-interest. Thus, although there may be remaining doubts about some of the legal conclusions drawn here, there is no doubt that the legitimacy of non-forcible measures in international relations is vastly increased if they are channelled through a competent international organization.

REFERENCES

ABASS, A (2004), *Regional Organisations and the Development of Collective Security. Beyond Chapter VIII of the UN Charter* (Oxford: Hart Publishing).

ABI-SAAB, G (2001), 'The Concept of Sanction in International Law', in Gowlland-Debbas, *United Nations Sanctions and International Law*, p 38.

AGO, R (1979), 'Eighth Report', *YBILC*, vol II, part one, 47.

ALLAND, D (2002), 'Countermeasures of General Interest', 13 *EJIL* 1221.

ALLAND, D (2010), 'The Definition of Countermeasures', in Crawford, Pellet, and Olleson, *The Law of International Responsibility*, p 1127.

ARANGIO-RUIZ, G (1991), 'Third Report on State Responsibility', *YBILC*, vol II, part one, 7.

ARANGIO-RUIZ, G (1994), 'Countermeasures and Dispute Settlement: The Current Debate within the ILC', 5 *EJIL* 20.

BEAUCILLON, C (2016), 'Practice Makes Perfect, Eventually? Unilateral State Sanctions and the Extraterritorial Effects of National Legislation', in N Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Leiden: Brill Nijhoff), p 103.

BEDERMAN, DJ (2002), 'Counterintuiting Countermeasures', 96 *AJIL* 817.

BIANCHI, A (2006), 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion', 17 *EJIL* 881.

BILLS, A (2020), 'The Relationship between Third-party Countermeasures and the Security Council's Chapter VII Powers: Enforcing Obligations *erga omnes* in International Law', 89 *Nordic Journal of International Law* 117.

BOISSON DE CHAZOURNES, L (2010), 'Other Non-derogable Rights', in Crawford, Pellet, and Olleson, *The Law of International Responsibility*, p 1205.

BOWETT, DW (1972a), 'Reprisals Involving Recourse to Armed Force', 66 *AJIL* 1.

BOWETT, DW (1972b), 'Economic Coercion and Reprisals by States', 13 *Virginia JIL* 1.

BRIERLY, JL (1932), 'Sanctions', 17 *Transactions of the Grotius Society* 68.

BRIERLY, JL (1946), 'The Covenant and the Charter', 23 *BYIL* 83.

BRZOSKA, M (2015), 'International Sanctions Before and Beyond UN Sanctions', 91 *International Affairs* 1339.

BUCHAN, R (2022), 'Non-Forcible Measures and the Law of Self-Defence', 72 *International and Comparative Law Quarterly* 1.

BULL, H (1992), 'The Importance of Grotius in the Study of International Relations', in H Bull et al (eds), *Hugo Grotius and International Relations* (Oxford: Oxford University Press), p 65.

CARDWELL, PJ, FRENCH, D, and WHITE, ND (2009), 'Yassin Abdullah Kadi', 58 *ICLQ* 229.

CASSESE, A (2005), *International Law* (2nd edn, Oxford: Oxford University Press).

CHARRON, A, and PORTELA, C (2015), 'The UN, Regional Sanctions and Africa', 91 *International Affairs* 1369.

CORTRIGHT, D and LOPEZ, GA (2000), *The Sanctions Decade: Assessing UN Strategies*

in the 1990s (Boulder, CO: Lynne Rienner).

CORTRIGHT, D and LOPEZ, GA (2002), *Sanctions and the Search for Security: Challenges to UN Action* (Boulder, CO: Lynne Rienner).

CRAWFORD, J (1994), 'Counter-Measures as Interim Measures', 5 *EJIL* 65.

CRAWFORD, J (2001), 'The Relationship between Sanctions and Countermeasures', in Gowlland-Debbas, *United Nations Sanctions and International Law*, p 57.

CRAWFORD, J (2002), *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press).

CRAWFORD, J, PELLET, A, and OLLESON, S (eds) (2010), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010).

DAWIDOWICZ, M (2017), *Third Party Countermeasures in International Law* (Cambridge: Cambridge University Press).

DE WET, E (2013), 'From *Kadi* to *Nada*: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions', 12 *Chinese JIL* 787.

DOPAGNE, F (2011), 'Sanctions and Countermeasures by International Organizations', in R Collins and ND White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Abingdon: Routledge), p 178.

DUGARD, J (2001), 'Judicial Review of Sanctions', in Gowlland-Debbas, *United Nations Sanctions and International Law*, p 8.

ELAGAB, OY (1988), *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford: Clarendon Press).

FRANCK, TM (2008), 'On Proportionality of Countermeasures in International Law', 102 *AJIL* 715.

GAZZINI, T (2006), 'The Legal Nature of WTO Obligations and the Consequences of their Violation', 17 *EJIL* 723.

GESTRI, M (2016), 'Sanctions Imposed by the European Union: Legal and Institutional Aspects', in N Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Leiden: Brill Nijhoff), p 70.

GOWLLAND-DEBBAS, V (ed) (2001), *United Nations Sanctions and International Law* (The Hague: Kluwer).

HAPPOLD, M (2003), 'Security Council Resolution 1373 and the Constitution of the United Nations', 16 *Leiden JIL* 593.

HAPPOLD, M (2016), 'Targeted Sanctions and Human Rights', in M Happold and P Eden, *Economic Sanctions in International Law* (Oxford: Hart).

HOFER, A (2017), 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?', 16 *Chinese JIL* 175.

HOFER, A (2020), 'The Proportionality of Unilateral "Targeted" Sanctions: Whose Interests Should Count?', 89 *Nordic JIL* 399.

KAMMINGA, MT (2023), 'Confiscating Russia's Frozen Central Banck Assets: A Permissible Third-Party Countermeasures?', 70 *Netherlands ILR* 1.

KATSELLI PROUKAKI, E (2010), *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (London: Routledge).

KELLER, H and FISCHER, A (2009), 'The UN Anti-terror Sanctions Regime under Pressure', 9 *Human Rights Law Review* 257.

KELSEN, H (1945), *General Theory of Law and State* (Cambridge, MA: Harvard

University Press).

KLEIN, P (2002), 'Responsibility for Serious Breaches of Obligations Deriving From Peremptory Norms of International Law and United Nations Law', 13 *EJIL* 1241.

KUNZ, LK, (1960), 'Sanctions in International Law', 54(2) *AJIL* 324.

LAUTERPACHT, H (1933), 'Boycott in International Relations', 14 *BYIL* 125.

LILLICH, RB (1975), 'Economic Coercion and the International Legal Order', 51 *International Affairs* 358.

LOWENFELD, AF (2001), 'Unilateral versus Collective Sanctions: An American Perception', in Gowlland-Debbas, *United Nations Sanctions and International Law*, p 95.

MCNAIR, AD (1930), 'The Functions and Different Legal Character of Treaties', 11 *BYIL* 100.

O'CONNELL, ME (2008), *The Power and Purpose of International Law* (Oxford: Oxford University Press).

PAUST, J and BLAUSTEIN, AP (1974), 'The Arab Oil Weapon—A Threat to International Peace', 68 *AJIL* 410.

PROVOST, R (2002), *State Responsibility in International Law* (Aldershot: Ashgate).

SCHACHTER, O (1994), 'United Nations Law' 88 *AJIL* 1.

SCOBBIE, I (2004), 'Smoke, Mirrors and Killer Whales: the International Court's Opinion on the Israeli Barrier Wall', 5 *German Law Journal* 1107.

SICILIANOS, L-A (2010), 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community', in Crawford, Pellet, and Olleson, *The Law of International Responsibility*, p 1137.

SOSSAI, M (2017), 'UN Sanctions and Regional Organizations: An Analytical

Framework', in L van den Herik (ed), *Research Handbook on Sanctions and International Law* (Cheltenham: Elgar), ch 17.

TALMON, S (2005), 'The Security Council as World Legislature', 99 *AJIL* 175.

TZANAKOPOULOS, A (2011), *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford: Oxford University Press).

WARD, CA (2003), 'Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council', 8 *Journal of Conflict and Security Law* 289.

WHITE, ND (2015), *The Cuban Embargo Under International Law: El Bloqueo* (London: Routledge).

WHITE, ND (2021), 'Shades of Grey: Autonomous Sanctions in the International Legal Order' in S.P. Subedi (ed), *Unilateral Sanctions in International Law* (Oxford: Hart), 61.

WILLEMS, A (2014), 'The European Court of Human Rights on the Individual Counter-Terrorist Sanctions Regime: Safeguarding Convention Rights and Harmonising Conflicting Norms in *Nada v. Switzerland*', 83 *Nordic JIL* 39.

ZOLLER, E (1984), *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, NY: Transnational).

FURTHER READING

CORTRIGHT, D and LOPEZ, GA (2000), *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder, CO: Lynne Rienner): a very good examination of the issues and problems of recent and current UN sanctions regimes.

CRAWFORD, J (2002), *The International Law Commission's Articles on State*

Responsibility: Introduction, Text and Commentaries (Cambridge: Cambridge University Press): an essential collection of International Law Commission materials necessary for an understanding of the nature, role, and function of countermeasures.

DAWIDOWICZ, M (2017), *Third Party Countermeasures in International Law* (Cambridge: Cambridge University Press): an excellent analysis of practice.

ELAGAB, OY (1988), *The Legality of Non Forcible Counter-Measures in International Law* (Oxford: Clarendon Press): a very thorough exposition of the history and development of countermeasures.

FARRALL, JM (2007), *United Nations Sanctions and the Rule of Law* (Cambridge: Cambridge University Press): a thorough review of sanctions practice by the Security Council and an evaluation of its legal shortcomings.

GOWLLAND-DEBBAS, V (ed) (2001), *United Nations Sanctions and International Law* (The Hague: Kluwer): an excellent collection of essays, exploring, *inter alia*, the boundaries between countermeasures and sanctions.

O'CONNELL, ME (2008), *The Power and Purpose of International Law* (Oxford: Oxford University Press): a clear reconsideration of the theory and practice of the enforcement of norms of international law, by both forcible and non-forcible means.

RONZITTI, N (2016), *Coercive Diplomacy, Sanctions and International Law* (Leiden: Brill Nijhoff): an excellent contextual and conceptual reconsideration of the place and role of sanctions in international law.

SICILIANOS, L-A (1990), *Les Réactions Décentralisées à l'Illicite: Des Contre-Mesures à la Légitime Défense* (Paris: Librairie Générale de Droit et de Jurisprudence): leading non-English text on the subject matter of countermeasures.

SUBEDI, S.P. (ed) (2021), *Unilateral Sanctions in International Law* (London:

Routledge): a collection of essays exploring the law and practice surrounding the adoption of unilateral or autonomous sanctions.

VAN DEN HERIK, L (ed) (2017), *Research Handbook on UN Sanctions and International Law* (Cheltenham: Elgar): selection of essays exploring the nature and function of UN sanctions within the international legal order.

ZOLLER, E (1984), *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, NY: Transnational): a useful conceptual analysis of countermeasures.